JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	POWER -v- SMART [2018] WASC 168
CORAM	**:**	DERRICK J
HEARD	**:**	9-12 APRIL 2018 WRITTEN CLOSING SUBMISSIONS FILED ON 26 & 27 APRIL 2018
DELIVERED	**:**	13 JUNE 2018
FILE NO/S	**:**	CIV 2665 of 2016
BETWEEN	**:**	ROBYN LOUISE POWER First Plaintiff MICHAEL JOHN PERKUSICH Second Plaintiff AND SUSAN FAYE SMART AINSLIE JOY PERKUSICH Defendants

Catchwords:

Wills - Probate - Whether testator had testamentary capacity - Whether testator knew and approved of contents of will - Whether testamentary undue influence

Legislation:

Nil

Result:

Plaintiffs' claim for probate of will in solemn form made out

Category: B

Representation:

Counsel:

First Plaintiff	:	Mr M S Macdonald
Second Plaintiff	:	Mr M S MacDonald
Defendants	:	Mr G A Rabe

Solicitors:

First Plaintiff	:	Macdonald Rudder
Second Plaintiff	:	Macdonald Rudder
Defendants	:	Summers Legal

Case(s) referred to in decision(s):

Bailey v Bailey [1924] HCA 21; (1924) 34 CLR 558
Banks v Goodfellow (1870) LR 5 QB 549
Brown v Wade [2010] WASC 367
Easter v Griffiths (1995) 217 ALR 284
Fisher v Kay [2010] WASC 160
In the Will of Wilson (1897) 23 VLR 197
Jones v Dunkel [1959] HCA 8; (1959) 101 CLR 298
McKinnon v Voigt [1998] 3 VR 543
Nicholson v Knaggs [2009] VSC 64
Nock v Austen (1918) 25 CLR 519
Re The Full Board of the Guardianship and Administration Board [2003] WASCA 268; (2003) 27 WAR 475
Romascu v Manolache [2011] NSWSC 1362
Saunders v The Public Trustee [2015] WASCA 203
Schellenberg v Tunnel Holdings Pty Ltd [2000] HCA 18; (2000) 200 CLR 121
The Estate of Juliana Voros; Cooney & Ors v Cherry [2016] NSWSC 1603
Timbury v Coffee [1941] HCA 22; (1941) 66 CLR 277
Tobin v Ezekiel; Estate of Lily Ezekiel [2011] NSWSC 81
Veall v Veall [2015] VSCA 60

Vernon v Watson; Estate Clarice Isabel Quigley Dec'd [2002] NSWSC 600
Wingrove v Wingrove (1885) 11 PD 81

DERRICK J:

Introduction

1 On 23 September 2011 Ms Irene Jean Okle (the deceased) executed a Last Will and Testament (the 2011 Will). The first plaintiff and the second plaintiff (the plaintiffs), who are the Executors under the 2011 Will, seek an order that the court pronounce the force and validity of the 2011 Will in Solemn Form.

2 The defendants dispute the validity of the 2011 Will. The defendants deny that the 2011 Will was the Last Will and Testament of the deceased on the following grounds:

1. The deceased lacked testamentary capacity at the time of making the 2011 Will; and/or

2. The deceased did not know and approve of the contents of the 2011 Will and its effect; and/or

3. The deceased was prevented by the undue influence of the first plaintiff from exercising her free will when making the 2011 Will.

3 The defendants claim that the valid will of the deceased is a will executed by the deceased on 14 February 1998 (the 1998 Will). The defendants seek an order that the court pronounce the force and validity of the 1998 Will in Solemn Form.

4 It follows from the grounds on which the defendants deny the validity of the 2011 Will that the questions for my ultimate determination are as follows:

1. Did the deceased lack testamentary capacity at the time of making the 2011 Will?

2. Did the deceased know and approve of the contents of the 2011 Will and its effect?

3. Was the deceased prevented by the undue influence of the first plaintiff from exercising her free will when making the 2011 Will?

5 I will return to deal directly with each of these questions in due course. However, before doing so it is necessary to deal with the factual and evidential background in light of which the questions must be addressed.

The deceased and her family

6 The deceased was born on 4 July 1920. She died on 23 August 2013 at the age of 93.

7 The deceased left school at the age of 14.

8 On 28 October 1939, when she was 19, the deceased married Mr Cyril Okle (Cyril).

9 In 1943 Cyril and the deceased bought a property at 11 Bateman Way in Mt Pleasant. The deceased and Cyril lived at this address together until Cyril died in 1975.

10 In 1986 the deceased subdivided the land at 11 Bateman Way. From this point on she lived at 11B Bateman Way. She remained at this address for the rest of her life, save for when she was living in aged care homes.

11 The deceased and Cyril had two daughters, the defendants Ainslie Joy Perkusich (Ainslie) born in 1941, and Susan Faye Smart (Susan) born in 1951.

12 Ainslie has three children, namely Stevan Perkusich (Stevan), born in 1963, the first plaintiff, Robyn Louise Power (Robin), born in 1965, and the second plaintiff, Michael John Perkusich (Michael), born in 1973.

13 Stevan, Robyn and Michael all have their own children. Stevan has two children, Robyn has two children and Michael has four children. One of Stevan's children is a daughter called Bethany. Bethany was born in 2003.

14 Susan has two children, Andrew Smart (Andrew) born in 1973 and Meagan Smart (Meagan) born in 1975. Meagan has one child of her own who was born in 2014, that is, after the death of the deceased.

15 As is apparent from the above summary of the deceased's family tree, the deceased, at the time of her death, had two children, five grandchildren and eight great grandchildren.

16 As is also apparent from my above summary of the deceased's family tree, I propose to refer to members of the deceased's family by their first names. I will do the same for some of the non-family member witnesses called to give evidence in the trial. I propose to adopt this approach solely for ease of reference. No disrespect is intended by my use of the first names of the deceased's family members or witnesses.

The witnesses and closing submissions

17 At trial Robyn gave evidence as part of her and Michael's case. They also called as witnesses Mr Paul Haynes, solicitor, Ms Natasha Haynes (who is Mr Haynes' daughter), Ms Alyson Haynes (who is Mr Haynes' wife), Dr Rudolf Bohmer, general practitioner, and Dr Olivia Lee, consultant psychiatrist.

18 Both Susan and Ainslie gave evidence in support of their case. In addition, they called as witnesses Meagan and Dr C Nick De Felice, consultant psychiatrist.

19 The evidence-in-chief of the witnesses was adduced by the tendering of their previously prepared witness statement or report supplemented by some brief oral examination.

20 The parties' closing submissions were made by way of written submissions.

The making of the 1998 Will, the 2011 Will and the enduring powers of attorney - non-contentious facts

21 As I have already stated, on 14 February 1998 the deceased made the 1998 Will. By the 1998 Will the deceased appointed Susan as her Executor and Trustee, and in the event that Susan did not survive her, Meagan as her Executor and Trustee.

22 Clause 5 of the 1998 Will relevantly provides that upon the deceased's death and after payment of all her debts, funeral and testamentary expenses, she gives the residue of her estate as follows:

> My property known as unit B 11 Bateman Road Mount Pleasant … to my daughter Susan Faye Smart of 952 Pinjar Road Pinjarra Western Australia. To my daughter Susan Faye Smart of 952 Pinjar Road Pinjarra WA the proceeds of the AMP Personal Insurance Policy number W4001906-K.

> My furniture, personal effects and money in my Commonwealth Bank Account number 7661025584 to be divided equally between my Daughters Ainslie Joy Perkusich and Susan Faye Smart.

23 On 28 September 2006 the deceased made an Enduring Power of Attorney by which she appointed Susan and Meagan jointly and severally as her Attorneys.

24 On 27 September 2007 the deceased revoked the Enduring Power of Attorney previously given to Susan and Meagan.

25 On 26 August 2010 the deceased made an Enduring Power of Attorney by which she appointed Robyn as her Attorney. On the same date Robyn executed a document by which she recorded her acceptance of the appointment as the deceased's Enduring Power of Attorney.

26 Some relatively short time after 31 March 2011 the deceased told Robyn that she wanted to make a will. The deceased asked Robyn to find someone who could make a will for her.

27 On 7 July 2011 Robyn, as a result of the deceased's request, contacted the law firm Haynes Legal. Robyn had never had any prior dealings with Haynes Legal. Robyn arranged for the principal of Haynes Legal, Mr Paul Haynes, to meet with the deceased on 15 July 2011 for the purpose of taking the deceased's instructions for the preparation of her will.

28 On Friday 15 July 2011 Mr Haynes met with the deceased (who was at the time 91 years old) at Anchorage Aged Care (Anchorage) in Mindarie. Anchorage was the high level aged care facility in which the deceased was living at the time. At the time the deceased was very frail, virtually blind and had a very significant hearing impairment. During the meeting Mr Haynes took instructions from the deceased for the preparation of a will for her. The instructions that the deceased ultimately provided to Mr Haynes were that she wanted her grandchildren Robyn and Michael to be her executors and for her estate to be held on trust for her great grandchildren in equal shares until they reached the age of 21.

29 At the end of his meeting with the deceased Mr Haynes obtained from the nurse at Anchorage the details of the deceased's doctor. He ascertained that the deceased's general practitioner was Dr Rudolf Bohmer of Brighton Beach Medical Practice in Merriwa.

30 On 16 July 2011 Mr Haynes sent a letter to Dr Bohmer. In his letter Mr Haynes stated that he had been instructed by the deceased in connection with the preparation of her will. Mr Haynes requested confirmation from Dr Bohmer that in his opinion the deceased had the necessary testamentary capacity to make her will. He informed Dr Bohmer that testamentary capacity consists of:

1. appreciating the effects of will-making and the consequences thereof;

2. having regard to the extent of the assets being disposed of by the will;

3. having regard to all potential claims that may be made against the estate; and

4. being of sound mind.

31 By 16 August 2011 Mr Haynes had not heard back from Dr Bohmer. Accordingly on that date his firm sent a follow up facsimile to Dr Bohmer.

32 On 6 September 2011, as a result of receiving the correspondence from Haynes Legal, Dr Bohmer met with the deceased to undertake a testamentary assessment of her. Having assessed the deceased Dr Bohmer concluded that the deceased did have the necessary testamentary capacity to make a will. Accordingly, on 6 September 2011 he sent a letter to Mr Haynes that was in the following terms:

> Thank you for your letter dated, 16/07/2011, requesting a report for the above named patient. My apologies for the delay in the report.
>
> I visited [the deceased] on the 6th of September to determine if she is capable of making a will. I had a long discussion with [the deceased] in the presence of Eva, one of the nursing staff.
>
> [The deceased's] assets included the sale of her house in Mt Pleasant, the contents of that home and funds that she has in her bank account. She has 2 daughters, Susan Smart and Ainslie Perkusich. Her granddaughter Robyn is her power of attorney. Her wish is to leave all her assets to her great granddaughter Bethany Perkusich.
>
> My opinion is that she appreciates the effects of Will making and the consequences thereof. She seems to have a clear understanding of the extent of her assets. She also have [sic] an understanding of potential claims that may be made against the estate. I am of the opinion that she is of sound mind.

33 After receiving Dr Bohmer's letter Mr Haynes made an appointment to see the deceased at Anchorage on 22 September 2011 for the purpose of having her sign the will that he had prepared for her.

34 On 22 September 2011 Mr Haynes met with the deceased at Anchorage. He read to the deceased the will that he had prepared for her which reflected the instructions ultimately given to him during his meeting with the deceased on 15 July 2011. During this process he made one handwritten amendment to the will at the request of the deceased for the purpose of making clear that the beneficiaries under the will were to be the 'biological' great grandchildren. Mr Haynes did not question, or speak to, the deceased about the statement that she had made to Dr Bohmer that she wanted to leave all her assets to her great granddaughter Bethany.

35 After he had read the will Mr Haynes told the deceased that he would find a witness. However, he was unable to find anyone to be a second witness. He then returned to the deceased and said, in substance, that he could not find a witness, that he or somebody from his office would have to come back, and that he would get the deceased to sign the will now as he was there. He then had the deceased sign the will and the amendment and he signed the document as a witness.

36 During the meeting Mr Haynes told the deceased that he had received a report from Dr Bohmer in which Dr Bohmer confirmed her capacity to make a will. The deceased responded by saying, 'I knew I hadn't lost my marbles'.

37 When Mr Haynes returned to his office he prepared a further typed version of the will which incorporated the handwritten amendment that he had made to the will that the deceased had signed earlier that day (that is, which incorporated the words 'who are the biological children of my grandchildren').

38 The next day, 23 September 2011, Mr Haynes arranged for his wife Ms Alyson Haynes (Alyson), and his daughter Ms Natasha Haynes (Natasha), both of whom worked as assistants in his firm, to attend on the deceased and to have her sign the amended will, that is, the 2011 Will, in their presence.

39 On 23 September 2011 Alyson and Natasha attended Anchorage and arranged for the deceased to sign the 2011 Will. Natasha and Alyson witnessed the execution of the 2011 Will.

40 Clause 1 of the 2011 Will is in the following terms:

> I REVOKE all former Wills and Codicils made by me AND DECLARE this to be my last Will and Testament.

41 By cl 2 of the 2011 Will the deceased appoints Robyn and Michael to be the Executors and Trustees (referred to thereafter in the document as 'My Executor') of her estate.

42 Clause 3 of the 2011 Will provides:

> I GIVE all of my real and personal estate, wherever situated (my estate) to my Executor UPON THE FOLLOWING TRUSTS:
>
> (a) to pay from my estate all my just debts, funeral and testamentary expenses, probate, unpaid taxes and other like duties and taxes payable on or in respect of my estate and the costs involved in the execution of the trusts of my will; and
>
> (b) to HOLD the balance then remaining (the residue of my estate) on trust for such of my **great grandchildren** who are the biological children of my grandchildren who survive me and attain the age of 21 years and if more than one as tenants in common in equal shares.

43 Clause 4 of the 2011 Will specifies the powers that Robyn and Michael have as Executors and Trustees in addition to powers conferred by law. One of the powers, which is specified in cl 4(f), is as follows:

> [T]o apply the whole or any part of the income and capital of the vested or contingent share of any beneficiary toward the maintenance, education, medical needs, evolving needs, welfare, advancement, benefit or support of such beneficiary…'

44 Clause 5 of the 2011 Will, which is headed 'Declaration', is in the following terms:

> I have considered my daughters **AINSLIE JOY PERKUSICH** and **SUSAN FAYE SMART**. Both daughters have been adequately provided for by me during my lifetime and I feel sure they will both agree to my estate being held in trust as directed for the benefit of their own grandchildren.

45 Once the 2011 Will had been signed by the deceased Mr Haynes destroyed the will that had been signed by the deceased in his presence on 22 September 2011.

The assessments of the deceased's abilities and mental state from 2006 to 2011

46 At this point it is convenient to refer to a number of the various assessments of the plaintiff's abilities and mental state that were undertaken during the period from 2006 up until the time that she executed the 2011 Will. The evidence in this regard revealed the following.

47 On 29 August 2006 the deceased was admitted to St John of God hospital Murdoch (SJGH Murdoch) with back pain which she suffered when she moved a brick paver at her home (exhibit 13). It was ultimately ascertained that she had a compression/crush injury to her lumbar spine (exhibit 16). The deceased remained in SJGH Murdoch until 14 September 2006.

48 On 14 September 2006 the deceased was, at the instigation of Susan and Meagan, transferred from SJGH Murdoch to the Joondalup Health Campus (JHC) for rehabilitation and ongoing care. JHC was closer to where Susan was living at the time.

49 On 18 September 2006 the deceased, while a patient at JHC, underwent a standardised Mini Mental State Examination (MMSE) and Geriatrics Depression Scale (GDS) test. The deceased scored 26/30. She lost two points on delayed recalls and a point on each of the day and date. Her GDS was 5/15 which was within normal range.

50 On 19 September 2006 Susan and Meagan in effect expressed concerns to medical staff at JHC about the deceased's ability to care for herself in her own home (exhibit 15). They told the medical staff that they had in the last six months noticed a decline in the deceased's cognition and that she was suffering from short term memory loss. They expressed the view that it would be unsafe for the deceased to return to live at her home by herself. They requested that the deceased be assessed so that the option of residential care for the deceased could be considered.

51 During the period 20 September 2006 to 10 October 2006 the deceased, while still a patient at JHC, was assessed by an Aged Care Assessment Team (ACAT) (exhibit 62). The record of the ACAT assessment listed the plaintiff's diseases and disorders to be dementia, macular degeneration, deafness, osteoporosis, shingles and a crush injury to the lumbar spine. In the course of the ACAT assessment the

deceased sought approval as a care recipient to access residential aged care.

52 The conclusion expressed in the record of the ACAT assessment was that it was no longer safe for the deceased to live alone due to her dementia, and that the deceased had been assessed and approved for low level residential care. The deceased had never previously been formerly diagnosed as suffering from dementia. The basis for the identification of dementia as being one of the deceased's disorders is not clear from the record of the ACAT assessment.

53 During the deceased's time at JHC Susan and Meagan continued to inform medical staff, in substance, that the deceased was not capable of living by herself in her home. They also informed medical staff that the deceased was not capable of managing her own finances.

54 On 23 November 2006 the deceased was discharged from JHC to Brightwater Kingsley Interim Care (KIC) pending the finding of a suitable low level residential aged care facility for her. At this point in time the deceased was content to be placed in residential care.

55 In a letter to KIC dated 23 November 2006 Dr Jake Harper, a consultant physician in rehabilitation and aged care who was attached to JHC, listed the deceased's diagnoses to be osteoporosis, an L1 crush fracture, dementia, hypertension, depression, mild liver function abnormalities and hyponatraemia (exhibit 19). Dr Harper stated in his letter that the deceased had some mild paranoia and agitation and had agreed that it would be in her best interests to seek residential care.

56 On 15 January 2007 Meagan provided further information about the deceased to medical staff at KIC (exhibit 39). She in effect repeated the concerns of her and Susan about the deceased's cognitive decline over the last six months and short term memory loss (STML). She also reported unwarranted and out of character emotional and verbally aggressive outbursts by the deceased directed towards family members. She stated that she and Susan had given consideration to all of these matters before accepting the previously made decision that the deceased should be placed into residential care.

57 On 15 January 2007 the deceased was, on referral by her general practitioner Dr Daryl Hollingworth, assessed by the Joondalup Older Adult Mental Health Service (JOAMHS) due to her having expressed suicidal thoughts (exhibit 20). The assessment was carried out by Dr Prakriti Gopinathan, a psychiatric registrar attached to the

JOAMHS. On assessment it was found that the deceased had expressed the suicidal thoughts out of frustration due to the fact that she did not want to be placed into care and wanted to return home.

58 During the assessment the deceased obtained a score of 23/27 on MMSE. She lost a point on date and day, a point on calculation, a point on orientation of space and a point on delayed recall. She was found not to exhibit any deficits in attention and concentration and to be orientated to place, time and person. She made clear that although she did initially accept that she would not go home, she did so because she was not fully recovered from her injury, and that she now was recovered and wanted to go home.

59 On 25 January 2007 the deceased was reviewed by Dr Gopinathan. The review was for a competence assessment (exhibit 39). Dr Gopinathan found that the deceased was orientated, alert and coherent, that she was able to tell him the reasons behind her stay at KIC and that she was able to tell him her next of kin details. There was no evidence of depressive symptoms, psychosis or major cognitive decline. During the assessment the deceased was adamant that she wanted to return home.

60 On or about 16 February 2007 Dr Gopinathan arranged for the deceased to be reviewed by a consultant psychiatrist, Dr Mathew Samuel (exhibit 74). Dr Samuel decided that due to the deceased's mild dementia she did not have the capacity to decide whether she could go home. At the time of the assessment the deceased was still adamant that she wanted to go home, and Susan and Meagan were still adamant that the deceased needed placement in a residential aged care facility.

61 On 6 March 2007 Ms Michelle Kay, an occupational therapist at KIC, conducted a full cognitive assessment of the deceased (exhibit 75). During the assessment the deceased obtained a Hierarchic Dementia Scale Score of 107/190 which was well within normal age related limits. A Modified Barthel's Index (MBI) score of 98/100, based on Ms Kay's interview with the deceased, indicated potential and motivation for the deceased to return to community living with support services.

62 Shortly after the cognitive assessment carried out by Ms Kay, and in any event prior to 14 March 2007, Meagan and Susan sent a relatively lengthy letter (written by Meagan on behalf of both of them) to KIC (although the letter was addressed to 'To whom it may concern')

(exhibit 85). In the letter Meagan and Susan, in effect, expressed their strong disagreement with any suggestion that the deceased was capable of returning to live by herself in her home. They set out in considerable detail their account of the deceased's cognitive, emotional and behavioural deterioration from a point in time prior to the deceased's admission to SJGH Murdoch.

63 On 14 March 2007, as a result of the letter sent by Meagan and Susan, Ms Angela Murphy, a social worker employed at KIC, requested that JOAMHS carry out a further assessment of the deceased.

64 On 29 March 2007 the requested JOAMHS assessment of the deceased took place. Following the assessment Dr David Brown, consultant psychiatrist, concluded that the deceased was 'quite capable of deciding to return home'. He conveyed this opinion to Dr Hollingworth in a letter dated 29 March 2007 (exhibit 17).

65 At around the same time Dr Brown prepared an undated and unsigned report to be used in a previously foreshadowed guardianship application to be made by Susan and Meagan with the support of KIC to the State Administrative Tribunal in relation to the deceased (exhibit 86). In his report Dr Brown stated his diagnosis of the deceased to be 'mild cognitive impairment insufficient for a diagnosis of dementia of any type' (exhibit 18). The guardianship application was not proceeded with.

66 On 3 April 2007 Dr Hollingworth, in a letter addressed to 'To whom it may concern', certified that he considered the deceased to be 'totally sound of mind and quite capable of making her own decisions and returning to live in her own home' (exhibit 25).

67 On 4 April 2007 the deceased was referred for an assessment by Osborne Park Hospital ACAT. The assessment was completed on that date (exhibit 63). As a result of the assessment it was arranged that the deceased would be discharged to her home on 13 May 2007 with comprehensive community services being put in place (exhibit 23).

68 On 13 May 2007 the deceased was discharged from KIC to her home. Support services were put in place for the deceased.

69 On 23 July 2007 the deceased was assessed by Dr Alison Smith, a medical officer attached to the South Metropolitan Area Health Service Fremantle Older Adult Mental Health Service (FOAMHS) (exhibit 27). The assessment occurred at the deceased's home at the

request of Susan. At the time of the assessment Dr Smith had been informed by Susan that since the deceased had returned home she had shown verbal aggression and one episode of physical aggression towards her, that is, Susan.

70 Dr Smith found the deceased to be well presented, pleasant and cooperative. She was deaf. She was reactive and her speech was normal in speed and volume. She described her mood as 'good' with no thoughts of deliberate self-harm or suicidal ideation. She did recall telling her daughter on one occasion, whilst she was in KIC, that she would kill herself if she was not allowed to go home. However, she had no plans to deliberately self-harm. There was no formal thought disorder and no hallucinations. She expressed the belief that her daughter had been stealing from her since she gave her daughter an enduring power of attorney. On a MMSE, which was limited by deafness and Senile Macular Degeneration, the deceased's score was 25/28.

71 Dr Smith concluded that the deceased was an 87-year-old woman with possible mild dementia and verbal aggression towards family, notably around financial issues.

72 Dr Smith reported the results of her assessment of the deceased to the deceased's general practitioner, Dr Leonie Nulsen, in a letter dated 24 July 2007 (exhibit 22).

73 On 21 August 2007 and again on 10 September 2007 the deceased was, at the request of Dr Smith, assessed by clinical neuropsychologist and special clinical psychologist Dr Michelle Reid (exhibits 28 and 29). The assessment occurred in the deceased's home.

74 On assessment the deceased's total camcog-r score was 86/105. This placed her equal to or above the '70th % of her age/education peers'. However, her performance on tasks of executive functioning suggested some difficulties in this area most particularly in her inability to inhibit. Other areas of executive difficulty included 'Borderline Impairment' in deductive reasoning with some mild stimulus bound tendencies. Her 'Low Average' performance on an inductive reasoning task also suggested that she had some mild difficulties with abstract reasoning. The deceased demonstrated adequate conceptual reasoning.

75 Dr Reid concluded that the deceased had the capacity to make a decision to remain at home and that 'past occupational therapy

assessment confirmed her ability to use her conceptual reasoning ability in a practical sense'.

76 During the period 17 October 2007 to 24 October 2007 the deceased was assessed by FOAMHS. As part of this assessment Dr Smith attended on the deceased on 17 October 2007 (exhibit 26). During this attendance the deceased provided to Dr Smith what was, in effect, a description of her family tree, and her account of her family situation and her relationships with her family members including Susan, Ainslie and Meagan. She described in some detail how she had in the past assisted various members of her family (including Susan and Meagan) financially. She said, in effect, that she had made a will in which she had left most of her property to Susan but that she was going to make a new will, and that she did not want to leave all of her property to Susan because Susan's partner was a 'parasite'.

77 On the basis of the FOAMHS assessment Dr Smith formed the view that the deceased was competent to deal with her financial affairs, and that there was no evidence of an affective or psychotic disorder.

78 Dr Smith reported the results of the FOAMHS assessment to Dr Nulsen in a letter dated 29 October 2007 (exhibit 30). In her letter Dr Smith advised that FOAMHS had offered the deceased's family the opportunity to discuss the assessment at a family meeting although it was at that stage unclear whether they would accept this option.

79 On 14 November 2007 the FOAMHS discharged the deceased from its service to the care of Dr Nulsen (exhibit 31).

80 On 12 May 2008 Dr Nulsen requested the Fremantle Hospital ACAT to carry out an assessment of the deceased (exhibit 33).

81 On 28 May 2008 the deceased was, as a result of Dr Nulsen's above referred to request, assessed by Dr Mark Wilson, geriatrician, from the Fremantle Hospital and Health Services Department of Community and Geriatric Medicine (exhibit 34). The assessment was carried out by way of a home visit. During the assessment the deceased did demonstrate some paranoid ideation towards some family members by stating that she believed that one of her daughters had 'sabotaged' her Webster medication pack, and also that they were not actually concerned for her safety but were rather concerned about how she was dealing with her money and how she would distribute her assets when she died. The deceased demonstrated no obvious hallucinations. Dr Wilson found that although the deceased's opinions regarding her

family members' motives were quite intense it was difficult to conclude that they were in fact of a delusional character. His impression was that the deceased was not in fact psychotic.

82 On examination of the deceased there were no focal neurological signs. Her MMSE score was 26/30. She lost two points for short term memory, a point for being unable to read the written instruction and a point for being unable to see the intercepting pentagons well enough to copy them. She was fully orientated to time and place and scored 5/5 on a spelling exercise. She would not attempt the maths exercise.

83 It appeared to Dr Wilson that the deceased did have some short term memory loss although she was good on most details. She appeared to have negative ideations about some family members although it was not clear that these ideations were of delusional strength.

84 On 23 June 2009 the deceased was assessed by a Ms Laura Johnson, social worker, attached to the Fremantle Hospital ACAT on the referral of her general practitioners Dr Nulsen and Dr Yin Wee (exhibit 37). During the assessment the deceased presented as alert, orientated and conversant. She answered most questions appropriately, demonstrating insight, good long term memory and an ability to describe events with dates in detail. There was evidence of fixation on issues surrounding family conflict and her previous institutionalisation at KIC. Some mild paranoia or negative ideation towards her daughter Susan and her granddaughter Meagan was demonstrated but this did not appear to be of delusional strength. The deceased also demonstrated a high degree of negativity in regards to her home services and reported lack of consistency.

85 The deceased scored 28/29 on a MMSE for both calculation and spelling. One question was omitted due to visual impairment and one point was lost for recall.

86 Functionally the deceased presented as alert and orientated, demonstrating insight into risk factors and cognitive function within normal range. The deceased was continuing to participate in personal care but required increased supervision due to visual impairment and declining confidence. She continued to ambulate and transfer independently with a walking stick or trolley, although osteoarthritis impacted upon her ease of movement. Most of her domestic duties were being completed via formal services due to her visual impairment.

87 With respect to her continued care the deceased expressed the belief that her progressive loss of vision was impacting upon her ability to continue safely residing at home. She described experiencing social isolation and no longer felt confident completing her activities of daily living. She felt that a residential environment would provide companionship and safety while ensuring that her ongoing care needs were appropriately met.

88 On the basis of her assessment Ms Johnson concluded that the deceased was suitable, and should be approved, for low level residential care.

89 On 19 November 2009 the deceased was admitted into full-time care at a residential facility in Salters Point.

90 On 5 March 2010 the deceased was admitted to the Frederick Guest Hostel aged care facility (FGH).

91 On 11 March 2010 the deceased underwent an Aged Care Funding Instrument Psychogeriatric Assessment Scales (PAS) Cognitive Impairment Scale assessment (exhibit 69). She obtained a score of 13 with the normal score being between 16 and 21.

92 On 13 July 2010 the deceased was assessed by Dr Peter McCarrey, a doctor associated with FGH (exhibit 38). The assessment was carried out in response to a request from a firm of solicitors who had been instructed by the deceased to deal with the sale of her house at 11B Bateman Road Mount Pleasant. Dr McCarrey assessed the deceased as having full legal decision making capacity.

93 On 1 February 2011 the Case Manager at FGH requested an ACAT review of the deceased. The request was made on the basis that the hostel's assessment of the deceased was that she now required a high level of care.

94 On 14 February 2011 the deceased was assessed by the Bentley ACAT (exhibit 42). The assessment revealed that since the deceased had been residing at the FGH she had become very frail, her eyesight and mobility had deteriorated and she was now requiring two people to assist with transfers out of bed and chairs, as well as the use of a hoist occasionally. There had been numerous falls. It was concluded that given the deceased's increase care needs the deceased was approved for high level residential permanent care.

95 On 14 February 2011 a delegate of the secretary of the Department of Health and Ageing approved the deceased as eligible to receive permanent residential care at a high level (exhibit 42).

96 On 31 March 2011 the deceased was admitted to Anchorage.

97 On 15 April 2011 the deceased underwent an occupational therapy assessment (exhibit 44). The assessment was carried out by Ms Belinda Ryan. During the assessment the deceased was quietly spoken but able to maintain appropriate conversation with some initiation. She had good comprehension but could become confused due to her hearing loss. She demonstrated a mild impairment in cognition, although a full assessment was not completed due to visual impairment. She had impaired short term memory and orientation. She was orientated to person only not to time or place. She was able to recall two of three objects after one minute and was able to recall four of five objects after three minutes. She was able to recall information in relation to the past and family, although she demonstrated some confusion in relation to the number of her grandchildren and great grandchildren.

98 On 31 May 2011 the deceased was assessed for aged care funding by a clinical nurse manager at Anchorage (exhibit 45). On assessment the deceased obtained a PAS Cognitive Impairment Scale score of 6.8 which equated to a moderate cognitive impairment. The assessment revealed the deceased to have significant problems in the performance of everyday activities, that she required supervision and some assistance with personal care, that she rapidly lost her memory of new material and retained only highly learned material, that disorientation to time and place was likely, and that she would possibly communicate with only fragments of sentences. The clinical nurse manager assessed the deceased as having a moderate cognitive impairment.

The lay witnesses

99 I turn now to the evidence given by the lay witnesses that bears upon the previously identified questions for determination.

The first plaintiff - Robyn Power

Evidence

100 Robyn made two statements, one dated 31 July 2017 (exhibit 78) and the other dated 27 September 2017 which was prepared in response to the statements of Susan, Meagan and Ainslie (exhibit 79).

101 Robyn's relevant evidence-in-chief was as follows.

102 Her mother Ainslie and her father Stevan Gledich split up when she was a baby. Her mother married John Perkusich in about 1970.

103 When her parents split up her mother, her older brother Mick (Michael) and her moved in with her grandparents and lived with her grandparents until her mother married John Perkusich. After this her family would visit her grandparents regularly. She used to spend some of her school holidays with her grandparents.

104 After her grandfather died she visited the deceased regularly with her family.

105 The deceased often said to her that Michael would be alright because he would inherit his father's property.

106 Her mother stopped seeing the deceased. She does not know when her mother stopped seeing the deceased. She does not know why her mother stopped seeing the deceased. Her mother and the deceased were still talking when her parents moved to Dongara in about 1988. She was about 23 at the time.

107 Aunty Sue (Susan) visited the deceased on the weekends until Aunty Sue started to see a man called Harvey. She thinks this was in the early 2000s. Aunty Sue took Harvey to visit the deceased occasionally until the deceased told her that she had told Aunty Sue that she did not want Harvey in her home.

108 She knows that Aunty Sue visited the deceased on weekends because she also visited the deceased about once a week and would call the deceased to organise the day. The deceased would tell her the day Aunty Sue was visiting and they would fix another day for her to visit.

109 The deceased did not like Harvey. The deceased called him the 'Sniffer Dog'. The deceased said something to her like:

> I don't want him in the house. Now [Aunty Sue's] got Sniffer Dog she doesn't want anything to do with me. She said she was going to look after me.

110 For the same reasons that she knew that Aunty Sue called on the deceased, she knows that after Aunty Sue had met Harvey Aunty Sue would rarely visit the deceased.

111 The deceased was very active until her eyesight started to fail in the early 2000s. Until then the deceased was very active and independent.

112 In around 2002 she noticed that the deceased did not like using the stove. The deceased told her that she was afraid that she might not see that it was still on. The deceased also told her that her eyesight was failing.

113 The deceased received two fortnightly payments. One was from GESB, a superannuation fund. The other was a war widow's pension. In total the deceased received about $1,300 per fortnight.

114 The deceased kept cash in the house to pay for things she needed or work that had to be done around the house. She knows this because from time to time the deceased asked her to take cash from an envelope that the deceased would keep in a pocket of a jacket in her wardrobe to pay workmen or to give as a Christmas present. She observed the deceased with money. The deceased was always very careful with her money. The deceased would never leave money lying around the house.

115 When the deceased was in JHC in 2006 the deceased told her that Aunty Sue and Meagan were telling the hospital staff that she was 'demented'. At this time Aunty Sue was managing the deceased's money. The deceased said that she was angry with Aunty Sue and Meagan for saying these things.

116 In or around early to mid-2007 the deceased moved back into her own home. At some point the deceased asked her to find out if the defendant and Meagan still held her Enduring Power of Attorney.

117 The deceased liked her (that is, Robyn's) brother Stevan. Soon after the deceased returned home the deceased gave Stevan and his then wife Samantha the job of paying her bills.

118 In early 2009 Aunty Sue called her and said something like, 'Nanna's bills are not being paid will you talk to Nan to find out why?' She then spoke to the deceased. The deceased did not know why the bills were not being paid. She took the deceased to the Commonwealth Bank. She found out that all the money that the deceased was receiving from her superannuation and her pension was being withdrawn from the deceased's account on the same day that the payments were being deposited into the account. She helped the deceased open a new bank account and arranged for the payments to be deposited into the new account. She did this to stop Stevan and Samantha taking the deceased's money.

119 The new account was opened on 30 March 2009 (exhibit 80). She took the deceased straight to the bank without first discussing the matter with Stevan because she knew that the deceased had already given Stevan about $40,000 from an AMP insurance policy account. She knows this because it was discussed at a family meeting between her, the deceased, Aunty Sue, Meagan, Stevan and Samantha that was held at the deceased's home.

120 She contacted the deceased's service providers who required money to be paid immediately to continue the deceased's services as nobody had yet arranged payment. She paid this money herself as the deceased had literally no money left. The deceased later reimbursed her what she had paid and caught up on the overdue payments very quickly as the deceased's payments were no longer being siphoned by Stevan.

121 On the day or the day after the payments were due to be paid into the deceased's old account (the one that was being closed), the deceased told her that Stevan had called her and abused her for stopping the money. The deceased said that she told Stevan that he had not paid her bills. She then took over the payment of the deceased's bills.

122 At the deceased's request she arranged for the deceased to give her an Enduring Power of Attorney. She does not remember when the deceased made this request. She used the Enduring Power of Attorney to apply for placements in care facilities for the deceased.

123 When the deceased first moved into FGH she was able to walk with the aid of a walking frame from her room to the sitting area albeit very slowly. The deceased's loss of mobility was part of the reason the deceased was required to move to a high care facility.

124 When the deceased was at FGH she visited the deceased at least three times a week. Since 2007 she had been working at Harvey Norman and City West which was not that far from FGH. She was the contact for the deceased for the deceased's entire time at FGH.

125 The deceased was moved to Anchorage because it was a high care facility and 'because Aunty Sue told her that she wanted the deceased to be close' to Aunty Sue.

126 On a date that she no longer remembers, but not long after the deceased was admitted to Anchorage, the deceased said to her that she wanted to make a will. The deceased said something like, 'Can you get someone to make a will for me?'

127 She googled 'mobile wills service' or something similar. She selected a site that read 'Wills at Home'. This brought up information about Haynes Legal.

128 She does not remember ringing Haynes Legal and making an appointment. However, she must have done because she met Mr Paul Haynes with the deceased not long afterwards. She had never had any dealings with Haynes Legal or Mr Haynes before this time.

129 She remembers the conversation that she had with the deceased and Mr Haynes on the day that she met Mr Haynes. She thinks both she and Mr Haynes were seated either side of the foot of the deceased's bed.

130 Mr Haynes went up to the deceased and introduced himself to the deceased. She does not remember if Mr Haynes and the deceased shook hands.

131 Mr Haynes had a pad and was writing things down. She does not remember the exact words used. The thrust of the meeting was as follows:

1. The deceased said to her that she wanted to leave everything to her. She said that she did not want it. The deceased said that she trusted her to decide 'who gets it'. She said that she did not want that responsibility. The deceased then said that she would leave 'it' to Bethany. She said that she did not think that was fair on the other kids 'but that if that is what you want to do'. By using the word 'kids' she meant the deceased's great grandchildren;

2. Mr Haynes said to the deceased that it would not be unusual for her (Robyn) to get something because she had been responsible for the deceased. She said, 'No, then they'll be saying you're ok', meaning that she had looked after herself;

3. The deceased paused and looked like she was thinking. The deceased then said, 'Alright, I'll leave it to all great grandchildren; my blood related great grandchildren';

4. At some point Mr Haynes suggested that the great grandchildren share on the basis of an equal distribution to the grandchildren. Mr Haynes gave as an example that if the estate was worth 'say $300,000 [t]his would mean that my two children would receive $150,000 and that Mick's four children would each receive $75,000'. The deceased rejected this idea. The deceased wanted each great grandchild to take an equal amount;

5. At one point Mr Haynes asked what age the great grandchildren would get funds. The deceased said '21'. She said, '25 would be a good age'. The deceased disagreed and said, '21, that is the age';

6. Mr Haynes then asked the deceased about her assets. The deceased said she had money from the sale of her house;

7. At some point Mr Haynes said, 'Why are you not leaving anything to your children? The deceased responded that she had given her children her property in Dunsborough in equal shares. The deceased said that Susan had given her share to Meagan and that Ainslie had sold her share to Meagan for only $50,000 when the property was worth over $300,000. The deceased said that she had already given her children enough. The deceased said that she wanted the great grandchildren to use the money as a deposit on a house. She recalls Mr Haynes saying that it could not be stipulated in the will what the great grandchildren could use the money for; and

8. At this point she left the meeting. She does not recall whether or not Mr Haynes asked her to leave.

132 She thinks that Mr Haynes mentioned at the meeting that he would arrange for the deceased to see the deceased's doctor prior to completing the will.

133 She did not discuss the will or its contents with either Mr Haynes or the deceased after this meeting.

134 She received a letter from Mr Haynes dated 9 November 2011 with the attachments specified in the letter, namely the original will (that is, the 2011 Will), a copy of a letter from Dr Bohmer and an invoice from Haynes Legal. She read the will, the letter from Dr Bohmer and the invoice which she paid. The original version of the will was the only version of the will that she ever saw. She did not see any drafts. She did not arrange the appointment with Dr Bohmer and was not present when Dr Bohmer saw the deceased.

135 She kept the original will at her home. She told the deceased that the will had arrived.

136 She does not recall calling Mr Haynes after she had met him at Anchorage or receiving a call from his office.

137 The deceased always spoke to her normally. The deceased never got upset with her in anyway.

138 At no stage during the deceased's life did she get the impression that the deceased had any memory or other mental problems. The deceased's eyesight and hearing became quite bad towards the end of her life but she was always able to deal with this in order to communicate with the deceased. She talked louder and made sure that she was facing the deceased. On one to one the deceased could hear. The deceased had hearing aids but told her that she did not like wearing them because they sometimes made a buzzing noise in her ear. This was mainly caused by an issue with the battery. The deceased rarely used the hearing aids in her presence and they were always able to communicate fine.

139 The deceased loved listening to the football on the radio and watching the football on the television. She noticed when the deceased was in Anchorage that the deceased could not distinguish the players. She would therefore sit by the deceased and give her a commentary of who had the ball and who scored which the deceased enjoyed.

140 She did not try to apply for a grant of probate of the deceased's will for a while because she wanted to delay the time the older great grandchildren received the money. She thought 21 was too young. The money in the deceased's estate could just earn interest while the children waited.

141 She did not tell her mother or Aunty Sue about the will because they were not in it.

142 From dealing with the deceased's finances when she had held the deceased's Enduring Power of Attorney she knows that the deceased has funds of about $800,000, made up of a $300,000 bond with Anchorage and $500,000 with the Commonwealth Bank.

143 Her memories of the deceased were of an independent woman who cared for her family. She was generous and always willing to help all of them.

144 The deceased never held a driver's licence but this never stopped her getting around by walking or public transport. The deceased's loss of mobility was her loss of independence.

145 Her mother, Ainslie, only visited the deceased four or five times in the year that the deceased was at FGH. On one occasion her mother said to her words to the effect that she did not visit the deceased on her own.

146 On one occasion she picked up her mother to take her to visit the deceased at Anchorage. On the way she said to her mother words to the effect of, 'why do you only visit Nanna with other people?' Her mother said something like she was not comfortable visiting the deceased on her own.

147 When she took over managing the deceased's money she explained to the deceased that as she was a single working mum it would be simpler to make payments via the internet as that was how she paid her own bills. She explained to the deceased that she and the deceased would both have a card for this new account and that she would print out statements to show the deceased that her bills were being paid and so she could see where her money was going. The deceased said something like, 'that is good' or words that made it clear to her that she wanted the internet account.

148 She and Meagan were not with the deceased when the deceased passed away. Meagan left early in the evening and she left very late. She had just got home and into bed when Aunty Sue called to say that the deceased had passed. She drove back and stayed with the deceased until the deceased was taken away.

149 The deceased never mentioned to her that someone was going through her house and stealing.

150 The family meeting in late 2007 was called to discuss the money taken by Stevan. However, the deceased did say at this meeting words to the effect that she intended to leave her property to her great grandchildren. She recalls saying something like, 'What about Meagan?' because as that time Meagan did not have any children.

151 At no time while she was at the meeting did the deceased demand or request that everyone go into the spare room to see the spare bed. Stevan and Samantha arrived at the meeting after her and left before her. She was sitting near the deceased during this meeting and did not hear the deceased mention anything about the mattress or the spare room at any time.

152 During the time that she was at the meeting the deceased did not make any statement to the effect that she was going to get a lawyer and have a will drafted leaving everything to Bethany. However, she (Robyn) had a big argument with Stevan over an unrelated matter and she left the meeting shortly after Stevan and Samantha left, and before Susan and Meagan left.

153 She never found the deceased to be 'spaced out' or not being aware of what was happening around her. She would knock on the door and the deceased would answer the door. They would sit and chat. She would make the deceased a cup of tea. The deceased told her about Samantha visiting and taking her shopping.

154 She took the deceased to see FGH prior to accepting the placement. The deceased said words to the effect that she liked that she was still in the area she had spent so much of her life in, and that she liked the large open activities room. From observing the deceased at FGH the deceased enjoyed the walk to and from her room to the activity room, as when she was at Salters Point she never liked that she was on the first floor and rarely left her room.

155 At Anchorage the deceased did not require help to the dining room because she was disorientated. She required the assistance due to her mobility issues.

156 The deceased knew she was at Anchorage and never said anything to her about being anywhere else. At one point when the deceased first moved to Anchorage she thought that the deceased might

like to go for a drive to see the new area she had moved to. The deceased said that she did not because the beach was too windy.

157 The deceased was a very proud woman and had always been so strong and independent. Therefore, for the deceased not to want to participate in activities in which she was not able to excel due to her mobility and sight deterioration could hardly come as a shock to anyone who understood her.

158 In cross-examination Robyn gave the following additional evidence.

159 She remembers parts of the conversation that occurred in the deceased's room with Mr Haynes.

160 She does not remember whether she arrived before or after Mr Haynes. She does not remember whether she was already in the room with the deceased when Mr Haynes arrived. She can just remember Mr Haynes going up to the deceased and introducing himself and shaking her hand. It is possible that she introduced Mr Haynes to the deceased.

161 She does not know if Stevan, when he took the money out of the deceased's bank account, stole the money or took the money with the deceased's permission. The deceased wanted her to change the bank account because her bills were not being paid. The deceased did not want Stevan to have the responsibility of paying her bills.

162 She knows that at the meeting that took place at the deceased's house the deceased said that she had given the AMP insurance policy money to Stevan. She is 100% sure that the deceased said at the meeting that she had agreed to Stevan cashing in the AMP insurance policy. Aunty Sue and Meagan were at the meeting.

163 She could not say how often the deceased had said to her that 'Mick will be alright because he will inherit his father's property'. The deceased said this to her when she was younger. The last time the deceased said this to her was many years ago, prior to the time that she took over responsibility for looking after things for the deceased and probably prior to 2006. The deceased said this in general conversations when she was visiting the deceased at home and when the deceased was still living at home.

164 The only time she remembers having any discussion during the period 2006 to 2011 with the deceased about who she was going to leave her estate to was at the family meeting that Meagan and Aunty Sue were at.

165 She agrees that she was the closest grandchild to the deceased before the deceased signed the 2011 Will. She was looking after the deceased's finances at that time. After the deceased had been put into a facility in 2006, Susan and Meagan were trying to keep the deceased in the facility. They were unsuccessful. Up until the time that the deceased was allowed to go back home Susan and Meagan had been looking after the deceased's bank account.

166 During the meeting with Mr Haynes she knows that she left and that she definitely did not go back into the deceased's room.

167 She was in the room when the deceased said that she wanted to leave everything to her. She said to the deceased that she did not want that responsibility. She believes that the deceased then said something about leaving her estate to Bethany. When the deceased said this, she said, 'well that's up to you but I didn't think it was fair'. It is not her memory that the deceased then persisted with her expressed intention of leaving the estate to Bethany.

168 She does not remember there being any discussion with the deceased about secret trusts when she was in the room.

169 She does not know if the deceased agreed with her that she should not leave the estate to Bethany. The deceased did not agree or disagree. She does not know if the deceased agreed or disagreed. However, the deceased then changed her mind from Bethany to the great grandchildren.

170 She had not told Mr Haynes anything about her relationship with the deceased. She does not know how Mr Haynes knew about her relationship with the deceased. However, it would have come from that meeting because she had not met Mr Haynes before. Her relationship with the deceased may have come up in the conversation while they were all in the room but she does not remember.

171 After she had said to the deceased that she did not think that it would be fair for all of the estate to be left to Bethany, Mr Haynes did say to the deceased that it would not be unreasonable for the deceased to leave her (Robyn) money because she had been responsible for the

deceased. It was at this point that she (Robyn) said, 'No. Then they will be saying "you're ok"', meaning that she had looked after herself.

172 She thinks that the correct sequence was first the deceased said she wanted to leave all her the estate to her, secondly all of the estate to Bethany, and thirdly to her 'blood great grandchildren'.

173 From what the deceased said, she was going to leave her estate equally to her great grandchildren. She does not know if there was a mention of how many great grandchildren there were. The deceased thought that the estate was going to be distributed into equal parts to her great grandchildren.

174 She does not accept that during the meeting she was in a very controlling position over the deceased. Nobody controlled the deceased. She did not instruct the deceased to do something different. She said that she would not accept the estate. What the deceased chose to do after that was up to the deceased. She does not accept that the deceased regarded her views on what she should do with her estate as very important. The deceased was a strong woman. She knew her own mind.

175 She does not recall there being any discussion about her and Michael being co-executors. However, the deceased must have said that she and Michael were going to be co-executors because she feels that she knew that she and Michael were going to be co-executors when she left the room. This makes her think that the conversation about this occurred although she does not actually remember it.

176 It may have been the deceased or it may have been Mr Haynes who suggested that she and Michael were to be the executors. She knows that it was not her who suggested it.

177 She does not know what the deceased said during the meeting about how many great grandchildren she had. She does not have any recollection of the deceased telling Mr Haynes that she had eight great grandchildren.

178 As to her recollection of the questions that Mr Haynes asked during the meeting, she thinks that Mr Haynes asked the deceased what assets the deceased had to leave. She does not recall telling Mr Haynes what the deceased's assets were but it could have been either her or the deceased. She does not know. It was just a conversation.

179 The deceased did tell Mr Haynes that she had given the Dunsborough property to her daughters. She remembers this because Mr Haynes asked the deceased why she was not leaving money to her children and the deceased told Mr Haynes that she had given the Dunsborough block to her children and that they were taken care of. The deceased told Mr Haynes this while she was in the room. She definitely recalls this.

180 She knows that Mr Haynes asked the deceased about why she was not leaving anything to her grandchildren and that the deceased answered this question although she cannot recall 'anything sort of specific'.

181 She does not recall the specifics of the deceased explaining what she had left to her grandchildren or how she had dealt with her grandchildren over the years because it was a conversation that the deceased and Mr Haynes were having. She was just there. If she had realised what was going to happen she would have paid a lot more attention. But to her it was pretty straight forward. She just sat with the deceased because the deceased did not know Mr Haynes. She sat with the deceased and when the deceased was comfortable and Mr Haynes seemed good and could communicate with the deceased she left the room.

182 She cannot remember how long she was in the room for. She knows that she left before anything was finalised.

183 While she was in the room she would be 'in and out' in the sense that she was not focussing on the conversation. If she was asked something then she would obviously answer, but she was not sitting there having a conversation.

184 She was in the room to look after the deceased. She was not in the room to make sure the deceased did not do anything which would not be appropriate.

185 Before she went into the meeting with the deceased and Mr Haynes, she had no idea that she might be a beneficiary of the deceased's estate. It made no difference to her. The only thing that she probably would not have been particularly happy about is that if the deceased had left her property to Stevan.

186 She did not tell the deceased what to do. The deceased did not get told what to do.

187 When she left the meeting she did not understand that there had been a discussion about her being a trustee. She does not actually know what a trustee is.

188 When she left the deceased in her room with Mr Haynes, all that she remembers is going out to have a cigarette. She does not know if she spoke to Mr Haynes again. She does not recall if she went back into the room.

189 She was not in the room when the deceased made final decisions on anything. She did not know what was in the will until it was sent out. She was just there for a conversation that covered things, but she does not know what was finally decided because she was not there.

190 She did not discuss with Susan, Ainslie and Meagan the existence of the 2011 Will. She waited until they raised it with her. She did not notify them of the 2011 Will because they were not in the will. She does not understand why she would tell them.

191 She did not think that she should notify people who may be interested in knowing about the 2011 Will. She only notified people who were in the 2011 Will because that is what she thought she was meant to do. She was not at all concerned that if she notified Susan, Ainslie and Meagan about the 2011 Will and that they were not in it they would challenge it. Susan had specifically said to her that she would not contest the will unless the deceased's property was left to Stevan. Susan said this to her at the family meeting at the end of 2007.

General observations on Robyn's evidence

192 Although I do have some reservations about the credibility of Robyn's evidence as to her reasons for not informing Susan and Ainslie about the details of the 2011 Will at an earlier point in time than she did (an issue to which I will return later in these reasons), my overall general assessment of Robyn was that she was an honest and reliable, that is, credible witness.

193 There were, as will become apparent, some discrepancies between aspects of Robyn's evidence and aspects of the evidence given by other witnesses, specifically Mr Haynes, Susan and Meagan. However, where in the case of the discrepancies I state my preference for the evidence of the other witness or witnesses to the evidence of Robyn, I do so on the basis that Robyn's evidence on the matter in

question was the result of an honest mistake in recollection or perception.

194 The defendants make a number of criticisms of Robyn's evidence in support of their contention that on important issues of fact she was not a credible witness, and that as a consequence her evidence does not support a finding that the deceased had testamentary capacity or knew and approved of the contents of the 2011 Will. Despite my above expressed view as to the credibility of Robyn's evidence I will, for purposes of completeness, at this point deal with the defendants' principal criticisms of her evidence and explain why I do not accept that they provide a basis for finding Robyn to be a witness lacking in credibility.

195 First, it is argued by the defendants that Robyn deliberately down played in her evidence, and more specifically in her witness statements, the deteriorating physical and mental condition of the deceased after 2006. Having watched Robyn give evidence I do not accept this to be the case. As I have said, to the extent that Robyn's evidence in relation to the deceased's physical and mental state in the last few years leading up to the deceased's death differs to the evidence of other witnesses, most particularly Susan and Meagan, to which I will refer in due course, my view is that the differences arise from honest mistakes on the part of Robyn in her recollection and/or perception. I note in this context that Robyn was clearly devoted to the deceased, and towards the end of the deceased's life was the relative who was closest to the deceased, and who spent most time with the deceased and most time looking after the deceased. In these circumstances I do not find it surprising that Robyn's recollection of the deceased's abilities and personality is perhaps more favourable to the deceased than the recollections of witnesses such as Susan, Meagan and Ainslie. Further, given the companionship and assistance that Robyn was providing to the deceased in the later part of the deceased's life, and the fact that Robyn was not involved in attempting to keep the deceased in residential care following her initial admission to hospital in 2006, I think it probable that the deceased would have been more favourably disposed to Robyn than to Susan, Meagan and Ainslie and hence would have been far less likely to expose Robyn to some of the 'less endearing' aspects of her personality to which others were exposed.

196 Second, it is said by the defendants that the evidence that Robyn gave during examination-in-chief by way of clarification of a paragraph in the first of her witness statements reflected adversely on her

credibility. In the relevant paragraph of her witness statement Robyn, in stating that Mr Haynes during his meeting with the deceased suggested to the deceased that the great grandchildren share on the basis of an equal distribution to the grandchildren, went on to say that Mr Haynes gave an example that if the estate was worth 'say $300,000' this would mean that her two children would receive $150,000 and Mick's four children would each receive $75,000. When questioned about this paragraph in examination-in-chief Robyn said that she had not explained the situation clearly. She said that Mr Haynes did give an example but that she did not know if the example she had referred to was the 'exact example'. She said, in effect, that what she was intending to convey was that if the estate was worth $300,000 and there were two grandchildren, the $300,000 would be split between the two grandchildren so that her two children would get $75,000 and her brother's four children would get $37,500.

197 The defendants contend that the 'arithmetic involved in [Robyn's] change of position is not the point' and that what is relevant is the late change of position by Robyn which is 'strongly suggestive of intervention by the plaintiffs' legal advisers to invite a reconsideration by [Robyn] of her sworn testimony': defendants' closing submissions, [32(a)].

198 I do not accept the defendants' contention. In my view all that Robyn was doing in this aspect of her evidence was correcting the arithmetical error that was apparent on the face of the paragraph in the statement. She was not changing her evidence as to the substance of the suggestion that she said Mr Haynes made to the deceased, namely that the great grandchildren share on the basis of an equal distribution to the grandchildren.

199 Third, it is said by the defendants that Robyn's evidence given in cross-examination after she was shown a letter (exhibit 81) written by Haynes Legal to a firm of solicitors called Summers Legal dated 18 May 2016 (which was written not by Mr Haynes but by a solicitor employed in his firm at the time) in which it was stated that Robyn's recollection of the meeting between Mr Haynes and the deceased was that she introduced Mr Haynes to the deceased, she was present for a short period thereafter, she left Mr Haynes with the deceased and left the building, she was not present when instructions in relation to the will were taken, and she did not attend at the execution of the will was inconsistent with her evidence-in-chief and reflected an attempt on her part to bring her evidence more into line with what she had said to the

solicitor who had written the letter. The evidence given by Robyn after being shown the letter was the evidence referred to above that when she left the deceased with Mr Haynes all that she remembers is going out to have a cigarette, that she does not know if she spoke to Mr Haynes again, that she does not know if she went back into the room, and that she was not present in the room when the deceased made final decisions. Robyn's evidence was that the reference in the letter to her having told the solicitor that she was not present when instructions in relation to the will were taken was a reference to the fact that she was not present when the final decisions concerning the content of the will were made. Robyn's evidence was also that although she did not dispute what she is recorded in the letter as having said to the solicitor, she could not recall providing the information.

200 I accept that after Robyn was shown the letter her evidence did change in that whereas before being shown the letter she had said in her evidence that she did not go back into the deceased's room, after being shown the letter she said that she did not know if she had gone back into the room. However, I do not consider this change in her evidence to be of such significance as to warrant the conclusion that she was making a dishonest attempt to bring her evidence more into line with what had been said in the letter. Further, I do not find it inherently implausible (or to use the term put forward by the defendants 'transparently devious': defendants' closing submissions, [32(c)]) that Robyn's statement apparently made to the solicitor employed by Haynes Legal that she was not present when instructions in relation to the will were taken was a reference to the fact that she was not present when the final decisions concerning the content of the will were made. This is particularly so given that a little earlier in her cross-examination, before she was shown the letter, Robyn had said that she did not know for how long she was in the room for and that she left the room before 'anything was finalised'. In short, Robyn may in her evidence have been mistaken as to the extent to which she was present at the meeting, and indeed based on Mr Haynes' evidence to which I will shortly refer I am satisfied that she was so mistaken. However, I am not persuaded that she deliberately attempted in cross-examination to tailor her evidence so as to attempt to make it more consistent with the terms of the letter from Haynes Legal to Summers Legal.

201 In summary, and for the reasons I have stated, I do not accept that the criticisms made by the defendants about Robyn's evidence warrant the conclusion that she was not a generally honest and reliable

witness. Nor do I accept that the defendants criticisms levied at Robyn provide a basis for concluding that her evidence does not support a finding that the deceased had testamentary capacity or knew and approved of the contents of the 2011 Will.

Paul Haynes

Evidence

202 Mr Haynes made his statement on 19 July 2017 (exhibit 56).

203 Although Mr Haynes did, during his evidence, indicate that he had some independent recollection of his dealings with the deceased, he gave much of his evidence of his meeting with the deceased on 15 July 2011 by reference to his handwritten notes of the meeting and a typed 'attendance note' which he dictated after the meeting. Similarly, Mr Haynes gave the majority of his evidence of his meeting with the deceased on 22 September 2011 by reference to a typed 'attendance note' which he dictated after the meeting.

204 Mr Haynes' evidence-in-chief (omitting those portions to which I have already referred above in setting out the non-contentious facts) was as follows.

205 He started his firm Haynes Legal in 2006. He has worked as a sole practitioner in the firm since that time. He has, since his establishment of the firm, practised almost exclusively in wills, inheritance and probate matters.

206 He made his handwritten notes of the meeting on 15 July 2011 during the meeting. He dictated his attendance note of the meeting on 15 July 2011 either on the day of the meeting or on the day after the meeting. Similarly, he dictated his attendance note of his meeting with the deceased on 22 September 2011 on the day of the meeting or on the day after the meeting.

207 His handwritten note of his meeting with the deceased on 15 July 2011, his attendance note of his meeting with the deceased on 15 July 2011 and his attendance note of his meeting with the deceased on 22 September 2011 are a 'faithful and true' record of his meetings with the deceased. His attendance note of his meeting with the deceased on 15 July 2011 has a little more detail than his handwritten notes of the meeting because in his attendance note he supplemented his handwritten notes with his recollection of what happened.

208 When he arrived at Anchorage to meet with the deceased on 15 July 2011 he was met by Robyn who showed him to the deceased's room. He had not previously met Robyn or the deceased.

209 After being taken to the deceased's room he took instructions from the deceased alone in the absence of Robyn. During the meeting the deceased told him, among other things, the following:

1. Over the years she had helped both her daughters and all of her grandchildren;

2. She had given her half acre block of land in Dunsborough to her daughters Ainslie and Susan, that Susan had transferred her half of the block to Meagan and that Ainslie had sold her half of the block to Meagan;

3. Meagan is one of the children of Susan;

4. The grandchildren are Stevan, Robyn, Michael, Andrew and Meagan;

5. She does not know where Stevan is. She let Stevan look after her money at one point and bought him a car. He used her money to pay debts and to get himself out of bankruptcy;

6. Robyn is the daughter of Ainslie and the one who in the main comes to see her and looks after her. She gave Robyn $5,000 20 years ago for a deposit on a house and $3,000 for a carport;

7. Michael is the third child of Ainslie. He is a 'nice man'. She does not see him much. He lives in Dongara and she gave him money for a car;

8. She cannot remember giving Andrew money but she did buy him a ride-on lawnmower. Andrew has gone 'off the rails'. She does not know where Andrew is;

9. Meagan, Ainslie and Susan do come to see her sometimes. Robyn comes and sees her more;

7. She knows that she has about $450,000 or probably more in the bank and that she has bond money from where she is living which is about $290,000 but this will reduce; and

8. She wanted to leave her entire estate to Robyn and Robyn could then do what she liked with the money.

210 He gave the deceased advice in relation to making an outright gift to Robyn, making a gift to Robyn into a half secret trust and making a gift to Robyn under a secret trust.

211 He made clear to the deceased that in his opinion if she gave all her money to Robyn she was in all probability going to cause discontent in the family, and with an estate of over $700,000 her daughters may very well be put out by this and may look at pursuing a claim under the 'Inheritance Act'. He said to the deceased that he was not saying that her daughters would be able to succeed in any such claim, but they would have the right to consider making such a claim.

212 At this point during his meeting with the deceased Robyn came and spoke with him and the deceased. The deceased told Robyn that she wanted her whole estate to go to Robyn. Robyn made absolutely clear that she did not wish to have the whole estate. Robyn said that it would not be fair on all the others and she was also equally concerned that she should not have the responsibility of deciding how to distribute the estate.

213 After Robyn had expressed her views on the matter the deceased stated that she felt that her daughters and her grandchildren had all benefited from her one way or another, and that she therefore wanted to secure her estate to help her great grandchildren.

214 He then spoke to the deceased again alone. He told her that her daughters would not necessarily be happy about her leaving her estate to her great grandchildren. He advised the deceased that her grandchildren have no right to be unhappy and they only have rights to pursue any claim should their parents predecease her. The deceased stated that her daughters would not, or should not, be unhappy with her securing money for their own grandchildren and therefore they would no doubt be quite happy with what she was proposing to do.

215 The deceased made it absolutely clear to him that she wanted Robyn and Michael to be the executors of her will, and that she wanted all of the estate to be left in trust for her great grandchildren until the age of 21.

216 He then discussed with the deceased whether she wanted the estate split into fifths so that the great grandchildren would share

equally the one-fifth that their parent as a grandchild might have had. The deceased stated that she just wanted all of the grandchildren to have exactly the same and the estate was therefore to be divided equally between all of the eight great grandchildren. The deceased instructed him to make clear in the will that the great grandchildren were to be the biological children of her own grandchildren.

217 The deceased instructed him to incorporate in the will a declaration of her reason for not leaving the estate to her daughters, namely that her daughters had always been looked after and that she is sure that they will agree to the estate being divided between their own grandchildren.

218 At this point Robyn re-joined him and the deceased. He advised Robyn what the deceased wanted to do. Robyn stated that she was happy to be the executor of the deceased's will.

219 He discussed the possibility of instructing a trust company because it was going to be quite a responsibility for Robyn and Michael to be the executors. However, Robyn indicated that she and her brother could look at this once they had commenced the administration of the deceased's estate. The deceased was happy with this and indicated that she would rather have Robyn and Michael as executors than a trust company being formally instructed. The deceased said that she understood that it would be wise for Robyn and Michael to instruct a trust company such as Perpetual Trustees to manage the trust as it is clearly quite a responsibility to hold all the money for several years for the children until they are 21.

220 During his meeting with the deceased he formed the view that the deceased, although an elderly lady, was clear and coherent in her conversation with him, could understand what he was saying to her, and was clear in her instructions to him. He formed the view that the deceased clearly had full testamentary capacity. However, despite being left in no doubt that the deceased was competent to make a will, he regarded her decision to leave her estate to her great grandchildren as unusual because in doing so she was not only cutting out her children, but also her grandchildren. For this reason he thought that it was best to have the deceased's doctor confirm her capacity to make a will. It was against this background that he arranged for Dr Bohmer to provide his opinion as to the deceased's testamentary capacity.

221 After receiving Dr Bohmer's letter dated 6 September 2011 Mr Haynes made an appointment to see the deceased at Anchorage on 22 September 2011 for the purpose of having her sign the will that he had prepared for her.

222 When he met with the deceased on 22 September 2011 (having received Dr Bohmer's letter dated 6 September 2011) he sat very close to her given that she was hard of hearing and her eyesight was bad. He read the will that he had prepared to the deceased slowly in stages. He read the opening words of the will to her and then said words to the effect of, 'This means that this is your last will and all other wills are revoked'. The deceased responded 'yes I understand', or with words to that effect. He then read cl 2 of the will and explained that Robyn and Michael would manage and distribute her estate. He read the opening words of cl 3 of the will and explained that this clause meant everything that she owned. He read cl 3(a) and explained that Robyn and Michael must first pay all her debts. He then read cl 3(b) and started to explain that everything the deceased owned after payment of her debts would go to her great grandchildren in equal shares. At this point the deceased said to him words to the effect, 'I said biological great grandchildren'. He then hand wrote on the will, after the words 'grandchildren' on the second line of cl 3(b), the words 'who are the biological children of my grandchildren'. He finished reading the will to the deceased.

223 At the time of arranging for the deceased to sign the will he was completely satisfied that the deceased understood and approved the will. He arranged for her to sign the will simply to complete the process that the two of them had started.

224 In cross-examination Mr Haynes gave the following evidence.

225 It is hard for him to recall if the deceased was sitting up in bed or sitting in a chair. He agrees that the deceased was virtually blind and was hearing impaired.

226 He cannot recall discussing with the deceased her prior wills. Before he starts talking about wills with a client he does not as a general practice talk about prior wills. He may well have asked the deceased about her prior wills but he cannot recall. If he had asked the deceased about prior wills he probably would not have referred to it in his handwritten notes.

227 His notes and his attendance note are not a recording of absolutely everything that was said in the meeting. They do not necessarily include verbatim everything that was said.

228 He did not go into the room and see the deceased on her own. His recollection is that Robyn was there and introduced him to the deceased as 'a solicitor has come to see you'. Whether it was Robyn that took him to the room, or whether Robyn was simply in the room when he got into the room, he cannot remember. Robyn either greeted him and took him to the deceased's room, or he went into the deceased's room and Robyn greeted him in the room. Robyn introduced him to the deceased and then she left the room.

229 When he said to the deceased that if she gave all her money to Robyn she would in all probability cause discontent in the family he was referring to the deceased's daughters. They were the only ones who had rights under the 'Inheritance Act' which was the relevant legislation that was then in force.

230 His recollection is that at the outset the deceased just wanted to leave her entire estate to Robyn and that Robyn could sort it out.

231 He did not simply just accept that instruction. He thinks that that would have been a very inappropriate thing for him to do. He wanted to make the deceased understand that if she just left her estate to one person who was her granddaughter, she was likely to cause upset in her family because in his experience that is what happens.

232 It was just coincidental that Robyn came back into the room when she did. He cannot remember going out looking for Robyn.

233 When the deceased said to him, 'I want to leave it to Robyn' it is his recollection that it would then be for Robyn to distribute the estate. Therefore, he would not say that the deceased changed her mind when she indicated that she wanted to leave the estate to her great grandchildren.

234 His recollection is not that the deceased was saying, 'Robyn has my whole estate and only Robyn'. That is not his recollection. Even though this is what his attendance note might indicate, it is not his recollection that the deceased was just giving her entire estate to one granddaughter (ts 110).

235 It was Robyn who was able to get the deceased to change her mind about leaving Robyn her entire estate.

236 Although at the point that Robyn came back into the room the deceased had not made a decision about the secret trust, when he told Robyn that the deceased wanted to leave her estate to Robyn, Robyn dissuaded the deceased from doing this.

237 When Robyn referred to all the others, he must have understood this to be a reference to the deceased's daughters and her grandchildren.

238 He does not accept that he should have asked the deceased when she had given half of the land to Susan and half of the land to Ainslie.

239 He does not agree that he should have made more enquiries than he did in relation to how the deceased had dealt with her assets. He was dealing with the deceased's estate as it was.

240 The deceased was giving him instructions. He was giving the deceased advice. He found the deceased's ability to understand his advice and her instructions clear. The deceased may well have modified her instructions based upon the advice that he gave her.

241 He cannot recall the deceased saying that she wanted to leave her entire estate to her grandchild Bethany. He does recall the name Bethany. He does recall the deceased talking to him about her family and who came to see her and that one of her grandchildren or great grandchildren was Bethany. He does remember that name. However, he does not recall the deceased saying 'I want to leave my estate to Bethany'. The deceased wanted to leave her estate in the family to the great grandchildren.

242 In light of the deceased's instructions to leave her estate to her great grandchildren, which is unusual, he said to the deceased that he would get a doctor to confirm that she had testamentary capacity. This is quite normal with somebody of the deceased's age. He does that quite regularly. He writes a letter to the doctor to ascertain if the doctor thinks that the person complies with the '***Banks v Goodfellow***' test. However, he had no doubts about the deceased's mental capacity. He referred her to Dr Bohmer because it was unusual to jump over children and grandchildren to great grandchildren. He said to the deceased, 'I will just get a letter from the doctor to just confirm you've got capacity'. He did that as a matter of prudence and good practice.

243 He allowed Robyn back into the room because he thought it was reasonable to bring her into the room and to tell her what the deceased wanted to do, namely to appoint her not only as the executor but also the whole residuary beneficiary.

244 When he received the letter from Dr Bohmer he did see that the deceased had, according to Dr Bohmer's letter, told Dr Bohmer that she wanted to leave all her assets to her great granddaughter Bethany. He did realise that this was not what the will that he had drafted for her said.

245 When he went to see the deceased for the second time he did not ask the deceased about Bethany. Rather, he went through the will with the deceased and asked her if it was still her instruction to leave her estate as set out in the will. He did not discuss with the deceased the fact that she told Dr Bohmer that she wanted her estate to go to Bethany.

246 The statement in Dr Bohmer's letter about the estate being left to Bethany was not 'a big red flashing light' for him in terms of the deceased's ability to have the mental capacity to give him instructions. He had already formed the opinion that she had testamentary capacity. Dr Bohmer's role was not to take instructions from the deceased for her will. The part of Dr Bohmer's letter which interested him was whether Dr Bohmer was of the opinion that the deceased satisfied the testamentary capacity test. The statement that according to Dr Bohmer's letter the deceased had made in relation to Bethany did not reflect his instructions. He was going to see the deceased again and if the deceased wanted to change her mind to her lawyer she would instruct him on his next visit. He did not react to Dr Bohmer's report by saying, 'I must go and see her immediately'. Rather, he saw the deceased afterwards and again took instructions from the deceased.

247 He did not take Dr Bohmer's letter as an extension of instructions to him. His instructions were as they were, to be reconfirmed at his meeting with the deceased on 22 September 2011. His instructions were confirmed.

248 When he was speaking to the deceased he knew that there were eight great grandchildren. He cannot now recall the number of great grandchildren who were the children of the two executors.

249 He did explain to the deceased what was meant by her estate being held on trust. He did tell the deceased that it would mean that she

was leaving her money on trust for the executors to deal with in the terms of cl 4 of the 2011 Will.

250 So far as cl 4(f) of the 2011 Will is concerned, he would have explained to the deceased, as he does with all clients, that the clause gives to the executors a power of advancement should one of the great grandchildren have a need for money before they turn 21. The executor has the power to advance money, if necessary, for their maintenance, education, benefit, support and medical needs. He accepts that he did not include in his typed file note reference to the fact that he had explained the power of advancement to the deceased.

251 He did not send his wife and daughter with the 2011 Will to the deceased for signing because he had some concerns about the deceased's mental capacity. He was satisfied as to the deceased's testamentary capacity. He had already been to see the deceased twice. The reason why he sent his wife and daughter with the will was that so they could be witnesses.

General observations on Mr Haynes' evidence

252 I found Mr Haynes to be an honest witness and in almost all respects a reliable witness also.

253 As is apparent from my above summary of Mr Haynes' evidence, there were two material points of difference between his evidence and Robyn's evidence. The first related to Robyn's movements in and out of the deceased's room during the meeting on 15 July 2011. The second related to whether the deceased did, during the 15 July 2011 meeting, make a statement to the effect that she wanted to leave her estate to her great granddaughter Bethany.

254 As to the first of these points of difference, I prefer the evidence of Mr Haynes. I prefer the evidence of Mr Haynes in this regard because his version of events is supported by his detailed attendance note. I note in this context that the evidence given by Robyn as to what was discussed during the meeting in her presence is in any event broadly consistent with the evidence of Mr Haynes as to what was discussed in Robyn's presence.

255 With respect to the second material point of difference, I note that the plaintiffs' position as set out in their closing submissions would appear to be that the evidence of Robyn should be preferred: plaintiffs' closing submissions, [5]. In any event, and regardless of this

concession, I do prefer the evidence of Robyn on this issue. Robyn impressed as being very definite in her recollection of the deceased making a statement to the effect that she wanted to leave her estate to Bethany. Indeed, it was on Robyn's evidence this statement of the deceased that prompted her to make the statement to the deceased to the effect that she did not think that this would be fair on the other kids, that is the other great grandchildren. In comparison to Robyn's evidence, Mr Haynes' evidence on this point was less certain. His evidence went no higher than him not recalling the deceased saying that she wanted to leave her estate to Bethany. Moreover, on Mr Haynes' own admission neither his handwritten notes nor his attendance note contained a verbatim record of everything that was said during the meeting. For these reasons I prefer the evidence of Robyn on this issue. It follows that my finding is that the deceased did, during her meeting with Mr Haynes on 15 July 2011, make a statement to the effect that she wanted to leave her estate to Bethany.

256 Similarly to the position that exists with respect to Robyn, the defendants make a number of criticisms of the way in which Mr Haynes gave his evidence and also the substance of aspects of his evidence. I propose at this point to deal with each of the major criticisms made by the defendants of Mr Haynes' evidence.

257 First, it is said by the defendants that the differences in the evidence between Mr Haynes and Robyn arise from the fact that Mr Haynes, after meeting with the deceased on 15 July 2011, became concerned that he had allowed Robyn in the room at all, and that he therefore dictated his attendance note to record that Robyn was in the room, was then not in the room, and then returned to the room so that he could say that 'the deceased gave him important instructions when [Robyn] was not there': defendants' closing submissions, [32(h)]. A proposition along these lines was never directly put to Mr Haynes. In any event, I reject this contention. Leaving aside my overall impression of Mr Haynes as a credible witness, if Mr Haynes wanted to be deliberately dishonest about the presence of Robyn in the room he could easily have omitted from his attendance note any reference to her returning to the room.

258 Second, the defendants assert that the 'most remarkable' aspect of Mr Haynes' evidence and his demeanour under cross-examination was the 'poised and self-assured manner' in which he dismissed various criticisms of his conduct: defendants' closing submissions, [38]. Putting to one side for the time being whether any or all of the

criticisms of Mr Haynes' conduct put forward by the defendants are valid, I do not consider that the way in which Mr Haynes dealt with or rejected the criticisms during cross-examination reflected adversely on his credibility. To the extent that he did become slightly defensive in rejecting some of the criticisms levelled at him during cross-examination, I did not find this surprising given that his professionalism was under attack.

259 Third, the defendants assert that Mr Haynes' evidence regarding the advice that he gave to the deceased to the effect that if she left all of her estate to Robyn this may cause upset in her family was 'remarkable', and revealed that it did not matter to Mr Haynes what the deceased wanted and that what mattered to Mr Haynes was what Robyn wanted: defendants' closing submissions, [39]. I do not accept this assertion which again was not put directly to Mr Haynes in cross-examination. In my view Mr Haynes' advice to the deceased in this regard did not reveal any desire on his part to do anything other than alert the deceased to potential problems that may be caused within her family if she did leave all of her estate to Robyn. I agree with Mr Haynes' that it was appropriate for him, as the deceased's solicitor, to alert the deceased to this possibility. In any event, on Mr Haynes' evidence he gave this advice to the deceased fairly early on in the meeting when Robyn was not in the room, that is, before he could possibly have known or had any idea about what Robyn 'wanted'.

260 Fourth, it is said by the defendants that the inferences to be drawn from Mr Haynes' failure to raise with the deceased when he met with her on 22 September 2011 the fact that she had told Dr Bohmer that she wanted to leave her estate to Bethany are as follows:

1. When he saw the deceased in July he took instructions from Robyn and not from the deceased;

2. He was never interested in the deceased's wishes when he saw her in July, and he was not interested in what the deceased had told Dr Bohmer 16 days earlier because Robyn was not with the deceased when she consulted with Dr Bohmer; and

3. In any event, he had grave reservations about the deceased's testamentary capacity in July and that while what the deceased told Mr Bohmer confirmed his reservations, 'to pull the plug on the work he had done in the matter would have been far too

inconvenient at that late stage': defendants' closing submissions, [40].

261 In my view Mr Haynes, when he met with the deceased on 22 September 2011, should have asked her about the statement that she had made to Dr Bohmer concerning Bethany. This is a point I will return to in due course. However, I simply do not accept that Mr Haynes' failure in this regard provides any proper or logical basis for drawing the inferences that the defendants contend should be drawn.

262 Fifth, the defendants contend that Mr Haynes' attendance note was 'a crude attempt to give the [deceased] testamentary capacity that she did not have': defendants' closing submissions, [42]. The defendants point out that Mr Haynes' handwritten notes did not cover 'even half' of what the attendance note referred to, and that neither the handwritten notes nor the attendance note referred to the deceased's statement that she wanted her estate to go to her great granddaughter Bethany.

263 It is the case that the attendance note is significantly more detailed than the handwritten note. However, I do not find this to be surprising. It would simply not have been possible for Mr Haynes to make during his meeting with the deceased handwritten notes of what was being said which were as detailed as what he was able to record at the time that he dictated the attendance note. It is also the case that neither the handwritten notes nor the attendance note refer to the statement made by the deceased regarding leaving her estate to Bethany. However, and as I have already pointed out, on Mr Haynes' own admission the notes and the attendance note were not a verbatim account of what was said during the meeting. In short, I reject the suggestion that Mr Haynes' attendance note was in any way false or constituted a crude attempt to give the deceased testamentary capacity which she did not have.

264 Finally, it is said by the defendants that Mr Haynes' demeanour in the witness box was 'a façade' to hide his realisation that he had not fulfilled his professional obligations to the deceased properly by excluding Robyn from the meeting and by failing to 'drill down' on the deceased's capacity to comply with the '***Banks v Goodfellow***' tests: defendants' closing submissions, [43]. As is apparent from what I have already said, I did not find anything about Mr Haynes' demeanour when he gave evidence which is capable of supporting the proposition that he

was putting up some sort of façade, or that he was otherwise either a dishonest or unreliable witness.

265 In summary, and contrary to the above referred to contentions of the defendants, I found Mr Haynes' evidence as to what occurred during his two meetings with the deceased to be credible. Subject only to what I have said about accepting Robyn's evidence that the deceased did during the meeting on 15 July 2011 make the statement that she wanted to leave her estate to Bethany, I accept Mr Haynes' evidence as to what occurred during his meetings with the deceased, and as to his reasons for conducting himself in the way that he did. The issue of whether any aspects of Mr Haynes' conduct impacts upon the questions for determination in this case is something that I will return to when I deal specifically with the questions.

Alyson Haynes

266 Alyson made her statement on 27 July 2017 (exhibit 52). Her relevant evidence (omitting those portions to which I have already referred above in setting out the non-contentious facts), which was not substantially disputed, was as follows.

267 She has been assisting Mr Haynes in his practice since he first started his practice in about 2005.

268 Initially they worked from home. Mr Haynes advertised for wills and promoted home visits. There were many home visits that she attended with Mr Haynes to sign wills. On occasions she went with her daughter Natasha to sign wills.

269 She has witnessed numerous wills and has on occasions read wills to elderly or sight impaired clients.

270 She has seen the 2011 Will. She recognises her signature and handwriting under the name on the last page and in the execution clause at the top of the last page. Her signature appears on all pages of the 2011 Will (except the first page with the firm details on it). She also recognises her daughter's signature and handwriting on the 2011 Will.

271 She has no recollection of the deceased or of attending anyone at Anchorage. However, from looking at the 2011 Will she knows that she read it to the deceased and witnessed the deceased signing it with Natasha. She would not have completed the execution clause at the top of the last page of the 2011 Will if she had not read the will to the

deceased and the deceased had not told her that she understood and agreed to the will.

272 When she reads a will to a client her invariable practice is to read one paragraph at a time and then stop and ask the client if they understood what she had just read to them before moving on to the next paragraph. She looks for more than a nod. She wants to see that the client is actively 'with her', that is, they look at her and say something like 'yes' or 'that's right'. She makes sure they are listening to her. In addition, she does not just walk into a room and start reading the will. She always starts a conversation, especially where the client is old or in a hospital or aged care facility. She relies on this conversation to make a decision about their ability to make a will.

273 There has never been an occasion when she has gone to see someone for the purpose of witnessing the person's signing of a will and formed the view that the person is not able to understand and agree to the will.

Natasha Haynes

274 Natasha made her statement on 7 August 2017 (exhibit 53). Her relevant evidence (omitting those portions to which I have already referred above in setting out the non-contentious facts), which was also not substantially disputed, was as follows.

275 During her time at university she worked casually for her father in his law practice and after university she worked for him part-time from 2005, and then full-time between about 2008 and 2012. She was a legal secretary, then in December 2010 a legal assistant having completed the Law Society of Western Australia's Legal Assistant's Training Course. In addition to administrative duties she visited numerous clients with her father to witness the execution of wills. One of her jobs was to make appointments for the signing of wills. She visited a number of aged care facilities to sign wills with her father and on occasion with her mother. She no longer remembers the names of these facilities. At one stage she was witnessing about five wills a day.

276 She has been shown the 2011 Will. From the document she knows that she witnessed the 2011 Will on 23 September 2011 but can no longer remember doing so.

277 She has no doubt that she would not have signed as an attesting witness if she was not satisfied that the deceased did in fact understand and agree to the 2011 Will.

278 She no longer recalls anything about the deceased. She has no independent recollection of the occasion on which she witnessed the signing of the 2011 Will. However, she always makes an assessment of anyone who is older, especially someone who is an aged care facility. To make this assessment she relies on conversation with the testator and their general demeanour. She considers whether the testator engages her, whether they look at her, and whether the testator is able to engage in conversation.

279 From 2005 to 2011 she would have witnessed the signing of a few hundred wills. On none of the occasions that she witnessed the signing of a will during this period did she have some doubt that resulted in her not signing the will as a witness.

The defendant - Susan Smart

Evidence

280 Susan made her statement on 8 September 2017 (exhibit 100).

281 Susan's relevant evidence-in-chief was as follows.

282 She was always very close to the deceased. She lived at home until she was 20 years of age when she got married. She and the deceased spoke and visited each other frequently, very often more than once a week. They had the occasional argument but they always resolved it and moved forward.

283 The deceased would help her with her children. They always caught up for birthdays, Mother's Day, Christmas, and so on.

284 After she left home she would see the deceased and her dad weekly for dinner either at their place or at her place. They also went on holidays together.

285 After her dad passed away in 1975 the deceased was still very independent despite not having a driver's licence. The deceased used a bus to get around. Nonetheless, she would often drive the deceased to things such as medical appointments, to go shopping as well as generally to spend time together.

286 Her boyfriend, Harvey Trezise, who she began a relationship with in 2004, also came with her on many occasions to visit the deceased. Harvey would also help the deceased around the house with general maintenance and labour.

287 In early 2005 she and the deceased went on a trip to Tasmania. They stayed with relatives. While on the trip she began noticing that the deceased was very jealous of other people spending time with her. Further, the deceased did not want her to do anything by herself even if it was just to go down to the shop. She found this very strange at the time.

288 The deceased's sight and hearing as well as her physical health seemed to deteriorate quite quickly after they returned from Tasmania. The deceased lost a lot of confidence due to her sight and hearing issues.

289 Once they returned from the Tasmania holiday and from around May 2005 onwards she began seeing and speaking to the deceased a lot more. She realised that the deceased's sight and hearing were worrying the deceased significantly.

290 At around this time the deceased asked her to help her with her cash withdrawals which was all of the banking that the deceased did. The deceased's pension and superannuation money went into one bank account. The deceased always used cash.

291 By 2005 she was doing all of the deceased's gardening and most of the deceased's housework. It was becoming clear to her that the deceased could not cope with daily things due to her sight, frailty and hearing.

292 At this time the deceased was receiving help from Melville Council with her shopping. A volunteer driver would pick the deceased up once a week. However, the deceased would not buy anywhere near the amount of groceries that she needed.

293 The deceased was unable to cook at this time despite having been a terrific cook previously. She used to cook a lot of food for the deceased and would bring it down to her.

294 Meals on Wheels was arranged intermittently throughout 2005 and 2006. Even though the deceased was still receiving Meals on Wheels she still often cooked for the deceased.

295 She would estimate that she went to the deceased's house twice a week usually on a Wednesday and then on the weekend. She would sometimes see the deceased after work or take a carer's day off work to see the deceased.

296 By 2006 she was caring a lot for the deceased which was very hard for her given that she had a full-time job and lived on a four acre property. Around this time she was driving the deceased to appointments, taking the deceased shopping and on outings, doing the cooking, cleaning, gardening, sewing, mending and housework for the deceased, assisting the deceased to fix things around the house, and organising anything for the deceased.

297 By around 2006 it was clear to her that the deceased was not coping at home. During this period Meagan was helping her as much as she could when she (Meagan) was on holidays from her fly-in-fly-out schedule. Harvey would also often come with her to see the deceased and help around the house and garden.

298 Robyn was not providing any assistance with the deceased at this point.

299 She did everything she could to help the deceased cope. Despite this the deceased was still not coping. The deceased would become agitated and angry when things went wrong or when she could not do something. The deceased would often get angry at her for the smallest of things. She accepted the deceased's behaviour partly because the deceased was her mother and also because she felt her mother's frustration given that her mother could not see or hear well and was beginning to have mobility issues

300 Around this time, being 2006, the deceased began being forgetful of when she had been to see the deceased and when she planned on seeing her. The deceased would also forget whether she had any food in the fridge.

301 During 2006 the deceased had a couple of falls that required medical attention from her regular doctor, Dr Nulsen. She took the deceased to these appointments and would come and see the deceased if she needed assistance.

302 In mid to late 2006 the deceased hurt her back. She decided to take the deceased to hospital. She managed to get the deceased into her

car and drove the deceased to SJGH Murdoch. The hospital admitted her for evaluation.

303 The staff at SJGH Murdoch arranged a transfer to JHC so that the deceased could be closer to her given that she had to commute from Wanneroo.

304 She visited the deceased virtually every day while the deceased was in JHC. She would feed the deceased dinner because the staff had told her that the deceased was losing weight and was not eating.

305 While the deceased was at JHC she went through an ACAT assessment.

306 As a result of the ACAT assessment she met with a social worker from JHC. The social worker recommended that a power of attorney be done. The social worker said that in her view the deceased should not go home given her failing eyesight and hearing, the diagnosis of dementia and her history of falls.

307 On 28 September 2006, after she had received the advice from the social worker, she and Meagan were appointed the deceased's attorneys under an Enduring Power of Attorney.

308 The social worker at JHC decided that the deceased could not go home. JHC therefore found a place for the deceased at KIC.

309 She recalls that while the deceased was at KIC the deceased told her that she was hopeful of returning home but was not ready to do so yet. She would see the deceased most days while the deceased was at KIC. Meagan also visited the deceased frequently. She would take the deceased out of the facility for lunches and birthdays and so on.

310 The deceased's mood deteriorated while she was at KIC to the point that the deceased said to her words to the effect that, 'If you don't take me home I'm going to kill myself'. The deceased was shouting and angry at her. She went out into the hall to get someone to help. The nurse was already on the way in to see what was going on. The nurse could not calm the deceased down. The staff called a doctor. It is at this point that the Older Adult Mental Health Unit became involved.

311 The staff at KIC removed all sharp objects from the deceased's room and gave them to her.

312 The manager at KIC confirmed that the deceased was not capable of making decisions regarding her lifestyle and could therefore not return home. A representative of the Older Adult Mental Health Unit then recommended that 'we' take out guardianship over the deceased. She was hesitant to do this because she knew that the deceased would be very upset and hurt if she did. The manager at KIC said that KIC could arrange guardianship and she asked KIC to do so.

313 The social worker at KIC found three facilities that might be suitable for the deceased to live in. She inspected two of them and she did not think they were suitable.

314 A few days or weeks later, she cannot recall, the manager at KIC informed her that the Older Adult Mental Health Unit had changed its mind and thought that the deceased could go home with an intensive home care package. She queried this decision. She told the manager that the deceased could not make a cup of tea or a piece of toast. She was told by the manager of KIC that she and Meagan could still apply for guardianship but that KIC would not support them.

315 During this period she continued to maintain the deceased's home and gardens. She also did the deceased's washing.

316 A few weeks after the deceased's initial outburst but after the deceased had been deemed capable of returning home she visited the deceased. The deceased said to her something like, 'Put me in the car and take me home otherwise I will never speak to you again'. The deceased was yelling at her and she was crying. The nurse came in and she left.

317 She visited the manager at KIC the next day because she was concerned that something must have happened the day prior that caused the deceased to be so angry. The manager told her that the deceased was very angry and upset as she wanted to go home immediately. The manager told her not to visit the deceased for a week to allow her to calm down. She therefore did not visit the deceased for a week.

318 After Christmas 2006, so most likely in early 2007, the deceased was angry and unhappy all the time. The deceased was very forgetful about things that she had done. The deceased seemed to always blame her for being in the facility.

319 It got to the stage where she had to speak to the deceased in a particular way to facilitate a discussion with her. It was very hard to

have a good conversation with the deceased and often she had to do most of the talking.

320 Around this time she would visit the deceased almost every day and Meagan would visit around once a week. To her knowledge no one else saw the deceased at KIC on a regular basis.

321 The deceased returned home in April 2007. Despite being home the deceased was still very angry and unhappy because she could not do anything for herself. By this stage the deceased had a significant care package. The deceased had people coming in to do her medication twice a day and a lady would do the dishes, supervise the deceased showering, make the deceased breakfast and do any other domestic chores. The deceased also had Meals on Wheels at this point in time.

322 She continued to cook the deceased's favourite meals and snacks. She would see the deceased every Sunday plus on one week day. She continued to do all of the deceased's shopping and any further housework that needed to be done as well as her gardening. She would also do any washing or mending that needed to be done.

323 Around this time Meagan was to the best of her knowledge still in charge of the deceased's banking and finances. Meagan had the deceased's bank book.

324 The deceased often forgot when she had been to see her, or questioned why she had been to see her on a particular day when it was the regular day that she would see the deceased. The deceased would also often say that Meagan had not seen her for ages when in fact she knew that Meagan had been to see the deceased recently.

325 She was very concerned during the entire period after the deceased returned home from KIC mainly because of the deceased's forgetfulness, confusion, inability to take care of herself and anger. The deceased was constantly angry at her no matter what she did and everything was her fault irrespective of how much she tried to help the deceased.

326 Fairly soon after the deceased returned home from KIC the deceased starting asking her to move in with her.

327 Shortly after returning home from KIC the deceased asked whether anyone had slept in her spare king size single bed which was brand new and still had the plastic wrapping on the mattress. The

deceased said that the mattress had been stained. Obviously this made no sense as the plastic was still on the mattress. The bed had not been stained. She told the deceased this after which the deceased said, 'It must have been you then'. This never occurred and was an example of some of the deceased's bizarre behaviour.

328 In or about mid to late 2007 she and Harvey visited the deceased as usual on a Sunday. The next time she spoke to the deceased and informed her that she planned on seeing the deceased on the coming Wednesday, the deceased said to her words to the effect, 'Don't bring Harvey with you, he's no good and he's just trying to get his hands on your property and probably mine too'. This was the first time that the deceased had ever made any negative comments about Harvey. She was very surprised when the deceased made the comment given that Harvey had spent a lot of time with the deceased and had helped her over the years.

329 After the deceased's comment Harvey never saw the deceased again. From this time onwards until her death the deceased never mentioned Harvey to her again and acted as though he did not exist despite the fact that she and Harvey were still in a relationship. She would still keep the deceased up dated about Harvey and her relationship with him but the deceased never seemed interested nor asked about him.

330 On an occasion in or about mid to late 2007 she visited the deceased and was unable to fully open the door. The deceased came to the door and said words to the effect, 'I don't want you to come in'. She asked the deceased why and the deceased said words to the effect that, 'You don't look after me properly, you don't care'. She then said to the deceased that she would leave all the food and other stuff on the mat and go home if that is what the deceased wanted. The deceased then opened the door. She asked the deceased, 'What was all that about?' and the deceased said that she had not had a good night.

331 She brought the things that she had brought with her inside and as she went to close the door the deceased threw the handpiece from the telephone at her. She picked up the phone and walked over to the deceased and gave it back to the deceased and told her to hang up the phone. The deceased then hung the phone up, walked over and grabbed a torch and raised it as though she was going to hit her. She grabbed the torch and asked the deceased to drop it because she did not want to get hit. After a short pause the deceased dropped the torch into her

hand. The deceased then sat down and did not want to discuss the matter further. She never asked the deceased about this. She was a bit nervous so she just went about preparing the deceased's lunch for her.

332 In or about mid to late 2007 she was aware that Stevan and his wife Samantha were spending time with the deceased, and that the deceased had asked Meagan to return the deceased's bank book to her. She was aware that Samantha had the deceased's bank book and was responsible for the deceased's finances. She had in fact asked Samantha for the bank book to be returned but Samantha refused

333 At one stage the deceased told her to ring Samantha and ask for the bank book back because the phone bills had not been paid. When she called Samantha and asked her to return the bank book Samantha told her that she would speak to Stevan and get back to her. However, Samantha never got back to her and she never saw the bank book again.

334 She told the deceased, in effect, that giving the bank book to Stevan and Samantha was not a good idea.

335 In around mid-2007 the deceased had a panic alarm around her neck as part of her care package. She received calls on three separate nights over a period of six weeks in or around late 2007 from the company who monitored the alarm advising her that the alarm had been pressed and that the deceased had told them that she needs her. On the first occasion the deceased was stuck in bed and had been unable to get to the toilet and as a result had wet her bed. On the second occasion the deceased had fallen out of bed. She does not recall what happened on the third occasion.

336 About a month or so later the deceased got Stevan to change the locks to the house. When she asked the deceased why she had arranged for Stevan to change the locks the deceased told her that too many people had keys to the house. However, at this stage, in late 2007, the only people with keys to the house that she knew about were Stevan, Meagan, herself and the deceased. The deceased said to her words to the effect that people had been coming into her house, going through her things and stealing things.

337 It made her very upset and hurt to know that the deceased had felt the need to change the locks after all that she and Meagan had done for the deceased over the last few years.

338 By this stage she was really struggling with the deceased's demands. No matter what she did for the deceased it was never enough and never right in the deceased's eyes. She was constantly yelled at and verbally abused when she visited the deceased.

339 She sat down with the deceased and told her that she needed to get more care because she was struggling to continue to look after her. She told the deceased that she would not be coming to see her anymore. She then made the deceased her lunch and a cup of tea. She told the deceased that she would come the next week and in the meantime she would ring relevant people to arrange extra care services to help her. She then left.

340 She arranged for further care to be put in place for the deceased and went and saw the deceased the next week. She did not see the deceased for several weeks after this, perhaps five weeks in total. She did ring the deceased at least twice a week during this period.

341 After about five weeks in early 2008 the deceased had an accident trying to get to the toilet and called her and asked her to come and help her. She then went and saw the deceased and cleaned her up as well as the house. Despite instances like this the deceased never accepted that she needed help.

342 In about mid to late 2007 and despite the deceased's issues, the deceased wanted her to take her and Bethany down to the Dunsborough property. When she went to collect the deceased Stevan, Samantha and Bethany were at the deceased's house. She saw that Stevan had a new car. Stevan asked her if she liked the car. Stevan told her, in effect, that he had won lotto and that this is how he afforded the car.

343 They went to Dunsborough for about a week to 10 days. When they returned to Perth she rang Samantha to ask if Bethany had had a nice holiday. Samantha started crying and said words to the effect that, 'We didn't win lotto, Nana gave him the money'. She then asked where the deceased (Nana) had got the money from. Samantha said that Stevan took the deceased to the bank and got the money.

344 She did not want to raise this issue with the deceased because she was worried that the deceased would be angry with her and tell her to mind her own business.

345 Shortly after this Meagan told her that she had gone to the bank to ask what had happened and that the bank had told her that an AMP

life insurance policy had been deposited into the deceased's bank account and that the deceased and Stevan had gone into the bank to withdraw it.

346 As a result of this she and Meagan became very concerned about the deceased's assets. Meagan began writing to various departments and agencies to protect the deceased's house and her cash.

347 In about late 2007 the deceased called a family meeting about her will. She was present along with Meagan, Robyn, Stevan, Samantha and the deceased. At this meeting the deceased demanded that everyone present come into the spare room to see the spare bed which had supposedly been stained despite the fact that it still had the plastic cover on it. At the meeting the deceased told them all that she was going to leave everything to the great grandchildren. She recalls Robyn saying words to the effect of, 'What if Meagan has children?' She does not recall the deceased responding to this question. No one really discussed the issue further. There was then an argument between Stevan and Robyn regarding the funds taken from the deceased's bank account and Stevan's behaviour in general. Stevan and Samantha stormed out. The deceased then told the people still at the meeting that Samantha was going to get a lawyer and have a will drafted leaving everything to Bethany.

348 In the weeks that followed the deceased called her half a dozen times and asked her to come to the house to be there when she met with a lawyer. She said to the deceased words to the effect that she was not interested and that the deceased could do what she liked but that no one else should be with her during the meeting. She said this on several occasions. She also said to the deceased something to the effect that the deceased had previously promised her Bateman Road in exchange for her agreeing to sign her share of the Dunsborough block to Meagan. The deceased never responded to these comments.

349 She never heard anything further about a new will.

350 Around this time, being in or around 2008, Stevan and Samantha were supposed to be taking care of the deceased. She continued to see the deceased once a fortnight but was not taking as much care of her anymore.

351 She noticed that the deceased was hard to engage and felt that the deceased's alertness and demeanour had flattened and that she was almost 'spaced out'. The deceased was very unaware of what was

happening around her. The deceased was unable to recall what she had done that day or week and could rarely recall what day it was. The deceased would also forget that she had not visited her as often as previously. The deceased could never recall what they had discussed in their prior phone call which usually occurred on the day that she saw her or on a couple of days prior. Even though she would call the deceased and let her know that she was on her way the deceased would often be surprised when she arrived.

352 In or around 2008 she became aware that the deceased's bills were not being paid. She contacted Robyn and asked Robyn to go and see the deceased to tell her what had happened.

353 In about late 2009 she received a call from the deceased who told her that she had a fall and asked her to come and help. She went and saw the deceased and then took her to SJGH Murdoch.

354 The deceased returned home shortly after being admitted to SJGH Murdoch. However, after returning home the deceased became upset and told her, in effect, that she could not look after herself at home unless she moved in. As a result of these concerns she contacted the doctor at SJGH Murdoch who had allowed the deceased to return home and told him, in effect, that the deceased was unable to look after herself and had admitted this to her. The doctor told her that he could readmit the deceased the next day and then the deceased could go into full time care.

355 She was unable to stay with the deceased that night. She therefore contacted Robyn and asked her to look after the deceased for the night. Robyn contacted her later and told her that she had convinced the deceased to spend the night at her place. Robyn subsequently took the deceased to stay at her house.

356 The deceased returned to the SJGH Murdoch the next morning. She spoke to Robyn at the hospital and Robyn said to her that she did not realise how bad the deceased had become.

357 The deceased stayed at SJGH Murdoch for about a week before being admitted to Gracewood at Salters Point. This was in late 2009.

358 In early 2010 the deceased moved to FGH. This was arranged by Robyn.

359 In 2010 or early 2011 FGH told her that as a result of the deceased's health the deceased required full-time high care. She, Meagan and Robyn thought it was wise to move the deceased to a high care facility that was close to herself and Ainslie, whom the deceased had reconciled with whilst at FGH. Anchorage seemed a good option. In about March 2011 the deceased moved to Anchorage.

360 While the deceased was at Anchorage she visited the deceased regularly, at least once a week. During the entirety of the deceased's stay at Anchorage, which was over two years, it was apparent to her that the deceased was very disorientated. She found the deceased to be very unaware, confused and very forgetful about whom had seen her, what day it was and what she had done or eaten that day or week. She thought the deceased's behaviour and awareness had deteriorated. The deceased was unable to watch television or listen to the radio due to her poor eyesight and hearing, but also because the deceased could not operate either by herself.

361 She continued to visit the deceased regularly, at least weekly, sometimes with one or both of Meagan or Ainslie up until the deceased's death. She was the only one by the deceased's side when the deceased died.

362 She found out from Robyn the night the deceased had died that the deceased had done a new will while at Anchorage. She was very surprised to hear this.

363 In cross-examination Susan said the following.

364 She accepts, given that Robyn opened the new bank account for the deceased in March 2009, that the issue arose with Meals on Wheels, and she made her request of Robyn to open a new account, in early 2009.

365 She accepts that towards the end of her life the deceased wanted her to come and live with her and look after her.

366 The bank account mentioned in the 1998 Will did not contain more than a few thousand dollars.

367 She accepts the proposition that the deceased got a bit upset with her because she wanted the deceased put into care and the deceased did not want to go into care.

368 Even after Samantha had the deceased's passbook, she was still doing monetary transactions for the deceased.

369 She does not think the deceased ever pretended that she was sick. However the deceased could certainly be very manipulative.

370 The issue in relation to the stain on the bed went on for several weeks. At the family meeting the deceased wanted to take everyone up the hallway to see the mattress and she remembers Samantha saying to the deceased, 'Nanna, that's not what we're here for'. Samantha guided the deceased from the hallway back into the dining area.

371 The deceased was unable to cope at FGH from the time that she commenced staying there. There were separate units with kitchenettes and the deceased could not care for herself. She had to use her walker to go to the dining room which was quite a walk. She had to have several rests along the way even when she first arrived at FGH. She then had about four falls in five months and at the end FGH said they could not cope with her.

372 She maintains that during the time of her stay at Anchorage the deceased was very disorientated.

General observations on Susan's evidence

373 Susan's evidence was not substantially challenged in cross-examination.

374 My assessment of Susan is that she was an honest and generally reliable witness. I accept that she (like Robyn and Meagan) at all times did the best that she could to support and care for the deceased, and that she always acted in what she believed to be the best interests of the deceased.

375 There is an obvious difference between the evidence of Susan and the evidence of Robyn as to the extent of the deceased's exhibited behavioural and mental problems from around 2006 onwards. Robyn's evidence, as is apparent from my above summary of her testimony, was in substance that she did not gain the impression that the deceased had any substantial memory, mental or behavioural problems during this period. On the other hand Susan's evidence was in substance that in the later years of her life the deceased exhibited significant behavioural and mental difficulties.

376 Given my overall assessment of Susan as a witness, the evidence of the assessments of the deceased's abilities and mental state from 2006 to 2011 to which I have already referred, and the fact that much of the substance and tenor of Susan's evidence is supported by the evidence of Meagan (to which I refer below), I accept Susan's evidence as to the specifics of the behaviour that the deceased exhibited towards her and others from around 2006 onwards. I accept on the basis of Susan's evidence that the deceased did in the later years of her life, particularly from around 2008 onwards, on occasion exhibit the unusual and sometimes aggressive behaviour to which Susan referred, as well as problems with her memory and levels of alertness.

377 I state to avoid any confusion on the issue that I accept Susan's evidence about the deceased being concerned about some perceived non-existent staining on her bed. I also accept Susan's evidence that the deceased did, at the family meeting in late 2007, attempt to draw the attention of those present to what she perceived to be staining on the bed.

378 I do not accept Susan's evidence that the deceased, at the family meeting and after initially stating that she was going to leave everything to her great grandchildren, made a statement to the effect that she was going to leave everything to Bethany. Susan's evidence in this regard is against the weight of the evidence in the sense that neither Robyn nor Meagan (to whose evidence I refer below) recalls the deceased making such a statement at the family meeting.

Meagan Smart

Evidence

379 Meagan made her statement on 8 September 2017.

380 Meagan's relevant evidence-in-chief was as follows.

381 She has always had a close relationship with the deceased.

382 Once she left university and in or about early 1997 she began fly-in-fly-out (FIFO) work in Meekatharra. From that time she would see the deceased during her weeks off in Perth. She did FIFO work for approximately 10 to 15 years. She continued to see the deceased during her weeks off throughout this period and would help the deceased with the gardening and other household chores.

383 In about October 2005 she stopped working as a FIFO worker and obtained a Perth based job.

384 Not long after this the deceased requested that she do the deceased's banking for her. The deceased was finding it difficult to get to the bank and to complete transactions. She and the deceased went to the Commonwealth Bank branch at Canning Bridge and the deceased made her a dual signatory to the deceased's bank account.

385 After she became a dual signatory she withdrew the deceased's pension in cash once it had been deposited into the account which occurred on a fortnightly basis. She would pay the deceased's bills at the post office and pick up and pay for the deceased's grocery shopping.

386 During the period late 2005 to late 2007 she started to observe significant changes in the deceased's behaviour towards her money and also her behaviour and demeanour generally. Also during this period the deceased's hearing and eyesight were deteriorating noticeably. It was clear to her that the deceased's deterioration was affecting the deceased's confidence to carry out activities that she used to carry out with ease such as catching the bus, getting groceries, needle work, gardening and cooking.

387 Also during this period the deceased, rather than depositing residual cash into the bank account, began keeping a lot of the cash herself or asking her to put it into a pill container in the pantry or in a container which was buried in the garden.

388 During this time she can remember a couple of occasions when the deceased would call her and tell her that she had no money. This surprised her and concerned her because sometimes only a few days previously she had given the deceased cash from her pension and she had no idea where the deceased had spent the money. Despite her concerns she never questioned the deceased about this because it was the deceased's money.

389 During 2005 to 2007 memory lapses on the part of the deceased were starting to become a regular occurrence. Consequently she and her mother would both note on the deceased's calendar next to the deceased's telephone the days that they had visited her. She and her mother would often have to rely on the calendar to convince the deceased that they had visited her recently.

390 During 2005 to 2009 she noticed changes in the deceased's behaviour. Examples of some of the changes of behaviour were as follows:

1. The deceased telling her that she was depressed and asking her to visit a lot more frequently;

2. The deceased calling her on her mobile phone during work hours and demanding that she immediately come and visit her or making unreasonable demands of her;

3. Despite the fact that she began visiting the deceased more frequently, up to at least three times a week, the deceased began forgetting more and more that she had visited the deceased with the result that the deceased would be constantly angry at her for not visiting despite the fact that she had visited and had marked her visit on the deceased's calendar;

4. The deceased became more confused particularly in relation to finances and the frequency of her visits;

5. The deceased became regularly angry and upset for one of a number of reasons such as her not being able to see the deceased or incorrectly saying that she had not visited the deceased or incorrectly asking where her money was; and

6. The deceased began using foul language when she was angry and on one occasion during a telephone call the deceased called her a whore.

391 It was during the period 2005 to 2007 that she began feeling very exposed and vulnerable as a result of the deceased accusing her of not bringing money to her and not understanding where large sums of money that she had given to the deceased were going.

392 In about February 2006 the deceased called her. The deceased was upset and wanted her to come to her house to sort out a dispute with a long-term neighbour in relation to a dividing fence. After speaking with the neighbour she told the deceased that the dividing fence did need to be supported or replaced. The deceased then began crying, shaking uncontrollably and yelling at her telling her to get out of the house. The deceased was physically pushing her out of the house and yelling at her. The deceased then closed the security door behind her and then slammed shut the wooden front door while she was trying

to talk through the mesh to calm the deceased down. After this incident she called her mother and expressed her concerns about the deceased as this was extreme behaviour which she had never witnessed in the deceased before.

393 In about September 2006 the deceased was admitted to JHC as a result of a fall at home. It was during the deceased's stay at JHC that the staff advised her and her mother to attempt to obtain an Enduring Power of Attorney to act on the deceased's behalf. The deceased subsequently signed an Enduring Power of Attorney on 28 September 2006 appointing herself and her mother as her attorneys.

394 While the deceased was at JHC either she or her mother would be there every night without fail.

395 In about November 2006 her mother was looking for suitable homes for the deceased to move into. At no stage did she hear the deceased mention that she wanted to go back to her own home. As a result the deceased was transferred to KIC pending placement at a suitable facility.

396 While she was at KIC the deceased began expressing to her a desire to go back to her own home. It was also during this period that the deceased's behaviour fluctuated. Sometimes the deceased would be happy to see her and at other times the deceased would be angry and upset. She spoke to the deceased on numerous occasions about her concerns with the deceased going home and how in her view the deceased would not be able to cope. Sometimes this caused the deceased to be angry and upset with her.

397 In or about January or February 2007 she and her mother met with Dr Mathew Samuel who she was told was a psychiatrist from the Joondalup Older Adult Mental Health Unit and another person who she recalls was a psychiatrist. During the meeting she and her mother outlined their concerns regarding the deceased's changed behaviour and demeanour. Sometime after this meeting someone from KIC informed her and her mother that it had been determined that the deceased did not have capacity in relation to lifestyle choices, such as to whether to go home or into care.

398 Subsequently she and her mother were contacted by the centre manager at KIC. The manager advised them that a second opinion had been sought and that the deceased was capable of making lifestyle choices, including the decision to return home. She and her mother did

not agree with this view. It was as a result of her and her mother's concerns regarding the deceased being allowed to return home that she prepared and sent to the manager the letter addressed to 'To whom it may concern' dated 14 March 2007.

399 On 13 May 2007 the deceased returned home. Her mother stayed with the deceased for the first two nights because her mother was concerned that the deceased could not cope.

400 After the deceased returned home she tried to see the deceased as often as possible. However, she never knew how the deceased was going to treat her even if she called ahead and notified the deceased that she was coming to visit. Sometimes the deceased would be happy to see her. Other times the deceased would be angry and upset for no particular reason or for a variety of reasons including that she had not been to see the deceased or the fact that her mother and her had tried to keep the deceased in care.

401 On a number of her visits the deceased told her that she thought that her carers were coming into the home and stealing from her.

402 In around 2003 or 2004 her mother starting going out with Harvey Trezise. She observed that the deceased was initially very welcoming of Harvey at her home as he was able to help out with lots of jobs like reticulation that she and her mother were not so strong at.

403 In around 2006 or 2007 when she had noticed changes in the deceased's demeanour and behaviour she also noticed that the deceased's attitude towards Harvey changed. The deceased told her on one occasion that Harvey had driven a wedge between the deceased and her mother.

404 Shortly after the deceased returned home from KIC the deceased demanded her bank book back. The deceased also wanted her cash from her account which at this stage totalled roughly $8,000. She spoke with the deceased and said words to the effect that she was concerned about this course of action and that she was worried about what was going to happen to the money. Despite this the deceased was adamant that she wanted the money and her bank book back. She therefore returned the bank book to the deceased and gave the deceased the money in about mid-2007.

405 In about September or October 2007 Samantha told her that Stevan had received money from the deceased and that he had used it to

buy his new car. Samantha said that the amount was around $40,000. It was her belief at this time that the $40,000 was likely to be the proceeds of the deceased's AMP life insurance policy which she knew the deceased had.

406 As a result of her conversation with Samantha she attended the Commonwealth Bank with the Enduring Power of Attorney and an old bank book. She ascertained the transactions by which the amount from the AMP policy ($40,968.56) which had been deposited into the deceased's account had then been disbursed for the benefit of Stevan and Samantha ($21,648.99 being paid to Grand Toyota and a total of $20,300 being paid to Stevan and Samantha). A very short time later she contacted her mother and Robyn and explained to them that Stevan and Samantha had taken money from the deceased.

407 In about October or November 2007 the deceased arranged a family meeting in relation to her will. Present at the meeting, which was at the deceased's house, were herself, her mother, Robyn, Stevan, Samantha, Stevan and Samantha's children, and the deceased. At the meeting the deceased told everyone that her intention was to leave her estate to her great grandchildren. Robyn said words to the effect of, 'What if Meagan has children?' She does not recall the deceased's response to this.

408 The next thing she remembers is that Robyn and Stevan were arguing in a side room in relation to Stevan's conduct concerning the money that he had obtained from the deceased. Stevan then walked out of the house after continuing to argue with and yell at Robyn.

409 After the family meeting and between late 2007 up until the deceased went into care at FGH, the deceased spoke to her on a number of occasions in relation to changing her will. The deceased was during this period constantly changing who she wanted to leave her estate to.

410 On one occasion in about 2008 or 2009 the deceased told her that she wanted her estate left to Bethany. On another occasion between late 2007 and March 2010 the deceased told her that she wanted her estate left to just Robyn's two girls. On a further occasion the deceased told her that she wanted to leave her estate to only Robyn and Stevan's children and specifically not Michael's children.

411 She never discussed the deceased's will with the deceased at the time the deceased was in Anchorage.

412 She continued to be concerned about the deceased's care arrangements, particularly as she was now aware of the way Stevan and Samantha had dealt with the deceased's money. Further, it had come to her attention in 2007 or 2008, although she cannot recall how, that Samantha was now responsible for the deceased's banking.

413 She continued to visit the deceased during 2008 and 2009. However, it was very difficult because she often did not know what response she would receive from the deceased. Both she and her mother saw the deceased regularly and continued to note on the calendar by her phone when they had visited. At some point during this time the deceased changed the locks to her house and told her and her mother that they had been stealing from her. The deceased later denied this was the reason she had changed the locks.

414 During her visits to the deceased around this time the deceased's behaviour and mood continued to be unpredictable. At times the deceased was angry, upset and confused but on other occasions the deceased was relatively okay and pleased to see her. The deceased's confusion was generally in relation to who had visited her and when she had been visited. The deceased would often incorrectly recall past events or actions of people.

415 The deceased was also very suspicious of people around this time. The deceased often accused people, including herself, of stealing things from her. The deceased was inconsistent. Sometimes the deceased was very aware and engaging whereas on other times it was very difficult to have a conversation with the deceased.

416 When she visited the deceased during this time it was very clear to her that the deceased could not cope at home. The deceased could not operate most appliances, and often fell and had bruises on her legs and arms. At this time the deceased had a panic alarm around her neck.

417 In 2009 the deceased suffered a sore back and her mother took the deceased to hospital. After this the deceased went into full time care at Salters Point. She and her mother would visit the deceased there often but the deceased was not happy there.

418 In March 2010 the deceased moved to FGH. She and her mother also visited the deceased there regularly. The deceased was still not happy in care and she and her mother continued to get mixed responses from the deceased when they visited.

419 The deceased was often angry and frustrated about being in care. The deceased was able to do very little due to her failed sight and hearing. There were days when the deceased was forgetful and confused about past events and facts. The deceased's sentiment towards family members often varied. The deceased would be angry at someone one day then happy with them the next.

420 When the deceased moved in to Anchorage in March 2011 she visited the deceased as often as she could. At this time the deceased was very hard of hearing and often struggled with hearing aids. The deceased could no longer see very well at all. She could not watch the television or listen to the radio. She could see that the deceased found this very frustrating.

421 She continued to visit the deceased at Anchorage up until the deceased's death. The deceased would get her to go through photo albums which the deceased could no longer see. She would flip through the pages describing the photos that she saw and the deceased would describe to her 'what she remembered the photos were, which trip and when and who she went with if she could remember'.

422 Her mother visited the deceased. By this stage Ainslie was living with her mother at Wanneroo and also visited the deceased regularly.

423 In cross-examination Meagan said the following.

424 At the time that Stevan took over looking after the deceased's finances, she gave the deceased's bank book back to her. Also at this time the deceased wanted all of the money that was in another account totalling $8,000 so she gave the deceased the bank book back and the cash.

425 The deceased always wanted her money drawn out of her account. Sometimes she would hold the deceased's money for her. She did not necessarily hold the cash herself. Sometimes she would put it in her account until she gave it to the deceased. The deceased always wanted her pension drawn straight out because she did not want the money to build up in the bank books so that it affected her pension.

426 The deceased was definitely strong willed. She would not agree that the deceased was always grumpy. She had seen the deceased treat other people throughout her life not particularly kindly.

427 She would not agree with the proposition that the deceased was manipulative and would feign illness to seek attention.

428 The deceased was initially agreeable to going into care. However at a point in time while she was in KIC this changed. She does not believe the change related to the deceased not having any more trouble with her back. She does not think that the deceased's back ever really got much better. The deceased was always, so far as she knows, on medication for her back. She is not too sure what changed the deceased's mind necessarily but her mind did change.

429 She and her mother moved the deceased from SJGH Murdoch to JHC so that the deceased could be closer to the two of them so that they could visit the deceased regularly.

430 The deceased was certainly angry with her and her mother for trying to keep the deceased in care. The deceased wanted to go home. However, sometimes they would visit the deceased and she would be happy to see them and on other times she would be angry at them.

431 She disagreed with the functional assessment which indicated that the deceased was capable of going home. The basis for her opinion in this regard was her observations of the deceased during the period that she worked close by (2007 - 2009) and the changes that she had seen in the deceased. She did disagree with the functional assessment because of how she had seen the deceased in her home prior to being in JHC and KIC.

432 The deceased had been angry with her and her mother prior to the time that she was in KIC and that had nothing to do with them keeping her in care.

433 The deceased was not always angry. Sometimes she was pleasant. She was not angry throughout her life. It was really from the time that she began to see a lot of the deceased when she was working in Perth that she observed the deceased angry.

434 It was at the family meeting on 7 October 2007 that the deceased expressed her intention to leave her estate to her great grandchildren. The deceased threatened to leave the estate to Bethany at a later date.

435 It is not her recollection that it was at the family meeting that the deceased switched from her stated intention to leave the estate to her great grandchildren to Bethany.

436 Prior to the time that her grandmother was released from KIC she was concerned about how the deceased would cope at home. She was also concerned about the deceased being financially taken advantage of by Stevan.

437 The fact that the deceased cashed in the $40,000 AMP insurance policy upset her and upset her mother because the policy had been left to her mother in the 1998 Will.

438 The issue arising with Stevan not paying the bills arose after the life insurance was cashed in and after the deceased had returned home from KIC. She remembers that the way that she and her mother were put onto the issue was that the Meals on Wheels contacted them and said that they had been instructed not to deliver meals to the deceased.

General observations on Meagan's evidence

439 Meagan's evidence was not substantially challenged in cross-examination. In any event, I found Meagan to be an honest and generally reliable witness. I accept that she (like Robyn and Susan) at all times did the best that she could to support and care for the deceased, and that she always acted in what she believed to be the best interests of the deceased.

440 Again, there is a relatively stark contrast between the evidence of Meagan and the evidence of Robyn as to the extent of the deceased's exhibited behavioural and mental problems from around 2006 onwards. It suffices for me to say in this regard that given my overall assessment of Meagan as a witness, the evidence of the assessments of the deceased's abilities and mental state from 2006 to 2011 to which I have already referred, and the fact that the much of the tenor and substance of Meagan's evidence is supported by Susan's evidence, I accept Meagan's evidence as to the specifics of the behaviour that the deceased exhibited towards her and others from around 2006 onwards. I accept, based on Meagan's evidence, that the deceased did in the later years of her life, particularly from around 2008 onwards, on occasion exhibit unusual behaviour, mood fluctuations, anger, some aggression, forgetfulness and confusion.

441 Further, I state to avoid any doubt on the issue that I am satisfied on the basis of the evidence given by Meagan (and for that matter Susan also) that neither Meagan nor Susan ever stole money or any other property from the deceased. I am satisfied that the deceased's expressed and apparently held beliefs in this regard were unfounded.

Ainslie Perkusich

Evidence

442 Ainslie made her statement on 8 September 2017 (exhibit 101).

443 Ainslie's relevant evidence-in-chief was as follows.

444 She has spent a large amount of time with the deceased over the years. However, they have also had their issues.

445 She moved to Dongara in 1988. However, she would come to Perth during most school holidays and would often visit the deceased and Susan during these times. She came to Perth roughly three to four times a year.

446 She contributed a lot of time to the deceased when she could for many years, helping the deceased around her house at 11B Bateman Road in Mount Pleasant and at the property in Dunsborough.

447 In about 2002 she and Susan took the deceased down to the Dunsborough property on which Meagan had built a home. She had previously sold her half share in the property to Meagan in late 1999 for $50,000.

448 On one day while they were at Dunsborough she and Susan wanted to go to Augusta to see the whales. The deceased did not want to go on the boat and was not very happy about her and Susan going. The deceased stayed home.

449 When she and Susan returned the deceased yelled at them and verbally abused them for going on the boat without her. The deceased said horrible things to her, Meagan and Susan (Meagan and her friend having arrived later in the day). She was around 60 or 61 at the time. As a result she and the deceased did not see much of each other for some time other than for Bethany's christening, and Stevan's and Samantha's wedding. This was the position until the deceased went into FGH.

450 Susan and Meagan took care of the deceased for many years while she was in Dongara. To her knowledge Robyn used to help but began assisting more in the later years of the deceased's life.

451 On 8 September 2009 she moved from Dongara to Perth to live with Susan as she could see Susan was really struggling to juggle the

demands for caring for the deceased, together with working full-time and looking after her property.

452 Shortly after the deceased went into FGH she was told by Susan that the deceased wanted to see her. As a result she went to FGH to see the deceased.

453 When she saw the deceased at FGH she noticed that the deceased could not walk and that her hearing had gone. However, the deceased seemed happy to see her.

454 She saw the deceased a further three or four times while she was at FGH. During these visits she noticed that the deceased could not toilet herself or make herself a cup of tea. She was very concerned at that time that the deceased should not be at FGH given the type of facility it was. She did not think that the deceased was capable of looking after herself in FGH.

455 She recalls staff at FGH telling her and Susan that the deceased needed to go to high care. As a result she, Meagan, Susan and Robyn started to look for other places for the deceased to live. They decided that Anchorage was a lovely place and would suit the deceased. Anchorage was also closer to where Susan and she lived, and close to Susan's work in Clarkson.

456 She helped the deceased move into Anchorage as Susan was away in Darwin. She thinks that this was in either March 2010 or March 2011. She is not sure where Robyn was. She thinks Robyn was at work.

457 On the day of the move she was with the deceased in her room at FGH. She was not sure what furniture was the deceased's because she had not been in her house for many years. She asked the deceased whether a wall clock and a sideboard were hers. The deceased said they were not. However, when Susan returned from holiday and visited the deceased at Anchorage Susan asked the deceased where the clock and sideboard were. Susan told her that the items were in fact the deceased's.

458 While the deceased was at Anchorage she would see the deceased at least twice a week. She visited the deceased frequently up until the deceased's death. She would also often go with Susan to see the deceased. They would take the deceased out for lunch or go to Meagan's house in Mullaloo on occasions.

459 When the deceased moved into Anchorage she seemed relatively happy although she was also her usual grumpy and negative self.

460 Shortly after the deceased moved into Anchorage she noticed that the deceased had become forgetful of who had visited her. She thought that people who had not visited her had visited her. She also often forgot which day it was. The deceased needed to be constantly reminded of a conversation that had been had with her.

461 When the deceased was in Anchorage she would often see the deceased by herself. However, it was difficult to find something to talk about because the deceased was always so negative about everything. The deceased was also very forgetful and could not do almost all simple tasks such as putting the television on.

462 During her visits the deceased would often rant about the negative aspects of whatever she wanted to talk about. By this time the deceased's behaviour was worse than it used to be and this made it difficult to talk to the deceased. However, she would stay there a few hours even if the deceased went to sleep. By this time the deceased could not see or hear very well.

463 She never spoke to the deceased about any of the deceased's wills. The deceased never said anything to her about her estate or who she wanted to give it to.

464 She saw the deceased a few days before the deceased died. However, when the deceased died she was at Susan's house where she lived caring for the animals so that Susan could be with the deceased.

465 In cross-examination Ainslie said the following.

466 Her estrangement from her mother started in 2002 after the argument concerning the whaling trip.

467 She has not previously seen a copy of the 1998 Will. She has never known that by the 1998 Will her mother left almost all of her estate to Susan.

468 The deceased was 'grumpy' with her in 2002 and had been 'grumpy' with her before that time.

469 When she went to Dongara in 1998 she spoke to the deceased on the phone on a weekly basis.

470 She returned to Perth because she thought that Susan needed support.

471 She did not see much of the deceased until the deceased went to FGH. That was when the deceased asked to see her. From 2002 and up until she saw her mother at FGH, she did not see the deceased much at all apart from at Bethany's christening and Stevan's and Samantha's wedding. She was not seeing the deceased in 2007.

472 She accepts that the deceased has always been a bit difficult and manipulative but that did not mean that she did not consider the deceased to be her mother.

General observations on Ainslie's evidence

473 Ainslie appeared to me to be an honest and generally reliable witness. Her evidence, although more limited in scope to the evidence given by Susan and Meagan, was broadly consistent with the evidence given by Susan and Meagan and was not substantially challenged. I accept Ainslie's evidence.

The evidence of Dr Bohmer

474 It is at this point necessary to refer to the evidence given by Dr Bohmer to the extent that I have not already done so in stating the non-contentious facts.

475 Dr Bohmer made his statement on 4 August 2017 (exhibit 61).

476 Dr Bohmer's relevant evidence-in-chief was as follows.

477 He is a General Practitioner holding a medical degree obtained in South Africa. He is a Fellow of the Royal Australian College of General Practitioners.

478 He no longer recalls his attendance on the deceased on 6 September 2011. However, he knows from documents that he has looked at that he did see the deceased on 6 September 2011 for the purpose of evaluating her capacity to make a will.

479 He has reviewed his letter to Haynes Legal dated 6 September 2011. He has also reviewed a copy of the letter to him from Haynes Legal dated 16 July 2011 on which he made some brief handwritten notes. He no longer recalls making the notes but he believes that he

made them during his meeting with the deceased. The handwritten notes read as follows:

> Robin (granddaughter)
>
> Power of Attorney
>
> House sold
>
> Mt Pleasant
>
> Contents of house
>
> 1 bank account
>
> Bethany Perkusich

480 The tree structure which he has drawn and written on the copy of the letter from Haynes Legal indicates that he obtained the following information from the deceased:

1. The deceased had two daughters, Ainslie Perkusich and Susan Smart with Ainslie being the older daughter;
2. Ainslie had two children, Robyn and a son;
3. Robyn had two daughters;
4. Ainslie's son had a daughter Bethany.

481 When he is asked to do testamentary assessments he follows guidelines set out in his notes on testamentary capacity. The guidelines set out in his notes state that in order to conduct an appropriate test as to testamentary capacity a medical practitioner should do the following:

> 1. Interview the subject alone;
> 2. Obtain from the subject an unprompted narration of the circumstances in which the subject is living;
> 3. Ascertain the property owned by the subject;
> 4. Prepare a list of relatives and other persons who have had relationships or close friendships with the subject;
> 5. Take an account from the subject of what he or she perceives as being the persons who have claims on the estate; and

6. Ascertain from the subject any reason or reasons for making testamentary gifts to particular persons or for not doing so.

482 In reaching a view on capacity he tries to get information about the person's assets as well as details regarding their closest family members. He asks the person to list their assets as well as all their closest relatives. He also makes sure that the person understands what it means to make a will and the implications thereof.

483 In order to ascertain if a person understands what it means to make a will and the implications thereof he asks the person to explain to him what it means to be making a will and the implications thereof.

484 His assessment of the person usually reveals if the person understands what they are doing and their ability to retain information, and also their ability to weigh up options and make decisions. He always does his assessment without any relatives or beneficiaries present.

485 When he wrote his report on the deceased he tried to convey all of this information. He did not write a separate note in his consult notes as he was of the opinion that the report contained all the pertinent information.

486 In cross-examination Dr Bohmer said the following.

487 He had seen the deceased on three occasions before the day that he met her in order to assess her testamentary capacity. He saw her on 6 April 2011, 13 April 2011 and 18 August 2011.

488 Prior to the first time that he saw the deceased he reviewed the file on the deceased which had been provided by FGH. The file included a document headed 'Aged Care Client Record' (exhibit 68). The document did not make any reference to the deceased having dementia.

489 Prior to seeing the deceased for the purpose of assessing her testamentary capacity he did not see any ACAT reports which included references to the deceased having dementia.

490 If he had seen ACAT reports prior to assessing the deceased which revealed that the deceased had dementia, a history of mild paranoia, depression, negative ideation towards the family and delusions this would have affected his assessment of the deceased's mental capacity.

491 At the time of carrying out his assessment of the deceased a nurse whose name was Eva was in the room with him. It was his practice to have a nurse in the room with him. He reads the guideline requiring that the medical practitioner interview the subject alone as requiring that the interview not occur in the presence of family members. He considers that he complied with this guideline despite the fact that a nurse was present.

492 He accepts that none of the notes that he made on the letter from Haynes Legal deal with the last of the guidelines, namely ascertaining any reason or reasons for making testamentary gifts to particular persons or for not doing so.

493 He has done a total of six or seven competency assessments for testamentary capacity. The assessment he performed for the deceased was the second of the assessments that he had done.

494 He considers that he dealt with the property owned by the deceased adequately. Apart from what is recorded in the notes made on the letter to Haynes Legal, he did not ascertain from the deceased any further details about the property that she owned.

495 He did not discuss with the deceased whether she had made any previous wills.

496 In the Aged Care Client Record that he did review prior to assessing the deceased there is a reference to the deceased 'regularly' having short term memory problems. He did think that this was relevant to her testamentary capacity. Nonetheless, he still formed the view that the deceased did have mental capacity.

497 There were two assessments of the deceased done around this time. One was an MMSE in which the deceased scored 22 out of 30 (exhibit 68). The second, which was done about two months later on 15 April 2011, was the occupational therapy assessment done at Anchorage (exhibit 44). So far as the MMSE is concerned about eight points depend on the person's visual ability. Taking this into account, the deceased's score of 22 out of 30 was not a bad score. Then, looking at the assessment done just two months later it reveals that in relation to the deceased's memory she scored two out of three and four out of five. These results supported the view that the problems with her short term memory were not that significant.

498 He did not ascertain the name of Ainslie's son. He did not ask the deceased what the son's name was. He does not know why he did not ask this question.

499 He understood the deceased to have two grandchildren. He did not make any inquiries as to the accuracy of this information.

500 He did not talk to the deceased about her daughters and where they were in the family relationship in terms of whether or not she should consider them in her will.

501 The deceased told him that she wanted to leave her entire estate to one of the great grandchildren, namely Bethany.

502 At the time it did not strike him that it was unusual for the deceased to want to leave her estate to one of her great grandchildren. However, he accepts that it is unusual. He accepts that it is so unusual that he ought to have taken the matter up further with the deceased.

503 During the assessment the deceased told him that she had three great grandchildren.

504 He was with the deceased, he would guess, for anything between 40 minutes and an hour.

505 He would have double checked the information he obtained from the deceased 'from different points of view'. It should be remembered that the deceased was hard of hearing as well.

506 He did not ask the deceased how old Bethany was. He should have asked this question.

507 He did not ask the deceased why she was not leaving anything to her daughters.

508 At the time he did not know that the deceased had eight great grandchildren. If he had known this he would have made further inquiries of the deceased as to the extent of her family.

509 He would have tested the answers that the deceased gave to him. He would have got her answers and then he would have started from the beginning and tested every part of it. Therefore any mistakes the deceased made she made twice.

510 Given what he knows now he still maintains that the deceased did have testamentary capacity. The deceased was clear about what she wanted to do and who she wanted to leave her estate to. The deceased recalled her assets. He still feels she had the capacity when he did the assessment.

511 So that is a summary of Dr Bohmer's evidence.

512 I note in relation to Dr Bohmer's evidence that he saw the deceased on three occasions before seeing her on 6 September 2011 that the plaintiffs assert, by reference to documents that were contained in the Book of Documents for Trial, that Dr Bohmer actually saw the deceased on five occasions before seeing her on 6 September 2011: plaintiffs' closing submissions, [9]. However, the documents referred to by the plaintiffs were not actually tendered into evidence at trial. I therefore, at the risk of stating the obvious, have no regard to them and will necessarily proceed on the basis of Dr Bohmer's oral evidence, namely that he saw the deceased on three occasions before seeing her for the purpose of assessing her testamentary capacity on 6 September 2011.

The expert psychiatric witnesses

513 As I have already mentioned, the plaintiffs and the defendants each called one expert witness. The plaintiff called consultant psychiatrist Dr Olivia Lee. The defendants called consultant psychiatrist Dr C Nick De Felice.

514 The evidence-in-chief of Dr Lee was comprised of two reports dated 19 September 2017 (exhibit 58) and 9 January 2018 (exhibit 59) supplemented by oral evidence. The evidence-in-chief of Dr De Felice was comprised of four reports dated 1 August 2017 (exhibit 89), 13 November 2017 (exhibit 90), 23 November 2017 (exhibit 91) and 1 December 2017 (exhibit 92) supplemented by oral evidence.

515 Before turning to the evidence given by Dr Lee and Dr De Felice I need to make some comments about the nature of some of the submissions made by each of the parties about the other's expert.

516 The defendants submit that Dr Lee's first report (exhibit 58) 'is inadmissible in its entirety because she does not state the reasoning by which she arrived at her conclusion of testamentary capacity': defendants' closing submissions, [8(a)]. The defendants then proceed in their closing submissions to devote considerable time to attempting

to explain why in their submission Dr Lee does not in her first report adequately disclose her reasoning for arriving at the conclusion expressed by her in relation to the deceased's testamentary capacity: defendants' closing submissions, [8(b)], [8(c)]. The defendants also contend that Dr Lee was, for various reasons, shown to be biased: defendants' closing submissions, [8(b)(viii)], [8(d)]. Indeed, they go so far as to contend that Dr Lee's demeanour in cross-examination was 'highly suggestive' of bias.

517 The defendants' submission that Dr Lee's first report is inadmissible in its entirety is difficult to understand given that the report was tendered as an exhibit and is therefore in evidence. In any event, I do not accept that Dr Lee's basis for arriving at the opinion ultimately expressed in the report is not adequately revealed by the report. Further, even if contrary to my view Dr Lee's reasoning process is not adequately revealed by the terms of her report, her process of reasoning which had led her to arrive at the conclusions that she expressed in her report and maintained in her oral evidence was certainly fully exposed by the conclusion of the cross-examination of her.

518 As to the defendants' assertion that Dr Lee was shown to be biased, this is an assertion that I reject. I did not detect anything in the substance of Dr Lee's evidence or in the way that she gave her evidence to provide support for the assertion that she was a biased witness. In particular I do not accept, as is contended by the defendants, that because Dr Lee at one point in her evidence said that when she prepared her report she was not aware of who she was writing the report for 'in terms of plaintiff and defendant', and then when presented with the letter of instruction written to her by the plaintiffs' solicitors accepted that the terms of the letter made clear that she was being asked to provide a report for the executors of a will that was being challenged, this shows that she was biased.

519 So far as Dr De Felice is concerned, the plaintiffs contend that his evidence was 'hopelessly compromised' by reason of the fact that he was not, in order to enable him to prepare his reports, given a large number of the documents that were ultimately tendered at trial: plaintiffs' closing submissions, [31(a)]. It is the case, as was revealed during the cross-examination of Dr De Felice, that he had not, prior to preparing his reports, or at least some of his reports, been provided with a significant number of the documents that had been tendered at trial. However, at the end of the day I do not think that this is of great

moment. I say this because by the end of the cross-examination of Dr De Felice his attention had been (quite properly) drawn to documents of importance that he had not previously seen, or at least the substance of the content of such documents, and he had been questioned about their content and the impact, if any, which the content had on the opinions that he was expressing. Thus similarly to the position that existed with respect to Dr Lee, by the end of Dr De Felice's lengthy evidence the basis for the opinions that he had expressed in his reports and in his oral evidence was well and truly exposed.

Areas of agreement and disagreement

520 In their evidence Dr Lee and Dr De Felice agreed on a number of matters. Specifically, they agreed on the following:

1. By 2007 the deceased was suffering from a mild cognitive impairment (that is, reduced short term memory and reduced long term memory);

2. It is likely that by 2010 the deceased was suffering from dementia (that is, an impairment affecting not just memory but the capacity to reason and make judgments);

3. It is probable that at the time of making the 2011 Will the deceased understood the nature and effect of making a will; and

4. At the time of making the 2011 Will the deceased knew the extent of her estate.

521 The evidence that formed the basis of the conclusion reached by both Dr Lee and Dr De Felice that the deceased was suffering from a mild cognitive impairment by 2007 included the references in the JHC progress notes made during the time that the deceased was an inpatient of that facility (exhibit 15) to a likely diagnosis of mild dementia alternatively a diagnosis of mild cognitive impairment, the results of the first ACAT assessment of the deceased carried out in October 2006 (exhibit 62), and the scores that were obtained by the deceased on the various MMSE conducted with her prior to 2007.

522 The evidence that formed the basis of the conclusion reached by both Dr Lee and Dr De Felice that the deceased was not suffering from dementia prior to 2010 consisted in essence of the following:

1. In March 2007 the deceased performed very well on the hierarchic dementia scale (exhibit 75);

2. In his letter dated 29 March 2007 Dr Brown, psychiatrist, concluded that the deceased was 'capable of deciding to return home' (exhibit 17);

3. In his letter dated 3 April 2007 Dr Hollingworth stated that he considered the deceased to be 'totally sound of mind' (exhibit 25); and

4. In September 2007 the deceased obtained the score of 86 out of 105 on the camcog-r test administered to her by Dr Reid (exhibit 22), this score being well above the cut-off point for dementia.

523 The basis for the opinion expressed by both Dr Lee and Dr De Felice that it is likely that the deceased was suffering from dementia by 2010 is most evident from the reports prepared by Dr De Felice dated 1 August 2017 (exhibit 89) and 13 November 2017 (exhibit 90). In this regard Dr De Felice points out in his reports that the results of the PAS Cognitive Impairment Scale assessment of the deceased carried out in March 2010 (exhibit 69) reveal that the deceased's cognitive state had deteriorated further by this time, and that the cognitive deficits revealed by the assessment were significant enough to form the basis for a conclusion that the deceased was suffering from dementia. In addition, Dr De Felice also points out in his reports that when the deceased was at Anchorage significant difficulties in her cognitive function were noted, even though she was not labelled as suffering from dementia. He points to, as an example of these significant difficulties in the deceased's cognitive function, the fact that in April 2011 the deceased was noted to have a mild impairment in her cognition, with impaired short term memory and orientation, and with some difficulty in long term memory as well (exhibit 44).

524 I have identified the areas of agreement between Dr Lee and Dr De Felice. The two areas of disagreement between Dr Lee and Dr De Felice relate to whether *there was any evidence* that the deceased had at any time prior to making the 2011 Will suffered from paranoid delusions or psychosis (although ultimately both Dr Lee and Dr De Felice agreed that it could not be said, on balance, that the deceased did suffer from psychosis), and whether at the time of making the 2011 Will the deceased had the ability or capacity to consider those

who might have a claim to her estate. It is this second area of disagreement that is, in my view, of far more significance to the determination of the issues in this case although I will, for the sake of completeness, address each area of disagreement in turn.

Conflicting opinions as to evidence of psychosis

525 In relation to the issue of psychosis Dr Lee's evidence was as follows.

526 There is no evidence that the deceased suffered from psychosis in the form of paranoid delusions. Although concerns were raised about the deceased's behaviours by the deceased's family members, and although the deceased's family members had expressed concerns about the deceased wrongly believing that the deceased's children wanted her estate, there was nothing to suggest in the material provided to her that the deceased suffered from any delusions. There is nothing in the nursing home notes recording the deceased as having expressed unusual or bizarre ideas. Nor is there anything in the notes made by Mr Haynes to suggest that the deceased was suffering from delusions. This is so even though Mr Haynes questioned the deceased about her family and her estate distribution.

527 Paranoid delusions are pre-occupying and patients generally speak of them at the first opportunity to do so. If someone is paranoid in a psychotic manner she would expect the person to be preoccupied with the issue to the point of expressing it, if not daily, then at least weekly. Also, when the person is asked about the issue they tend, if they are psychotic, to give very convoluted and elaborate explanations of how they come to the belief. She does not see the evidence in the documentation of this.

528 The decision of the deceased not to gift to others who would have a natural claim on her estate was stated clearly and consistently by the deceased, including in 2007 when she was deemed to have capacity to determine her estate and accommodation. The deceased's rationale for not gifting to those who would have a natural claim on her estate was not bizarre or of a delusional nature.

529 She is satisfied that the deceased was not suffering from paranoid delusions.

530 Dr De Felice's evidence as to the issue of whether or not the deceased suffered from psychosis in the form of paranoid delusions was as follows.

531 The views that were expressed by the deceased in 2007 and 2008 in relation to her family members (to the effect that they were concerned about how she was dealing with her money and how she was going to distribute her assets when she died, and that Susan and Meagan had been stealing from her) certainly raises his suspicions about psychotic symptoms. The particular relevance of the views expressed by the deceased is that they were paranoid ideas concerning the deceased's daughter Susan. He cannot be sure from the documentation provided that the deceased was psychotic. However, nor is it clear that she was not psychotic.

532 The ideas in question no longer appeared to be present after about 2008. He therefore does not think that the deceased had a paranoid disorder. However, it is not uncommon in dementia of the Alzheimer type for there to be a phase of the illness when psychotic symptoms emerge only to disappear with a further decline in memory. They can be the presenting feature when the patient is in the early phase of their cognitive decline. However, he cannot be sure about the presence of psychotic symptoms in 2007 or 2008.

533 Ultimately, his opinion is that although the material provided to him contains some evidence pointing towards the possibility that the deceased suffered from delusions or psychosis, when he looks at all the material he is not satisfied on the balance of probabilities that the deceased was suffering from delusions or psychosis. He is happy to accept, as was asserted by Dr Alison Smith, that the deceased had no affective or psychotic disorder.

534 As is apparent from my above summary of the evidence given by Dr Lee and Dr De Felice in relation to the psychosis issue, at the end of the day, and as I have already indicated, neither of them expressed the opinion that the deceased did suffer from psychosis in the form of paranoid delusions at any time prior to her death.

535 As I have previously stated, I am satisfied, based on the evidence of Susan and Meagan particularly, that at various times in or around 2007 and 2008 the deceased held some unfounded beliefs, specifically a belief that her unused mattress had been stained and a belief that Susan and Meagan had been stealing money from her. However, consistently

with the evidence given by Dr Lee and Dr De Felice, I am not satisfied that the beliefs that the deceased held were of such intensity, or pre-occupied the deceased to such an extent, as to amount to paranoid delusions of a psychotic nature.

Conflicting opinions as to whether the deceased had the ability or capacity to consider those who might have a claim to her estate

Dr Lee's evidence

536 In relation to the issue of whether the deceased had the ability or capacity to consider those who might have a claim to her estate, the expert opinion evidence of Dr Lee was as follows.

537 The assessment of testamentary capacity without having seen the patient is an imprecise exercise because the opinion is dependent on the biases of the writer of the documentation.

538 Testamentary capacity is situation specific. It requires the person to have a level of cognition to demonstrate understanding of the estate, the potential claims and to be able to express his or her disposition to its distribution. While cognition can influence a person's capacity, capacity is not determined by cognitive functions.

539 The MMSE is a coarse screening tool for cognition. It cannot be relied upon to determine capacity. It is useful to support an opinion regarding cognition.

540 From the attendance note of Mr Haynes and from the terms of the 2011 Will, it would appear that the deceased fulfilled the criteria for testamentary capacity. The statements made by the deceased to Mr Haynes about having gifted her property to her children and grandchildren is consistent with statements that she had made previously. Mr Haynes recorded that the deceased had an understanding of the people who had a potential claim on her estate, namely her children, grandchildren and great grandchildren. He also recorded the deceased's rationale for her decision not to gift property to her children and grandchildren. The rationale was plausible and reveals that despite family conflict the deceased still wanted to give her estate to her family. That is, having gifted her property to her children and grandchildren she now wanted to help her great grandchildren.

541 When questioned by Mr Haynes, the deceased gave an account of all of her children. She had sufficient cognitive capacity to formulate

plausible answers. She gave specific instructions that her estate should be distributed to only her biological great grandchildren. She therefore considered the complication that some of her grandchildren had blended families. This demonstrated a sophisticated understanding of her family structure. It demonstrated a cognitive capacity that would have allowed her to consider the implications of her wishes.

542 Some time between 2007 and 2010 the deceased stated to Meagan and Susan that she wanted to leave her estate to her great grandchildren. Thus it does not appear that the deceased's decision as reflected in the 2011 Will was out of character.

543 There is evidence that the deceased's cognition was impaired but the impairment was not of a severity that affected her ability to comprehend and appreciate the claims which she ought to give effect to. The deceased demonstrated an ability to weigh the claims which 'naturally ought to place upon her, primarily between the generations of the family'. The deceased gave a plausible rationale for her disposition, namely that she had given to the children and grandchildren sufficiently and thus wanted her estate to remain within the biological great grandchildren. The deceased gave clear instructions to a solicitor to make the will according to her disposition.

544 From the documentation available to her she is of the opinion that the deceased demonstrated adequate testamentary capacity between July and September 2011, and that she knew and approved of the contents of her will on the day that she signed it, namely 23 September 2011. She is of the opinion that the deceased had in 2011 sufficient cognitive capacity to make a decision on the distribution of her estate.

545 In cross-examination Dr Lee said the following.

546 The fact that the deceased suffered from at least mild cognitive impairment in 2007 onwards, and by 2010 was suffering from dementia, does not necessarily preclude her from having capacity to make a will. Having dementia does not preclude someone having the capacity to make a will. It just depends on the stage at which the dementia has reached.

547 A person can decide what she wants to do with her will according to her feelings and according to her perception of the situation. If the deceased's family had been trying to put her into care when she did not feel that she needed to be in care, it is perfectly reasonable for her to feel paranoid about the family, that is, that they

might have some sort of alternative motive. Paranoia does not necessarily mean that a person is psychotic.

548 She does not think that the evidence suggests that the deceased had an inability to understand what her family was trying to do for her.

549 She does not in her report dated 19 September 2017 (exhibit 58) attempt to specifically state her opinion according to each item of documentation that she refers to in the report. Rather, she refers to the documentation that contains the pertinent facts that helped her form her opinion.

550 She does not deal specifically in her report with the letter written by Dr Gopinathan to Dr Hollingworth dated 16 February 2007 in which Dr Gopinathan states that there does seem to be 'some settling of mood although she continues to be very angry with her family in relation to her continued stay away from home' (exhibit 74). She does not do so because later on the deceased underwent full neuropsychological testing, the results of which found the deceased to be competent (exhibit 29). Therefore, she did not think that the letter from Dr Gopinathan added anything. There was evidence subsequently to say that even in spite of the deceased's then diagnosed dementia the deceased was still competent and that is why the deceased returned home. She read Dr Gopinathan's letter even though she does not specifically acknowledge the letter in her report.

551 She acknowledges in her report that there was family conflict. However, she does not deem what the deceased thought about her family, or the concerns she had about her family, to be a paranoia that would impact upon her capacity to make decisions about a will.

552 Aggression does not necessarily reflect paranoia.

553 She acknowledges in her report that there were concerns about the deceased being aggressive. However, she took into account that when the neuropsychological testing was done in around 2007 the deceased was deemed competent. She therefore did not feel, although she may not have specifically referred to this in her report, that the deceased's behaviours justified the conclusion that the deceased was not competent to make a will. Given that the deceased was displaying these behaviours at the time that the deceased was deemed competent by neuropsychological testing she would not consider these behaviours to be reflective of a lack of competence.

554 She thinks it is quite reasonable for someone to suspect the intentions of family when they are doing things against that person's wishes. She does not think that this is delusional.

555 She accepts that the score of 10 out of 33 on the Aged Care Funding Instrument PAS Cognitive Impairment Scale Assessment that the deceased underwent on 11 March 2010 (exhibit 69) was low. The score could mean that the deceased had communication difficulties and short term memory difficulties.

556 The deceased's poor cognition as at March 2010, however poor it was, might have meant that the deceased had communication difficulties short term memory difficulties and difficulties learning new material. However, when the deceased was making the 2011 Will she was able to recall and express on two separate occasions what she wanted to happen to her estate. So 'to that extent dementia … doesn't necessarily preclude someone making the will'.

557 She agrees with the conclusion that was arrived at by Dr Bohmer in relation to the deceased's competence. However, the way that the two of them reached that conclusion might be different.

558 Dr Bohmer's opinion was something that she took into account in arriving at her opinion. However, she did not base her opinion on Dr Bohmer's opinion.

559 She noted that according to Dr Bohmer's letter to Mr Haynes the deceased had told Dr Bohmer that she wanted to leave her estate to her great granddaughter Bethany. This did not change her opinion in relation to whether or not the deceased may have been confused about who she wanted to leave her estate to, although she did take this into account. The deceased had previously expressed to her granddaughter Meagan and her daughter Susan sometime between 2007 and 2010 that she wanted to leave her estate to her great grandchildren. Therefore, the decision reflected in the 2011 Will was not one that was out of character.

560 Mr Hayne's assessment of the deceased's mental state was something that supported her opinion that the deceased did have mental capacity.

561 She does not think it is necessary to document everyone that has been considered for the deceased's choice to be valid. The deceased had stated specifically who should benefit under the will. Somebody

can choose not to consider other people that are in one's family and would have a claim to the estate. This does not necessarily reflect lack of competence or capacity.

562 Whilst she agrees with Dr De Felice that the deceased had cognitive deficits, she disagrees with Dr De Felice's assessment of the impact of these cognitive deficits on the deceased's capacity. From what she can see in the materials it has not been demonstrated that the deceased's cognitive impairment did affect her capacity.

563 She does not think that it is necessary in order for the deceased to have had testamentary capacity for the deceased to have understood and considered every complexity of the 2011 Will. She does not think it is necessary for the deceased to have considered all of the complexities of her will to make the decision to leave her estate in the way that she did.

Dr De Felice's evidence

564 Dr De Felice's lengthy evidence in relation to the issue of whether the deceased had the ability or capacity to consider those who might have a claim to her estate, may be summarised as follows.

565 In his letter dated 6 September 2011 (exhibit 54) Dr Bohmer concludes that the deceased had 'an understanding of potential claims that may be made against the estate'. However, there is no documentation revealing the basis on which he came to this conclusion. For Dr Bohmer to have reached this conclusion he thinks that the deceased would need to have told Dr Bohmer about who it was who might lay claim on the estate. The deceased clearly identified to Dr Bohmer that she had two daughters, Susan and Ainslie, and told Dr Bohmer that her granddaughter Robyn was her power of attorney. However, there is nothing in Dr Bohmer's documentation which indicates that the deceased was aware that she had five grandchildren.

566 In his letter Dr Bohmer states that the deceased expressed that she wished 'to leave all her assets to her great granddaughter, Bethany Perkusich'. There is no documentation in Dr Bohmer's letter as to whether the deceased knew of any other great grandchildren who might also have a call on her estate. Without these matters he cannot know, and neither could Dr Bohmer have known, that the deceased had considered all of those who might have a claim on her estate.

567 There is no documentation to suggest that Dr Bohmer ascertained from the deceased her reasons for excluding her daughters from the

2011 Will, her reasons for not leaving her estate to her grandchildren, or her reasons for choosing a particular great grandchild (Bethany) rather than all of them. In other words, it is not apparent from Dr Bohmer's documentation that he assessed the deceased's reasoning as to the relative claims on her estate. Dr Bohmer could therefore not have assessed the deceased's capacity to make such a decision.

568 Neither the 2011 Will nor any other documentation makes clear how the deceased's daughters had been catered for. This fact, and the comment in Dr Bohmer's letter about the deceased leaving all of her estate to Bethany Perkusich, highlights that the deceased was not consistent in her considerations regarding all the claims on her estate. This raises a question as to whether she considered all the claims on her estate in preparing her 2011 Will.

569 In his opinion there is no adequate documentation describing the deceased's rationale for missing the whole generation of her grandchildren, even if one considers that the rationale for excluding her daughters from her estate is adequately described, which he does not think it was.

570 In April 2011 there was a moderate impairment found on the PAS, mild impairment in short term memory and long term memory, impairments in orientation. In addition some confusion was noted. Importantly, on 15 April 2011 it is documented that the deceased had 'some confusion with the number of grandchildren and great grandchildren' (exhibit 44).

571 In May 2011 it was noted that the deceased had cognitive difficulties especially with short term memory, and that she had poor judgment, reduced insight and did not understand risk matters (exhibit 45). Even more pointedly, she indicated to Dr Bohmer that she wanted to leave her estate to Bethany Perkusich only 16 days before she actually signed the 2011 Will.

572 He therefore concludes that the deceased 'did not have the cognitive capacity to weigh up the relevant claims to her estate, let alone the relative claims to her estate of those claimants, especially given past dispersions, let alone to address the complexity of how she was to leave her estate as she did' in the 2011 Will.

573 In his opinion the deceased is likely to have been suffering from dementia, probably of the Alzheimer type, when she gave instructions and executed the 2011 Will. He does not think that the deceased was of

sufficiently sound mind, memory and understanding to have weighed up the various matters required. Hence, he does not think that the deceased was of sufficient sound mind to permit the conclusion that she had testamentary capacity when she gave instructions and executed the 2011 Will.

574 He does not agree with Dr Lee's view that the deceased's decision to leave her estate to her great grandchildren was not a decision that was out of character when one takes into account statements made by the deceased to Susan Smart and Meagan Smart in 2007 and 2010 as to who she wanted to leave her estate to which conflicted with her decision to leave her estate to her great grandchildren. In his view, the deceased was in this regard 'consistent in her inconsistency'.

575 In cross-examination Dr De Felice said the following.

576 The fact that when Mr Haynes saw the deceased on the second occasion the deceased corrected Mr Haynes by stating that the estate was to be left to her biological great grandchildren does not change his opinion on the question of the deceased's testamentary capacity.

577 In his view, Dr Bohmer's failure to require the deceased to identify all of her grandchildren precluded Dr Bohmer from arriving at the conclusion that he did in relation to the deceased's testamentary capacity. He takes the same view about the great grandchildren. If he was assessing testamentary capacity he would want to understand the deceased's reasoning for not including her children. He would then also want to understand why the deceased would miss any of her grandchildren. He would then want to understand, if the deceased chose one great grandchild over others, why she made this choice.

578 It is in his view highly relevant that Dr Bohmer did not illicit from the deceased the deceased's family tree in its entirety. The deceased did not adequately describe all of her family members so as to then provide a basis for concluding that she had considered all of them.

579 In his opinion the test for testamentary capacity is whether the person is able to appreciate those who might have a claim on their estate and then is able to give their reasoning as to why they have come to the conclusions that they have regarding the dispersions of their estate. Therefore, if a person decides to leave their estate to just their children, they need to detail why they may or may not leave it to one child or another. If they decide to leave their estate to all of their grandchildren, they might then have to detail why they may or may not

leave it to one grandchild or another. If they do it for the great grandchildren a similar process applies.

580 In summary in the circumstances of this particular case he thinks that in order to demonstrate that the deceased had testamentary capacity it is essential to show that she had considered her children, her grandchildren, and her great grandchildren.

581 If the position is that the natural objects of the deceased's bounty are limited to her daughters, with the result that they were the only people that the deceased had to consider, then she obviously considered them. Whatever he thinks of her reasoning for considering them is not pertinent. The deceased obviously considered them and then came to a decision about how she would disperse her assets. Therefore, she was able to cognitively consider her two daughters and that is what she did consider.

582 He does not agree that demonstrating capacity to be able to handle a simple matter permits the conclusion that the deceased was able to consider more complex matters. The deceased had to consider why she would miss a generation, namely her children. She then had to consider why she would miss her grandchildren and then go on to decide about her great grandchildren. However, the even greater complexity for the deceased was not only that she had to think about her great grandchildren, but she had to think about what her decisions were on the very day that she saw Mr Haynes. So it is not just the complexity of missing two generations, but also the complexity of handling in her mind the fact that she was actually changing her mind all the time. This 'inconsistency makes the cognitive capacity you need even greater'.

583 He accepts that the deceased considered her five grandchildren and gave reasons with respect to each of them.

584 If the deceased considered her children and grandchildren, and if the deceased knew that she had eight great grandchildren, he thinks that this would be sufficient to establish the capacity to make a will.

585 If one just looks at Mr Haynes' documentation one would say, 'well look this lady seemed to know all of her children her grandchildren, she didn't distinguish between one great grandchild and another, so on the basis of that there is no reason to particularly consider the merit of one grandchild versus another'. However, he looks at all the evidence as to the deceased's cognitive capacity and her

performance. There are occasions revealed by the documentation where the deceased was given the opportunity of explaining who it was that formed her family. One of these occasions was when the deceased was assessed by Dr Bohmer. She seems not to have been able to explain her family on that occasion. Another occasion was during the occupational therapy assessment where the deceased is noted to have been confused about grandchildren and great grandchildren (exhibit 44). Looking at the whole picture there is a question in his mind about whether the deceased was cognitively able to consider all of these issues. She had to also consider 'her changing mind about it'. In fact, when the deceased saw Mr Haynes she actually changed her mind in the course of the interview with him. For the deceased to consider all of her children, her grandchildren and her great grandchildren, whether she should or should not leave anything to them, and then to 'actually consider what she would do in the event of changing her mind' while she was talking to Mr Haynes, required quite a lot of cognitive capacity. On the information before him, he cannot conclude that the deceased had this cognitive capacity.

586 Given that Dr Bohmer was assessing the deceased for her testamentary capacity he would presume that Dr Bohmer tried to establish what the deceased knew of her family tree. So although the information of Mr Haynes might lead to one conclusion the evidence of her assessment by Dr Bohmer, and the comments she made during the occupational therapy assessment about being confused in relation to her grandchildren and great grandchildren, raises a doubt about the issue of whether she had testamentary capacity. When he takes these matters into consideration along with the 'changing nature of her ideas' and when he considers the cognitive deficits that have been demonstrated, he does not think the deceased had the necessary capacity.

587 Where he states in his report that 'given the ideas that [the deceased] had expressed in 2007 and 2008, ... one would have thought that [the deceased] would not have assumed that [her children] would both agree to the terms of [the 2011 Will]', the ideas that he is referring to are the conflicts that occurred previously between the deceased and her daughters. There were discussions in 2007 about the deceased's will, there were issues relating to the deceased alleging that Susan had been stealing from her, and there were conflicts about how Meagan had used the deceased's finances. In addition, the deceased had changed her enduring power of attorney. Susan was managing the finances. It was these sorts of issues that he considered would have raised the question

in most people's mind about how their daughters would react to the 2011 Will.

588 He accepts, having reviewed Mr Haynes' notes of the meeting on 15 July 2011, that the deceased was able to identify all of the people who could lay claim to her estate. However, this does not mean that she was able to do to that all of the time. The nature of dementia is that there can be 'an island of memory and a sea of forgetfulness'. He thinks that the notes of Mr Haynes meeting with the deceased clearly demonstrate that the deceased did consider all of the people she needed to consider on 15 July 2011. However, taking all of the evidence together he cannot be sure that that was the position at every moment and he certainly does not think that it was.

589 He agrees that on 15 July 2011 the deceased was able to identify all of the people whom she should consider in dispersing her assets and that she considered some of the issues that were relevant in terms of past dispersions. Nonetheless, he would hesitate to say that on that day the deceased had testamentary capacity because it is clear from Mr Haynes' notes that the deceased changed her mind during her meeting with Mr Haynes. He totally agrees that if one looks just at Mr Haynes' report one would say that the deceased on that day was able to consider all of those people to whom she should give effect in her will. He has no trouble saying this.

590 The fact that someone has a diagnosis of dementia in no way means that the person cannot make a will.

591 The assessment carried out in April 2011 (exhibit 44) which indicates that the deceased was 'orientated person day only' means that she was not orientated to the date, the month or the year.

592 Although on 15 April 2011 the deceased would appear to have had some confusion with her number of grandchildren and great grandchildren, the documents from Mr Haynes indicate that she did not have that confusion on 15 July 2011.

Did the deceased lack testamentary capacity at the time of making the 2011 Will?

593 Against the above evidentiary background I turn now to deal directly with the first of the questions for my determination.

Testamentary capacity - applicable legal principles

594 The will of a deceased person will only be admitted to probate if it is proved that at the time of its execution the testator had testamentary capacity. This is always a question of fact: ***Re The Full Board of the Guardianship and Administration Board*** [2003] WASCA 268; (2003) 27 WAR 475 [52].

595 The traditionally accepted test for determining testamentary capacity is that stated by Cockburn CJ in ***Banks v Goodfellow*** (1870) LR 5 QB 549, 565: ***Easter v Griffiths*** (1995) 217 ALR 284, 290; ***Saunders v The Public Trustee*** [2015] WASCA 203 [159]. In ***Banks v Goodfellow*** (565) Cockburn CJ said the following:

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

596 In ***Timbury v Coffee*** [1941] HCA 22; (1941) 66 CLR 277, 283 Dixon J cited with apparent approval the statement of the test for determining testamentary capacity made by Hood J in ***In the Will of Wilson*** (1897) 23 VLR 197, 199. Hood J's statement of the test was as follows:

> Before a will can be upheld it must be shown that at the time of making it the testator had sufficient mental capacity to comprehend the nature of what he was doing, and its effects; that he was able to realize the extent and character of the property he was dealing with, and to weigh the claims which naturally ought to press upon him. In order that a man should rightly understand these various matters it is essential that his mind should be free to act in a natural, regular, and ordinary manner...

597 The question is whether the testator had the capacity of sound judgment rather than whether he or she in fact made the judgment about the disposition of his or her estate soundly and for reasons which might appear to be to the observer to be good: ***Saunders v The Public Trustee*** [199]. There is a critical distinction between harsh and unreasonable judgment, which is nevertheless the product of a sound mind, on the one hand, and a judgment so affected by unreason and prejudice indicating a lack of mental capacity to comprehend and

appreciate the claims of a person who may deserve benefit, on the other: ***Saunders v The Public Trustee*** [66].

598 The question is an enquiry into the testator's capacity at the time he or she made the will, not years or decades earlier: ***Saunders v Public Trustee*** [199].

599 The question whether a person had testamentary capacity at the time of making a will is a legal rather than a medical question: ***Saunders v The Public Trustee*** [200]. Accordingly, the question must be decided by the court, not experts: ***Romascu v Manolache*** [2011] NSWSC 1362. As was stated by Vickery J in ***Nicholson v Knaggs*** [2009] VSC 64:

> In the end it is for the Court, assessing the evidence as a whole, to make its determination as to testamentary capacity. In the present case, the opinions of expert witnesses as to whether the testator was competent or not competent, while not without weight, cannot be decisive as to testamentary capacity at the relevant times. The Court must judge the issue from the facts disclosed by the entire body of evidence, including the observations of lay and professional witnesses who knew and saw the testatrix at the time of her making the relevant wills and codicils. The manner in which she gave her instructions, the content of those instructions, the setting in which the instructions were given and the outcome of enquiries made by the solicitor acting in the matter, all assume importance [41].

600 A conclusion that a person had a condition which may fit current diagnostic criteria used by psychiatrists to identify mental disorder may inform consideration of the legal question whether the testator had testamentary capacity, but does not itself deny testamentary capacity: ***Banks v Goodfellow*** (561); ***Saunders v The Public Trustee*** [200]. The question turns on the extent of the testator's capacity rather than the reason for any lack of capacity: ***Saunders v The Public Trustee*** [201].

601 As was noted by Mitchell J in ***Saunders v The Public Trustee*** [202], there will be many persons who may meet the diagnostic criteria for a currently recognised psychiatric condition but who retain testamentary capacity [202]. The critical question is always whether the testator understood the nature of the claims of those he or she was excluding from the will, not whether he or she met the current criteria which a psychiatrist may employ to diagnose a mental disorder: ***Saunders v The Public Trustee*** [202].

602 As to the requirement that the testator understand the nature of what he or she is doing and its effects, it is not necessary to establish that the testator was capable of understanding all the clauses of the will. An appreciation of the legal effect of every clause in a will is not necessary. However, it does need to be shown that the testator was capable of understanding the nature of the act of making a will and of understanding the 'practical effect of the central clauses' of the will: ***Nicholson v Knaggs*** [97]; ***Brown v Wade*** [2010] WASC 367 [95].

603 As to the onus and standard of proof, the party propounding the will bears the onus of satisfying the court on the balance of probabilities that the deceased had testamentary capacity at the time that the will was made: ***Bailey v Bailey*** [1924] HCA 21; (1924) 34 CLR 558, 570.

604 If the propounder of a will proves that the will is regular on its face and has been duly executed (that is, signed by the testator and two witnesses) a presumption arises that the testator had testamentary capacity: ***Fisher v Kay*** [2010] WASC 160 [83]; ***Veall v Veall*** [2015] VSCA 60 [168]. In these circumstances the evidentiary burden shifts to the party challenging the will to point to circumstances that raise a suspicion that the testator did not have testamentary capacity: ***Veall v Veall*** [168]. If suspicious circumstances are established the onus is put back on the propounder of the will to satisfy the court that the testator had testamentary capacity: ***Veall v Veall*** [168]. The position was summarised by Gleeson CJ in ***Easter v Griffiths*** (289) (cited with approval in ***Saunders v The Public Trustee*** [158]) in the following terms (citation omitted):

> Where the evidence in a suit for probate raises a doubt as to testamentary capacity, there rests upon the plaintiff the burden of satisfying the conscience of the court that the testatrix had such capacity at the relevant time. If, following a vigilant examination of the whole of the evidence, the doubt is felt to be substantial enough to preclude a belief that the testatrix was of sound mind, memory and understanding at the time of execution of the will, probate will not be granted.

605 The courts have recognised that where a will has been professionally prepared on instructions and then explained by an independent and experienced solicitor to the maker of the will, it will be markedly more difficult to challenge its validity on the ground of lack of testamentary capacity (as well as on the ground of want of knowledge and approval): ***Veall v Veall*** [184]. However, there have been decisions in which courts have held that suspicious circumstances

have not been dispelled notwithstanding that a will has been read over to a testator by a solicitor before its execution: ***Veall v Veall*** [186]. Each of these decisions turns on their own facts.

Analysis and decision

606 At the time that the deceased executed the 2011 Will she was 91 years old, almost totally blind and had a very significant hearing impairment. In addition she had a cognitive impairment. The plaintiffs accept, correctly in my view, that these circumstances at least raise a suspicion that the deceased did not have testamentary capacity and that therefore they bear the onus of proving that the deceased did have testamentary capacity.

607 In relation to the issue of the deceased's cognitive impairment, and consistently with the evidence given by both Dr Lee and Dr De Felice, it is not in dispute between the parties that from 2007 the deceased suffered from a mild cognitive impairment, and that from 2010 the deceased had dementia. Given the absence of any dispute on the issue, and on the basis of the evidence of the various assessments of the deceased and the evidence of Dr Lee and Dr De Felice, I am satisfied that the deceased was from 2007 suffering from a mild cognitive impairment and that from 2010 she had dementia. However, and as I have pointed out above by reference to the relevant authorities, the fact that the deceased had dementia from 2010 and at the time that she executed the 2011 Will, while clearly relevant to the question whether she had testamentary capacity, does not of itself mean that the deceased did not in fact have testamentary capacity.

608 Against this background I turn to the questions that must be considered in deciding if the deceased had testamentary capacity.

609 The first question is whether the deceased understood the nature of the act of making the 2011 Will and its effects. It is not in dispute between the parties that the evidence to which I have referred, particularly the evidence of Mr Haynes, justifies a finding that the deceased did have this understanding. Indeed, and as I have already pointed out, both Dr Lee and Dr De Felice were of the opinion that she did so. In short, on the basis of all of the evidence and given that there is no dispute on the issue, I am satisfied that the decease did understand the nature of the act of making the 2011 Will and its effects.

610 The second question in deciding the issue of testamentary capacity is whether the deceased understood the extent of the property

of which she was disposing. Again, it is not in dispute between the parties that the deceased had this understanding. In any event, such a conclusion is supported by the evidence given by Mr Haynes as to the deceased's description of her property, Dr Bohmer's evidence of the deceased's description of her property, and the expert opinion evidence given by each of Dr Lee and Dr De Felice. On the basis of this evidence, and in light of the absence of any dispute on the issue between the parties, I am satisfied that the deceased did understand the extent of the property that she was disposing of at the time that she executed the 2011 Will.

611 The question which remains, and the question which is in hot dispute between the parties, is whether the deceased was, at the time of executing the 2011 Will and despite the fact that she had dementia, able to comprehend and appreciate the claims to which she ought give effect or, to use the words adopted by Dixon J in ***Timbury v Coffee*** (283) 'to weigh the claims which naturally ought to press upon her'.

612 In relation to this question the plaintiffs submit that the claims which the deceased was required to comprehend and appreciate were limited to the claims of her daughters Susan and Ainslie. I do not accept this submission. In my view it is clear from the authorities to which I have referred that the determination of the claims to which a person making a will ought to give effect, or in other words, which naturally ought to press upon him or her depends on the circumstances of the particular case. In my view, given that the deceased was deciding to leave her estate to her great grandchildren, the claims which naturally ought to have pressed upon her were not limited to the claims of her daughters, but extended to the claims of her grandchildren.

613 It is apparent from reading the defendants' Defence and Counterclaim dated 8 November 2016 in conjunction with their closing submissions, that they allege that there are a number of facts independent of the circumstances surrounding the making of the 2011 Will which, taken together, justify the conclusion that the deceased, at the time of executing the 2011 Will, did not comprehend and appreciate the claims to which she ought to give effect. It is convenient to begin the consideration of the question whether the deceased was, at the time of making the 2011 Will, able to comprehend and appreciate the claims of her daughters and grandchildren by addressing and dealing with the facts that are relied upon by the defendants in this regard.

614 One of the alleged facts is that in 2011 the deceased was 91 years of age, frail, in poor health and almost totally blind and deaf.

615 These matters are not in dispute. Moreover, although these matters are not of themselves determinative of the question whether or not the deceased was able to comprehend and appreciate the claims of her daughters and granddaughters, they are clearly relevant to the determination of the question.

616 Another of the facts alleged by the defendants is that the 2011 Will is itself irrational having regard to:

1. its exclusion of two generations of descendants of the deceased;
2. the dispositions made in the 1998 Will;
3. the deceased's previously expressed testamentary intentions; and
4. the statements made to Dr Bohmer by the deceased that she wanted to leave her estate to her great granddaughter Bethany.

617 I do not consider that any of the first three of the above identified matters provides a basis for concluding that the 2011 Will was irrational.

618 As to the exclusion of Ainslie from the 2011 Will, Ainslie had largely been excluded from the 1998 Will so the 2011 Will did not reflect a significant change in that regard. In addition, it is clear from the evidence that Ainslie was, for a significant number of years (between approximately 2002 and 2009), largely estranged from the deceased. Further, the deceased gave to Mr Haynes an explanation for excluding Ainslie from the Will, namely that she had helped Ainslie in the past by giving her a half share in the block in Dunsborough. The fact that the deceased's motivation for making this gift may have been, as Ainslie asserts in her statement (ex 101), to avoid her pension entitlements being reduced is not to the point. In these circumstances, the exclusion of Ainslie from the 2011 Will cannot, in my view, be described as irrational.

619 With respect to the exclusion of Susan from the 2011 Will, the evidence of Robyn, Susan and Meagan to which I have referred establishes that the deceased over time came to significantly resent Susan and Meagan for, among other things, taking steps to prevent her

from being released from residential care following her initial admission to SJGH Murdoch in 2006. It is also clear on the evidence that the deceased held a degree of resentment towards Susan as a result of Susan's refusal to live with her and look after her. Further, and similarly to the position that existed with respect to Ainslie, the deceased gave to Mr Haynes an explanation for excluding Susan from the 2011 Will, namely that she had helped Susan financially in the past. Part of this financial assistance consisted of the transfer by the deceased to Susan of the half share in the block in Dunsborough. In these circumstances, the exclusion of Susan from the 2011 Will, while perhaps harsh, cannot, in my opinion, be described as irrational.

620 I turn then to the grandchildren. As I have already indicated, the evidence establishes that the deceased over time came to resent Meagan for taking steps to keep her in residential care. This in itself might be said to provide a rational explanation for the deceased's decision to exclude her from the 2011 Will. In any event, the deceased, in giving her instructions to Mr Haynes, made reference to each of her five grandchildren and in doing so provided an explanation as to why they were being excluded from the 2011 Will, namely that she felt that they had all benefited from her in the past. Indeed, with the possible exception of Meagan she indicated to Mr Haynes how she had helped, directly or indirectly, each of her grandchildren in the past (and in respect to Meagan made the point that Susan had transferred to Meagan the half share in the Dunsborough block and that Ainslie had sold her half share in the block to Meagan). In these circumstances, I do not consider that the exclusion of the grandchildren from the 2011 Will can properly be described as irrational.

621 With respect to the terms of the 1998 Will, I do not consider that the fact that the dispositions under that will were different to the 2011 Will provides any basis for concluding that the 2011 Will was irrational. This is particularly so taking into account the matters to which I have just referred which provide an explanation for the deceased having excluded Ainslie and Susan from the 2011 Will.

622 As to the deceased's previously expressed testamentary intentions, it is clear from the evidence of Robyn, Susan and Meagan that the deceased had, at various times during 2006 to 2011, expressed differing views about how she was going to ultimately dispose of her estate. She had in the past said on one or more occasions that she was going to leave her estate to her great grandchildren, to her great granddaughter Bethany, to Robyn's daughters, and to Robyn and

Michael's children. However, I do not consider that the fact that the deceased had over the years made differing statements about who she was going to leave her estate to provides, in itself or together with the other matters advanced by the defendants, a basis for concluding that the 2011 Will was irrational. A person is entitled over time to change his or her mind about how they are going to dispose of their estate.

623 So far as the allegation of the irrationality of the 2011 Will is concerned, the remaining matter referred to by the defendants is the statement made by the deceased to Dr Bohmer when he assessed her on 6 September 2011 that she wanted to leave her estate to Bethany. This matter, which is of my view of more significance in dealing with the issue of the deceased's ability to comprehend and appreciate the claims of her daughters and granddaughters, is something that I will return to in due course.

624 Another of the alleged facts which the defendants point to as demonstrating that the deceased was not able to comprehend and appreciate the claims to which she ought to give effect is that from 2006 onwards the deceased was:

1. experiencing periods of severe depression, and exhibiting rude and aggressive behaviour towards her family and neighbours;

2. behaving violently towards Susan and Meagan;

3. showing progressively worsening states of confusion and forgetfulness; and

4. making threats to kill herself.

625 The defendants assert that all of these forms of behaviour on the part of the deceased were totally out of character.

626 I am not satisfied on the evidence to which I have referred that from 2006 onwards the deceased experienced periods of severe depression.

627 As to the assertion that the deceased was making threats to kill herself, the deceased did, as I have previously indicated, in 2007 express suicidal thoughts while she was at KIC. However, these thoughts were found by the psychiatrist to have been expressed out of frustration due to the fact that the deceased did not want to be placed in care and wanted to return home. This being the case I do not consider

the deceased's expression of the suicidal thoughts more than four years prior to the date on which she made the 2011 Will to be of any relevance to the question of her ability to comprehend and appreciate the claims to which she ought give effect.

628 I am, however, and as I have already indicated in dealing with the evidence of Susan, Meagan and Ainslie, satisfied that from 2006 the deceased did, on occasions, exhibit unusual and/or aggressive behaviour towards Susan and Meagan in particular. I am also, on the basis of the evidence of the various assessments of the deceased to which I have referred, as well as the evidence of Susan and Meagan, satisfied that the deceased did in the later years of her life, particularly from 2008 onwards, on occasion exhibit confusion and worsening problems with her memory. The fact that the deceased was exhibiting unusual and/or aggressive behaviours, confusion, and worsening problems with her memory is, I am satisfied, at least partially attributable to her cognitive deterioration, although I have no doubt that her behavioural issues were also in part the result of the resentment that she felt towards Susan and Meagan for trying to keep her in care and her deteriorating eyesight, deafness and physical health generally. In any event, the fact that the deceased was exhibiting unusual and/or aggressive behaviours, confusion and worsening problems with her memory in the years leading up to the time of the execution of the 2011 Will is clearly of relevance to the question whether the deceased, at the time of executing the 2011 Will, was able to comprehend and appreciate the claims to which she ought to give effect.

629 Another of the alleged facts which the defendants point to in support of their contention that the deceased was not able to comprehend and appreciate the claims to which she ought to give effect is 'the possibility' that she was in and around 2007 and 2008 experiencing paranoid delusions about her family members. The beliefs pointed to in this regard include the beliefs expressed by the deceased not only to Susan and Meagan but also during the assessment of her by Dr Wilson, geriatrician, in May 2008 (exhibit 34) to which I have already referred, to the effect that Susan and Meagan had been stealing from her, were not truly concerned about her safety while living at home alone, and were rather concerned about how she was dealing with her money and how she would distribute her assets when she died. To these beliefs can be added the deceased's belief regarding the staining of the unused mattress.

630 As I have already made clear, although I am not satisfied that the beliefs of the deceased to which I have just referred were paranoid delusions of a psychotic nature, I am satisfied that the beliefs were intense and unfounded. The fact that the deceased held these intense and unfounded beliefs, even though they were held a few years prior to the time that she made the 2011 Will is, in my view, of relevance to, and something that does need to be taken into account in determining, the question whether the deceased, at the time of executing the 2011 Will, was able to comprehend and appreciate the claims to which she ought to give effect.

631 Another of the alleged facts which the defendants point to as demonstrating that the deceased was not able to comprehend and appreciate the claims to which she ought to give effect is the conclusion expressed in the record of the ACAT assessment carried out in September and October 2006 (exhibit 62) that the deceased was 'no longer safe to live alone due to her dementia'. The defendants also point in this context to the deceased's other health issues as evidenced by this report.

632 I do not consider this assessment to be of any particular relevance to the assessment of the deceased's ability to comprehend and appreciate the claims to which she ought to give effect. The deceased did not have dementia in 2006. It therefore follows that I am not persuaded that it was no longer safe for the deceased to live alone at her home 'due to her dementia'. As to the other health issues that the deceased was dealing with at the time, and which impacted on her ability to live at home, they are irrelevant to the question of the deceased's ability in September 2011 to comprehend and appreciate the claims to which she ought to give effect in her will.

633 Another alleged fact which the defendants point to as indicating that the deceased was not able to comprehend and appreciate the claims to which she ought to give effect at the time that she made the 2011 Will is that Susan and Meagan were, on 28 September 2006, appointed as the deceased's joint and several attorneys. This is of course correct. However, the fact of the appointment is in my view of no relevance to the question of the deceased's ability to comprehend and appreciate at the time of making the 2011 Will the claims to which she ought to give effect. This is particularly so given that the deceased revoked the appointment on 27 September 2007 (which was only about four months after the deceased had been allowed to return home from KIC contrary to Susan and Meagan's wishes).

634 Another of the alleged facts pointed to by the defendants in this context is that following the ACAT assessment conducted on 4 April 2007 (exhibit 63) the deceased was 'again diagnosed as having dementia'. It is the case that the record of the ACAT assessment recorded dementia as one of the health conditions that impacted on the deceased's need for assistance. However, and as I have already stated, my finding is that the deceased did not have dementia in 2007. Given this finding, the 'diagnosis' of dementia at the time of the ACAT assessment is of no relevance to the determination of whether the deceased was able to comprehend and appreciate the claims to which she ought to give effect at the time that she made the 2011 Will.

635 Another of the alleged facts which the defendants rely upon as indicating that the deceased was not able to comprehend and appreciate the claims to which she ought to give effect at the time that she made the 2011 Will is that during 2006 and 2007 when Susan and Meagan were the deceased's attorneys under the enduring power of attorney, a total of approximately $45,000 was withdrawn from the deceased's bank account without the knowledge of Susan and Meagan for the benefit of Stevan. Indeed, the defendants allege that this sum of money was stolen from the deceased.

636 The fact that the money was withdrawn from the deceased's bank account is clearly established by the evidence to which I have referred. It is clear from the evidence of Susan and Meagan that in or around September or October 2007 the deceased did cash in her AMP insurance policy, arrange for the funds from the policy to be paid into her bank account, and then in effect give the funds to Stevan (either directly or by authorising for them to be used to his benefit). However, the evidence also reveals that this was done at a time when Stevan and his wife Samantha were spending a significant amount of time with the deceased and had assumed responsibility for assisting her with her finances. At the end of the day, I do not consider that the fact that the deceased made a decision to effectively gift this amount of money to Stevan in late 2007, something which she clearly recognised that she had done when she met with Mr Haynes in July 2011, provides a basis either by itself or in conjunction with other facts, for concluding that the deceased was not able to comprehend and appreciate the claims to which she ought to give effect at the time that she made the 2011 Will.

637 As is apparent from what I have just said, I do not consider that there is any basis in the evidence for the defendants' allegation that the $45,000 was stolen from the deceased.

638 A further alleged fact which the defendants point to as indicating that the deceased was not able to comprehend and appreciate the claims to which she ought to give effect at the time that she made the 2011 Will is that by letter dated 12 May 2008 to the ACAT team at Fremantle hospital, the deceased's general practitioner, Dr Leonie Nulsen, outlined the deceased's medical condition and referred to the deceased as having a cognitive impairment (exhibit 33). Dr Nulsen did in her letter list as one of the deceased's current diagnoses 'impairment; cognitive'. In any event, and as I have already pointed out, I am satisfied that the deceased did have a cognitive impairment in 2008 which by 2010 had progressed to dementia. Further, and as I have also already indicated, I am satisfied that the deceased's cognitive impairment and dementia is a factor that is relevant to the question of whether she had the ability to comprehend and appreciate the claims to which she ought to give effect at the time of making the 2011 Will.

639 Another of the facts alleged by the defendants is that following the ACAT assessment on 23 June 2009 in which the deceased was described as being 'functionally ... alert and orientated, demonstrating insight into risk factors and cognitive function within normal range' (exhibit 37), the deceased was assessed as being entitled to low level residential care. The correctness of this assertion is not in dispute. However, I fail to see that this fact provides any support for the contention that the deceased did not in September 2011 have the ability to comprehend and appreciate the claims to which she ought to give effect in the 2011 Will.

640 A further alleged fact which the defendants point to as indicating that the deceased was not able to comprehend and appreciate the claims to which she ought to give effect at the time that she made the 2011 Will is that following a further ACAT assessment on 14 February 2011 (exhibit 42) the deceased was assessed as being entitled to the levels of care as set out in the Department of Health and Ageing's letter to the deceased dated 14 February 2011, that is, high level permanent residential care (exhibit 42). Again, and as is apparent from my above outline of the various assessments of the plaintiff, the correctness of this assertion is not in dispute. However, the basis for the assessment, as I have pointed out, was the defendant's physical disabilities, specifically her frailty, eyesight problems and lack of mobility. This being the case, I do not accept that the ACAT assessment of the deceased carried out on 14 February 2011 provides any support for the contention that the deceased did not, at the time of making the 2011

Will, have the ability to comprehend and appreciate the claims to which she ought to give effect.

641 Another of the alleged facts which the defendants rely upon in support of their contention that the deceased was not able to comprehend and appreciate the claims to which she ought to give effect at the time that she made the 2011 Will is that when she underwent the occupational therapy assessment on 15 April 2011 (exhibit 44) she demonstrated some confusion in relation to the number of her grandchildren and great grandchildren. Again, this fact is not in dispute. Further, I agree that the fact that the deceased exhibited this confusion approximately three months before her meeting with Mr Haynes is clearly of relevance to the determination of the question whether she was able to comprehend and appreciate the claims to which she ought to give effect at the time that she made the 2011 Will.

642 So that deals with the facts unrelated to the actual making of the 2011 Will which the defendants assert justify the conclusion that the deceased lacked the ability to comprehend and appreciate the claims to which she ought to give effect at the time of making the 2011 Will. Further, and as is apparent from what I have said, I accept that a number of the above identified facts do bear upon the question whether the deceased lacked the ability to comprehend and appreciate the claims to which she ought to give effect at the time of making the 2011 Will. Therefore the question becomes whether by reason of these facts, considered in combination with each other, I should fail to be satisfied that the deceased, at the time of executing the 2011 Will, was able to comprehend and appreciate the claims to which she ought give effect, that is, the claims of her daughters and grandchildren.

643 It is, I think, necessary at this point to turn to the evidence as to the circumstances surrounding the actual making of the 2011 Will, commencing with the evidence of Mr Haynes.

644 I have already set out in detail Mr Haynes' evidence. It is not necessary for me to do so again. It suffices for me to say at this juncture that it is apparent from Mr Haynes' evidence that during his meeting with the deceased the deceased, among other things, did the following:

1. Identified her two children and her five grandchildren;

2. Expressed the view that she had helped both of her daughters and explained why she was of this view;

3. Expressed the view that she had helped her grandchildren and, with the possible exception of Meagan, explained why she was of this view (although she did point out that Susan had transferred her half share in the Dunsborough block to Meagan and that Ainslie had sold her half share in the block to Meagan);

4. Stated that she felt that her daughters and grandchildren had all benefited from her one way or the other and that she therefore wanted to secure her estate to help her great grandchildren;

5. Expressly stipulated that only her biological great grandchildren were to benefit from her estate (thus revealing that she had in contemplation that some of her grandchildren had blended families);

6. Stated to Mr Haynes that she wanted all of the great grandchildren to have exactly the same and that the estate was to be divided equally between all eight great grandchildren; and

7. Instructed Mr Haynes to incorporate into the will a declaration of her reason for not leaving the estate to her daughters.

645 In addition Mr Haynes, a solicitor who since 2006 had practised almost exclusively in wills, inheritance and probate matters, formed the view that the deceased, although elderly, was clear and coherent in her conversation with him, could understand what he was saying to her, and was clear in her instructions to him.

646 In my opinion the above referred to statements made by the deceased to Mr Haynes during the meeting on 15 July 2011 clearly demonstrated that as at that date she had the capacity to, and in fact did, consider the nature of the claims of those whom she was excluding from her will, namely her daughters and her grandchildren. In my view this is the only inference that can reasonably be drawn from the fact that she expressly referred to each of her children and grandchildren and explained why she was bypassing them in her will.

647 In arriving at this conclusion I do take into account the opinion of Dr Lee, whose evidence on the issue I prefer to that of Dr De Felice. As Dr Lee put the matter in her evidence, the deceased's instructions demonstrated a sophisticated understanding of her family structure and a cognitive capacity that would have allowed her to consider the implications of her wishes.

648 With respect to Dr De Felice's evidence, it is in my view clear from my above summary of his evidence that ultimately the real basis for his 'hesitation' in saying that the deceased did demonstrate testamentary capacity during her meeting with Mr Haynes on 15 July 2011 was that she was required to change her mind a number of times during the meeting as to who she was going to leave her estate to. I do not accept that the fact that the deceased was in reality required to change her initial instructions by reason of Robyn's refusal to be the sole beneficiary of her estate, and was then required to take into account Robyn's statement to the effect that it would be unfair to leave all of the estate to Bethany alone, in some way makes it less likely that she was able to comprehend and appreciate the claims of her children, grandchildren and all of her great grandchildren. To the contrary, in my view the fact that the deceased was apparently able to take on board the statements made by Robyn, and adapt her instructions to take account of these statements in light of the advice being given to her by Mr Haynes, further demonstrates that she did have the necessary cognitive capacity to comprehend and appreciate the claims to which she ought to give effect.

649 Of course, the ultimate question is not whether the deceased had the capacity to comprehend and appreciate the claims to which she ought to give effect on 15 July 2011, but rather whether she had this capacity at the time that she executed the 2011 Will on 23 September 2011, although clearly my finding that she had this capacity on 15 July 2011 is of relevance in this regard. It is in this context that it is necessary to return to the evidence of Dr Bohmer.

650 Two things are readily apparent from Dr Bohmer's evidence. First, that the deceased did not, in response to whatever questions he asked of her, identify to him all of the members of her family. She did not identify three of her grandchildren, specifically the children of Susan. Nor did she identify a number of her great grandchildren. Second, the deceased expressed to Dr Bohmer the wish for all of her estate to be left to her great grandchild Bethany, which was contrary to the instructions that she had given to Mr Haynes a little over two months previously. Thus it would appear on the basis of Dr Bohmer's evidence that the deceased, at least on the date that Dr Bohmer assessed her, being 6 September 2011, was unable to recall all of her grandchildren and great grandchildren. It follows, in my view, that on the basis of Dr Bohmer's evidence the deceased, at least on the date that he assessed her, would not have been in a position to comprehend and

appreciate the claims to which she ought to give effect, namely the claims of all of her grandchildren and great grandchildren.

651 If the situation that one was left with was the meeting with Dr Bohmer I think there would be good grounds for being left with a doubt about the ability of the deceased to comprehend and appreciate the claims to which she ought to give effect at the time that she executed the 2011 Will. However, this is not, of course, the position. The evidence also includes the evidence given by Mr Haynes as to his meeting with the deceased on 22 September 2011, the day the deceased signed the will that was in precisely the same terms as the 2011 Will (which she signed on the following day and which incorporated the handwritten amendment that had been made by Mr Haynes to the document he had with him when he met with the deceased the day before). Mr Haynes' evidence, which as I have already indicated I accept, was that at this meeting he read the will to the deceased slowly in stages. In particular he read cl 3(b) of the will and explained that this meant that everything that the deceased owned after payment of her debts would go to her great grandchildren in equal shares. He said that it was at this point that the deceased corrected him by telling him that her instructions had been that the estate was to be left to her biological great grandchildren.

652 In my view the reading of cl 3(b), and the deceased's statement that her instructions had been that the estate was to be left to her biological great grandchildren, is of significance. It is of significance because the deceased's statement that the estate was to be left to her biological great grandchildren clearly revealed an understanding of the clause and that she knew that she was excluding from the will her grandchildren. This is, in my view, the only inference that can follow from her statement to Mr Haynes.

653 Mr Haynes also gave evidence that he read the rest of the will, including the declaration, and that the deceased indicated that she understood and approved the will. In other words, on Mr Haynes' evidence the deceased indicated an understanding of the declaration which had been inserted into the will at her request. It necessarily follows from her stated understanding of the declaration that she had in mind that her two daughters were being excluded under the will.

654 Finally, it is also necessary to bear in mind in this context the evidence of Alyson which was to the effect that when she attended on the deceased on 23 September 2011 she would have read the 2011 Will

to the deceased one paragraph at a time, would have asked the deceased if she understood what had just been read to her, and would have looked for more than a 'nod' on the part of the deceased as an indication that she did understand what had been read to her.

655 In summary, when I take into account what the deceased said and what occurred at the meeting with Mr Haynes on 15 July 2011, what the deceased said and what occurred at the meeting between Mr Haynes and the deceased on 22 September 2011, Mr Haynes' assessment of the competence of the deceased at both of his meetings with her, what occurred during Alyson's and Natasha's attendance on the deceased on the day of the execution of the 2011 Will and the expert opinion evidence of Dr Lee, I am satisfied on the balance of probabilities that the deceased, when she executed the 2011 Will on 23 September 2011, had the capacity to, and did in fact, comprehend and appreciate the claims to which she ought to give effect at the time that she made the 2011 Will, specifically the claims of her children and grandchildren. I am satisfied of this fact despite the facts that I have identified above as bearing upon the determination of the deceased's testamentary capacity including her age and poor state of physical health, her behavioural changes and cognitive decline (confusion and worsening memory ultimately developing into dementia), her unfounded beliefs concerning members of her family specifically Susan and Meagan, her demonstrated confusion in April 2011 in relation to the number of her grandchildren and great grandchildren, and her statement to Dr Bohmer during the assessment on 6 September 2011 that she wanted to leave her estate to Bethany.

656 As is apparent from my above expressed conclusion I do not accept the expert opinion evidence of Dr De Felice that the deceased did not, at the time of executing the 2011 Will, have the ability to comprehend and appreciate the claims to which she ought to give effect. While I do not overlook the matters raised by Dr De Felice in support of his opinion that the deceased did not have this capacity, I am not, given the matters to which I have referred, persuaded by his reasoning. In particular, and as I have already stated, I do not accept that the fact that the deceased was required to change her instructions during the 15 July 2011 meeting in some way makes it less likely that she was able to comprehend and appreciate the claims of her children, grandchildren and all of her great grandchildren at the time that she made the 2011 Will.

657 In arriving at my conclusion that the deceased did have the ability to comprehend and appreciate the claims to which she ought to give effect at the time that she made the 2011 Will, I have not placed any weight on the opinion of Dr Bohmer that the deceased did have testamentary capacity. I have not done so because in my view the information that Dr Bohmer obtained from the deceased during his assessment of her did not provide a sufficient basis for him to arrive at the conclusion that he did with respect to her testamentary capacity. In this respect I agree with the views expressed by Dr De Felice in relation to the opinion expressed by Dr Bohmer.

658 Further, although as is apparent from what I have said I have, in arriving at my conclusion that the deceased did have the ability to comprehend and appreciate the claims to which she ought to give effect at the time that she made the 2011 Will, taken into account Alyson's evidence as to her interaction with the deceased on 23 September 2011, I have not placed any reliance on the evidence given by Alyson or Natasha to the effect that they would not have witnessed the signing of the 2011 Will if they had not been satisfied that the deceased did in fact understand and agree to the will. Both Alyson and Natasha testified that despite witnessing wills on numerous occasions there had never been an occasion when they had visited someone for the purpose of witnessing the signing of a will and had formed the view that the person did not have the capacity to make the will. This being the case, and although I am satisfied that both Alyson and Natasha gave honest evidence to the best of their ability, I am not confident that any assessment that either of them might have made of the deceased at the time of witnessing the deceased's signing of the 2011 Will would have been particularly discerning or vigorous in nature. It is for this reason that I have not placed any weight on this aspect of their evidence in coming to the conclusion that I have.

659 As is apparent from what I have already said, I have not overlooked the occupational therapy assessment of the deceased conducted on 15 April 2011 during which the deceased demonstrated some confusion about the number of her grandchildren and her great grandchildren (exhibit 44). However, whatever confusion the deceased demonstrated on that date I am, for the reasons I have expressed, satisfied that the deceased was cognisant of all of her grandchildren and her great grandchildren at the time of executing the 2011 Will.

660 In summary, for the reasons that I have stated, I am satisfied that the deceased did have testamentary capacity at the time of executing the 2011 Will.

Did the deceased know and approve of the contents of the 2011 Will and its effect?

Knowledge and approval - applicable legal principles

661 In addition to proving that the deceased had testamentary capacity, the propounder of a will must also prove that the deceased knew and approved of its contents. This requirement is conceptually distinct from testamentary capacity and must not be conflated with testamentary capacity. As was stated by Santa Maria JA in ***Veall v Veall*** [173] (citations omitted):

> 'Knowing and approving of the contents of one's will is traditional language for saying that the will "represented [one's] testamentary intentions" '. 'Testamentary capacity' and 'knowledge and approval' are distinct concepts. The former is a necessary but not a sufficient condition for the establishment of the latter.

662 As is the case with testamentary capacity, if the propounder of a will proves that a will is regular on its face and is duly executed, a presumption arises that the testator knew and approved of the contents of the will: ***Fisher v Kay*** [85]; ***Veall v Veall*** [169]. As with the presumption of testamentary capacity, the presumption of knowledge and approval can be displaced by circumstances giving rise to a suspicion that the testator might not have appreciated the contents of the will and approved them: ***Veall v Veall*** [169]. The burden then shifts back onto the propounder of the will who must adduce affirmative proof that the testator knew and approved of the contents of the will: ***Veall v Veall*** [169]. In the end result, if the court is not satisfied that the will does contain the real intention of the testator, the court is bound to pronounce its decision that the will is not entitled to probate: ***Nock v Austen*** (1918) 25 CLR 519, 528; ***Vernon v Watson; Estate Clarice Isabel Quigley Dec'd*** [2002] NSWSC 600 [2] - [9].

663 When considering if there are circumstances that give rise to a suspicion that the testator might not have known and approved of the contents of a will, the court looks at a number of factors including the circumstances surrounding the preparation of the will, whether a beneficiary was too involved in the preparation of the will, the extent of the physical and mental impairment, if any, of the deceased, whether the will in question constitutes a significant change from a prior will,

whether the lawyer or person who prepared the will takes a benefit, and whether the propounded will generally seems to make testamentary sense: ***Tobin v Ezekiel; Estate of Lily Ezekiel*** [2011] NSWSC 81 [96] - [111]; ***Veall v Veall*** [173]; ***The Estate of Juliana Voros; Cooney & Ors v Cherry*** [2016] NSWSC 1603 [135].

664 A circumstance that may give rise to a suspicion that the testator may not have known and approved of the contents of a will include the situation where the will itself has not been produced for a significant period: ***McKinnon v Voigt*** [1998] 3 VR 543, 552.

Analysis and decision

665 For the same reasons as I have already outlined in dealing with the issue of the deceased's testamentary capacity, the plaintiffs, correctly in my view, accept that they bear the onus of proving that the deceased did know and approve of the contents of the 2011 Will.

666 In support of its contention that the deceased did not know and approve of the contents of the 2011 Will the defendants point to all of the above identified facts and circumstances which they assert justify the conclusion that the deceased did not have testamentary capacity. However, it is apparent from reading the defendants' Defence and Counterclaim in conjunction with their closing submissions, that they allege that there are a number of additional facts and circumstances which provide further support for the conclusion that the deceased did not know and approve of the contents of the 2011 Will. The defendants contend that a consideration of all of these facts and circumstances in combination with each other 'excite suspicion that the terms of the 2011 Will may not have been fully known to the deceased or understood by her in September 2011': Defence and Counterclaim, [4(a)].

667 It is again convenient to commence my consideration of the question whether the deceased knew and approved of the contents of the 2011 Will by addressing each of the additional alleged facts relied upon by the defendants in this regard.

668 The first of the alleged facts is that five of the seven eligible beneficiaries under the 2011 Will are children of the plaintiffs. The alleged fact is itself incorrect. The true position is that six of the eight eligible beneficiaries under the 2011 Will are children of the plaintiffs. In any event, for reasons that are apparent from what I have said in concluding that the deceased was at the time of executing the will able to comprehend and appreciate the claims to which she ought to give

effect, I am satisfied that the deceased knew that under the 2011 Will six of the eligible beneficiaries were the children of the plaintiffs and that she approved of this. I do not consider that the fact that six of the eligible beneficiaries under the 2011 Will were children of the plaintiffs provides any support for the conclusion that the deceased did not know and approve of the contents of the 2011 Will.

669 The defendants' next point to circumstances surrounding the preparation of the 2011 Will. Specifically, it is said that the circumstances surrounding the preparation of the 2011 Will were as follows:

1. Robyn had by 2011 obtained from the deceased an Enduring Power of Attorney in the knowledge of the existing Enduring Power of Attorney in favour of Susan and Meagan and in circumstances where Susan and Meagan were never notified that their Enduring Power of Attorney had been revoked or withdrawn;

2. Robyn arranged for Mr Haynes to prepare the 2011 Will;

3. Robyn introduced the deceased to Mr Haynes when he attended at Anchorage on 15 July 2011 and remained with the deceased and Mr Haynes for at least a short time thereafter;

4. At the meeting Mr Haynes took instructions from the deceased for the preparation of the 2011 Will;

5. Mr Haynes thereafter sought a medical opinion as to the deceased's testamentary capacity from Dr Bohmer and by his report dated 6 September 2011 Dr Bohmer set out what the deceased had told him about her assets and that it was her wish to leave all of her assets to her great granddaughter Bethany;

6. Bethany is Stevan's daughter; and

7. The 2011 Will was executed by the deceased approximately nine weeks after Mr Haynes' obtained the deceased's instructions and over two weeks after the deceased had told Dr Bohmer how she wanted to dispose of her assets in her will.

670 As is apparent from what I have already said, the above outlined circumstances surrounding the preparation of the 2011 Will are not in dispute. However, and for reasons that are apparent from what I have

said in deciding that the deceased had the capacity to comprehend and appreciate the claims to which she ought to give effect, I do not consider that the sequence of events as outlined provides any basis for concluding that the deceased did not know and approve of the contents of the 2011 Will at the time that she signed it. Of particular relevance in this context, in my view, is the evidence of Mr Haynes as to what occurred at his meeting with the deceased on 22 September 2011.

671 The next alleged fact which the defendants point to as supporting the conclusion that the deceased did not know and approve of the contents of the 2011 Will is that the 2011 Will constituted a significant change to the 1998 Will in that the principal beneficiaries of the 1998 Will were Susan and Ainslie.

672 It is, I think, a little misleading to suggest that Ainslie was a principal beneficiary under the 1998 Will. Under the 1998 Will the vast majority of the deceased's estate was left to Susan. In any event, for the reasons that I have already given in rejecting the defendants' contention that the differences between the 1998 Will and the 2011 Will provide a basis for concluding that the 2011 is irrational, I do not consider that the fact that Susan and Ainslie were the beneficiaries under the 1998 Will provides a basis for concluding that the deceased did not know and approve of the contents of the 2011 Will.

673 The next alleged fact which the defendants point to as supporting the conclusion that the deceased did not know and approve of the contents of the 2011 Will is that the principal beneficiaries in the 2011 Will are different to the principal beneficiary who the deceased told Dr Bohmer she wished to leave all her assets to, namely Bethany. For reasons that are apparent from what I have said in dealing with the question of whether the deceased was able to comprehend and appreciate the claims to which she ought to give effect, I do not consider that the fact that the deceased told Dr Bohmer that she wanted to leave her estate to Bethany provides a basis for concluding that she did not know and approve of the contents of the 2011 Will at the time that she signed it. Again, I consider that the evidence of Mr Haynes as to what occurred at his meeting with the deceased on 22 September 2011 to be of particular significance in this regard. As I have already pointed out, when Mr Haynes attended on the deceased on 22 September 2011 he read the document that became the 2011 Will to the deceased in stages and the deceased indicated her understanding of the clauses of the document. In these circumstances, and given my finding that the deceased had testamentary capacity, there is no basis

for concluding from what the deceased said to Dr Bohmer that the deceased did not know of and approve of the contents of the 2011 Will at the time that she signed it.

674 Another of the alleged facts which the defendants put forward in support of their contention that the deceased did not know and approve of the contents of the 2011 Will is that Robyn did not disclose the details of the 2011 Will to Susan, Ainslie or Meagan for over two years after the deceased's death. This is the position and I have already referred to Robyn's explanation for her conduct in this regard, namely that she did not tell Susan, Ainslie and Meagan about the 2011 Will because they were not named in the will.

675 I note that as part of contending that Robyn's failure to disclose the details of the 2011 Will to Susan, Ainslie and Meagan for a significant period of time after the deceased's death justifies the conclusion that the deceased did not know and approve of the contents of the 2011 Will, the defendants point to the failure of the second plaintiff Michael to give evidence. The defendants assert that Michael could have given evidence as to why he and Robyn did not inform Susan, Ainslie and Meagan of the terms of the 2011 Will earlier than they did, and that the unexplained failure of Michael to give evidence on this issue justifies the drawing of the inference that his evidence would not have assisted his and Robyn's case in relation to this issue: ***Jones v Dunkel*** [1959] HCA 8; (1959) 101 CLR 298, 321 - 322.

676 The decision in ***Jones v Dunkel*** is authority for the proposition that the unexplained failure by a party to call a witness may, not must, in appropriate circumstances lead to an inference that the evidence of the uncalled witness would not have assisted the party's case. The rule only applies where a party is 'required to explain or contradict something': ***Jones v Dunkel*** (321 - 322); ***Schellenberg v Tunnel Holdings Pty Ltd*** [2000] HCA 18; (2000) 200 CLR 121 [51] - [53]. Whether a party is required to explain or contradict something depends on the issues in the case as thrown up in the pleadings and by the course of the evidence. If there is no issue between the parties on the matter there is nothing to answer.

677 I accept that Michael could have given evidence in relation to why he and Robyn did not inform Susan, Ainslie and Meagan of the terms of the 2011 Will at an earlier point in time than they did. Moreover, no evidence was adduced at trial explaining why Michael was not called to give evidence. The issue of why Robyn delayed in

informing Susan, Ainslie and Meagan of the terms of the 2011 Will and the inference to be drawn from her conduct in this regard was one that was 'thrown up' by the pleadings and the evidence adduced at trial. In these circumstances I accept that the inference to be drawn from the failure of Michael to give evidence on this point is that his evidence would not have assisted his and Robyn's case, or more specifically, would not have provided any positive support to Robyn's evidence about her reasons for not notifying Ainslie, Susan and Meagan about the 2011 Will until approximately two years after the deceased's death.

678 Despite my generally favourable view of Robyn as a witness, I am not satisfied that the reason given by Robyn in her evidence for not disclosing the details of the 2011 Will to Susan, Ainslie and Meagan for a significant period of time was the only reason for her failure to do so. I did not find Robyn's evidence on this discrete issue to be persuasive. Rather, I am satisfied, particularly when I take into account the inference that I draw from Michael's failure to give evidence, that another motivating factor for Robyn's conduct in this regard was that she believed that Susan, Ainslie and Meagan would be upset about being overlooked by the deceased in the 2011 Will. Indeed, it would, in my view, be somewhat odd if Robyn did not hold such concerns given that Susan, Ainslie and Meagan were her auntie, mother and cousin respectively. In short, I find that the reasons for Robyn not disclosing the details of the 2011 Will to Susan, Ainslie and Meagan earlier than she did were that she did not believe that she was required to notify them of the 2011 Will given that they were not named as beneficiaries, and also that she believed that they would be upset about being omitted as beneficiaries under the 2011 Will.

679 The fact that I have found that Robyn was not as candid as she could have been about her motivation for not disclosing the contents of the 2011 Will to Susan, Ainslie and Meagan at some point prior to the time at which she ultimately did so does not, however, support a finding that the deceased did not know and approve of the contents of the 2011 Will. To the contrary, it necessarily follows from my finding as to the reasons for Robyn's conduct in not disclosing the details of the 2011 Will to Susan, Ainslie and Meagan earlier than she did, that I am also satisfied that Robyn's conduct in this regard was not motivated by, and is not indicative of, some suspicion on Robyn's part that the deceased did not know and approve of the contents of the 2011 Will. Consequently, I am also satisfied that Robyn's conduct in not disclosing the details of the 2011 Will to Susan, Ainslie and Meagan for a significant period of time does not provide a basis for concluding that

the deceased did not know and approve of the contents of the 2011 Will.

680 So far as the other facts relied upon by the defendants are concerned, that is the facts which the defendants advance in support of their assertion that the deceased was not able to comprehend and appreciate the claims to which she ought to give effect, the remarks that I have already made in relation to each of these facts in dealing with the issue of the deceased's testamentary capacity apply equally to the assertion that they provide a basis for finding that the deceased did not know and approve of the contents of the 2011 Will. In particular, given my finding that the deceased did have the capacity to, and did in fact, comprehend and appreciate the claims to which she ought to give effect at the time of signing the 2011 Will, I do not consider that any of the facts put forward by the defendants in support of their contention that the deceased did not have this capacity, individually or collectively, provide a basis for concluding that she did not know and approve of the contents of the 2011 Will. In making this statement I am not overlooking the fact that testamentary capacity on the one hand, and knowledge and approval of the contents of a will on the other, are distinct concepts.

681 There are two further issues that I need to deal with before leaving the question of the deceased's knowledge and approval of the contents of the 2011 Will.

682 The first of these issues again relates to the failure of Michael to give evidence. The defendants submit that in accordance with the principles in ***Jones v Dunkel*** I should draw an inference that Michael's evidence would not have assisted his and Robyn's case in relation to the following matters (defendants' closing submissions, [59]):

1. His observations of the deceased's health between 2006 and 2011;

2. Whether he agreed to be one of the executors;

3. What he received from the deceased during her lifetime;

4. When and how he found out about the terms of the 2011 Will;

5. What his involvement was in the preparation of the 2011 Will that by its terms has his four children as beneficiaries;

6. What he knows or knew about money allegedly being stolen from the deceased; and

7. What he knows about the present whereabouts of Stevan's two children who between them have an entitlement as beneficiaries under the 2011 Will.

683 The defendants submit that if the contended for inference is drawn this adds yet 'another suspicious circumstance' surrounding the issue whether the deceased knew and approved of the contents of the 2011 Will: defendants' closing submissions, [60].

684 The plaintiffs' brief submission in response to the defendants' contention is that they accept that the failure to call Michael is unexplained and that the evidence would not have assisted their case, but not that the failure to call Michael creates a suspicious circumstance.

685 I turn to deal with each of the matters in respect of which the defendants assert I should draw the inference that Michael's evidence would not have assisted his and Robyn's case.

686 As to the first of these matters, I accept that Michael could have given evidence of his observations of the deceased's health between 2006 and 2011. I also accept that I should infer from Michael's failure to give evidence that his evidence on this point would not have assisted his and Robyn's case. However, given that I have made findings on the evidence in relation to the deceased's health during this period which are broadly consistent with the defendants' contentions in this regard, I do not consider that the inference that Michael's evidence would not have assisted his and Robyn's case adds anything to the defendants' case on the issue of the deceased's knowledge and approval of the contents of the 2011 Will.

687 As to whether or not Michael agreed to be one of the executors under the 2011 Will, I do not consider that this is a matter which has any material bearing on the question whether the deceased knew and approved of the contents of the 2011 Will. Accordingly, I do not consider that the failure to call Michael to give evidence on this issue is of any significance.

688 With respect to the issue of what Michael received from the deceased during his life, the defendants did not dispute that Michael did receive at least what the deceased told Mr Haynes that she had given to

him, namely money for a car. There was therefore nothing for the plaintiffs to contradict in this regard. This being the case, I do not consider that the failure to call Michael to give evidence in relation to what he received from the deceased justifies the drawing of the inference contended for by the defendants. I do not consider that the failure to call Michael to give evidence on this point adds anything to the defendants' case on the question of the deceased's knowledge and approval of the contents of the 2011 Will.

689 As to the issue when and how Michael found out about the terms of the 2011 Will, clearly Michael could have given evidence about this matter. However, I do not see how any evidence he could have given on the issue would have any bearing upon the question whether the deceased knew and approved of the contents of the 2011 Will. I therefore do not see the failure to call Michael to give evidence on this issue to be of any significance.

690 As to the issue of what involvement Michael had in the preparation of the 2011 Will, it is clear on the evidence to which I have referred that Michael did not have any involvement in the preparation of the 2011 Will. I therefore do not consider that the failure to call Michael to give evidence on this issue to be of any moment.

691 With respect to the issue of the money allegedly stolen from the deceased, I have made findings on the evidence that the $45,000 obtained from the AMP policy was given by the deceased to Stevan as opposed to having been stolen from the deceased. I do not see, in light of the evidence that was adduced on this issue, how any evidence given by Michael could have had any material bearing on this issue. Moreover, I have also found, in accordance with the plaintiffs' case, that neither Susan nor Meagan stole any money from the deceased and that the deceased's beliefs in this regard were unfounded. Therefore, the failure to call Michael to give evidence in relation to the issue of the 'stolen' money is in my view of no significance.

692 As to the last of the matters pointed to by the defendants in this context, the question of where Stevan's children are is of no relevance to the question whether the deceased knew and approved of the contents of the 2011 Will. Accordingly, once again the failure to call Michael to give evidence on this point is in my view of no significance.

693 In summary, I am not persuaded that the non-calling of Michael to give evidence on the above identified matters provides any support

for the defendants' case that the deceased did not know and approve of the contents of the 2011 Will.

694 The second additional issue that I need to deal with relates to the defendants' passing reference in their closing submissions to the 'Noddy Syndrome' as discussed in ***Nicholson v Knaggs*** [382] - [387]. The defendants submit that the 'whole of the evidence' points strongly to the operation of the syndrome in the present case: defendants' closing submissions, [34].

695 The defendants did not adduce any medical evidence dealing with the concept of the 'Noddy Syndrome', let alone evidence suggesting that it operated in the present case. In these circumstances I do not accept the submission that I should find that the Noddy Syndrome operated in the present case and/or that it in any way provides a basis for finding that the deceased did not know and approve of the contents of the 2011 Will.

696 For the reasons I have stated I am satisfied that the deceased did, at the time of executing the 2011 Will, know and approve of its contents.

Was the deceased prevented by the undue influence of Robyn from exercising her free will when making the 2011 Will?

Undue influence - applicable legal principles

697 If a will is executed as a result of undue influence it will not be admitted to probate.

698 The party alleging undue influence must prove the claim: ***Veale v Veale*** [166].

699 To prove undue influence the party making the allegation must prove that the testator's mind was overborne by undue pressure or coercion: ***Wingrove v Wingrove*** (1885) 11 PD 81; ***Re The Full Board of the Guardianship and Administration Board*** [53]. The party alleging the undue influence must prove that there has been such undue pressure or coercion brought to bear on the testator that the will cannot be said to be the product of his or her conduct: ***Nicholson v Knaggs*** [111].

Analysis and decision

700 The defendants allege that given a number of circumstances surrounding the execution of the 2011 Will it is more probable than not that the only reason the deceased made the 2011 Will (and thereby in effect changed the 1998 Will) was because she was 'easily influenced by [Robyn] and did what [Robyn] told her to do for the sake of quietness': Defence and Counterclaim, [5(b)]. The circumstances surrounding the execution of the 2011 Will that the defendants point to in this regard are, in essence, as follows:

1. The deceased was 91 years of age, significantly cognitively impaired, and extremely physically debilitated and vulnerable;

2. The role that Robyn played during the meeting between the deceased and Mr Haynes on 15 July 2011; and

3. Robyn, 'by securing a benefit for her own children by the terms of the 2011 Will herself derived an indirect benefit given the terms of the testamentary trust in the 2011 Will given that she was also a co-trustee of that testamentary trust' (Defence and Counterclaim, [5(a)]).

701 As I have already indicated, there is no question that at the time of signing the 2011 Will the deceased was 91 years old, suffering from dementia, extremely physically debilitated and vulnerable. Despite these circumstances however, I do not accept the defendants' assertion that the deceased was prevented by the undue influence of Robyn from exercising her free will when making the 2011 Will. The evidence to which I have referred simply does not in my view provide any support for the suggestion that Robyn brought undue pressure or coercion to bear on the deceased to the extent that the 2011 Will cannot be said to have been the product of the deceased's conduct. In this regard I particularly note the following matters.

702 First, the deceased had in the past, well prior to Robyn assuming the role as her primary carer, spoken about changing her 1998 Will.

703 Second, it was the deceased who requested Robyn to contact a lawyer for her so that she could make a new will. Any decision about a new will being made was not instigated by Robyn.

704 Third, and as I have already explained in dealing with the assertion made by the defendants that the 2011 Will is irrational, the

evidence reveals that there were reasons for the deceased to have wanted to make a new will, and in particular for wanting to make a new will which excluded Susan and Ainslie as beneficiaries. The deceased's reasons may have been harsh, but that is not to the point. The point is that the evidence demonstrates that the deceased did have reasons for changing her will so as to exclude Susan and Ainslie (and for that matter her grandchildren also).

705 Fourth, the evidence of Robyn, Susan and Meagan was that the deceased was a strong willed woman.

706 Fifth, there is simply nothing in the evidence of Robyn or Mr Haynes which supports the proposition that Robyn was during the meeting on 15 July 2011 acting in any sort of overbearing way. It was certainly not Mr Haynes' evidence that Robyn appeared to have any undue influence over the deceased during the meeting. To the contrary, and as I have found, Robyn was not present for a significant part of the meeting. In addition, when the deceased initially indicated an intention to leave all her estate to Robyn, Robyn expressly stated that she did not want that to occur. This conduct of Robyn is, in my view, inconsistent with the suggestion that she was bringing undue pressure or coercion to bear on the deceased.

707 It is of course the case that the deceased would appear to have taken on board Robyn's statements that she did not want the estate left to her, that she did not want the estate left to her on the basis that she could decide who to distribute it to, and that she did not think it was fair to the other great grandchildren for the deceased to leave all of her estate to Bethany. However, the fact that the deceased took on board these suggestions in my view falls well short of establishing undue influence on the part of Robyn. I do not accept the submission made on behalf of the defendants that the evidence reveals that the deceased was 'railroaded' by Robyn into deciding to leave her estate to her great grandchildren.

708 Seventh, on Robyn's evidence, which was not contradicted, once the deceased had met with Mr Haynes on 15 July 2011 she had no further involvement in the events leading to the preparation and signing of the 2011 Will. She did not discuss it further with the deceased.

709 Eighth, and following on from the previous point, Robyn was not present during the meeting between Mr Haynes and the deceased on 22 September 2011.

710 Ninth, the only real potential benefit that Robyn might derive under the 2011 Will is if she decides to exercise the advancement power under cl 4(e) in favour of one of her own children. However, the exercise of this power will always be subject to Robyn's overriding obligations as executor and trustee, and will also only be able to be exercised in conjunction with Michael, the other executor. In any event, the potential benefit is not one that came about as a result of any suggestion on Robyn's part. She did not ask to be the executor and trustee under the 2011 Will. This was the deceased's decision. Nor did Robyn have any knowledge of, or input into, the insertion of the advancement power into the terms of the 2011 Will. As she said when she gave her evidence, she does not really know what a trustee is.

711 For all of the above reasons, and despite the deceased's age, frailty, physical health issues, vulnerability and dementia at the relevant time, I am not satisfied that Robyn brought undue pressure or coercion to bear on the deceased such that it can be said that the 2011 Will was not the product of the deceased's own conduct. I am satisfied that the deceased's execution of the 2011 Will was not the result of undue influence on the part of Robyn.

Conclusion

712 For the reasons I have given I would make orders pronouncing the force and validity of the 2011 Will in Solemn Form.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

CP

ASSOCIATE TO THE HONOURABLE JUSTICE DERRICK

13 JUNE 2018