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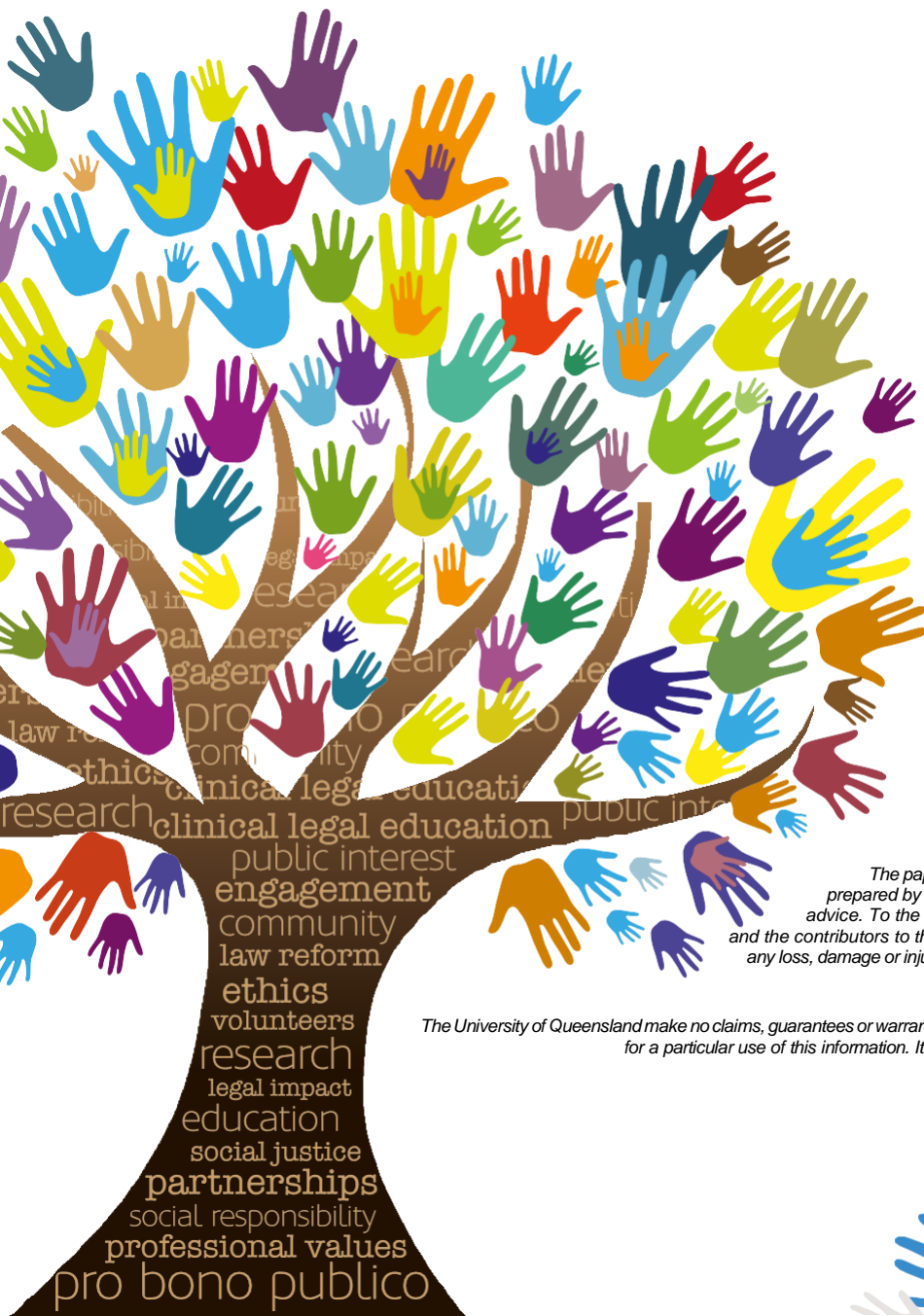
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Issa v Owens [2023] QSC 004

Date: 2023

Court/Tribunal: Queensland Supreme Court

Judicial Officer/Tribunal Member: Crowley J

Legislation: *Land Title Act 1994* (Qld)

Area of Law: Property Law

Legal Issue: Whether the plaintiff's son - who forged his mother's signature on a mortgage over her property - was fraudulent in this act; whether the plaintiff or third party purchasers retained the proprietary interest over the property.

Vulnerability Criteria: Lack of capacity; Culturally and linguistically diverse (CALD)

Facts: Ms Issa, an elderly woman (83 years old) had Alzheimer's and dementia, with English being her second language, and was divorced with three children. Ms Issa did not have capacity, and her daughter Ms Jennifer Halik acted as her litigation guardian during the proceedings.

Ms Issa and her former husband immigrated in the 1960s and opened several small businesses. They purchased two residential properties and following their divorce in 2006, Ms Issa held sole ownership of both residential properties. By that time, their son, Mr Karbotli, had also taken over the family's Gold Coast businesses, running them through a company, Mazop Pty Ltd. In 2018, Ms Halik found that her mother's property in Mermaid Waters had been mortgaged as security for a \$1,000,000 loan advanced to Mazop, without her mother's knowledge or approval. The Court found that Mr Karbotli had fraudulently forged his mother's signature on the mortgage documents and subsequently defaulted on the mortgage repayments. The purported witness to Issa's signature, Mr Stephen Picken (a former solicitor), admitted that he had not witnessed Ms Issa sign any of the relevant documents and had never met her in person. The mortgagee purported to exercise its power of sale, but Ms Issa registered a caveat. The property was sold at auction; however, the transfer was not completed, and the purchasers did not obtain the legal interest in the property



Legal Issue: Whether the plaintiff's son - who forged his mother's signature on a mortgage over her property - was fraudulent in this act; whether the plaintiff or third party purchasers retained the proprietary interest over the property.

Legal Conclusion: Crowley J held that Ms Issa was the victim of fraud and the mortgage over her property was null and void. Mr Karbotli perpetrated the fraud and Mr Picken enabled registration of the fraudulent mortgage. Ms Issa retained ownership over the property, and the purchasers were entitled to compensation from the State of Queensland under *Land Title Act 1994* (Qld) s 188(1).

Link to Judgment: [Issa v Owens & Orrs](#)



Wylie & Wylie [2021] QSC 210

Date: 2021

Court/Tribunal: Queensland Supreme Court

Judicial Officer/Tribunal Member: Lyons SJA

Legislation: *Powers of Attorney Act 1998* (Qld) - Section 87; *Succession Act 1981* (Qld) - Section 41

Area of Law: Real Property; Wills & Estates; Succession

Legal Issue: Whether the transfer of the deceased's real property to the defendant was the result of undue influence or unconscionable conduct on the part of the defendant; Whether further and better provision should have been made from the deceased's estate for the benefit of his other surviving children.

Vulnerability Criteria: Poor physical health; Capacity issues; Isolation

Facts: Mr Wylie (deceased) passed away at the age of 82. Prior to his death, he had health issues including metastatic bowel cancer, emphysema and chronic kidney disease. In September 2017, one of his daughters, Yvette (the defendant), moved into his home to assist him. On 28 March 2018, three months before his death, the deceased appointed Yvette as his attorney pursuant to an enduring power of attorney (EPA). One month prior to his death, he gave Yvette a half interest as joint tenant in his real property for 'natural love and affection'. On 8 May 2018, he made a new will which appointed Yvette as executor. After making some pecuniary legacies to a friend and his surviving children, Wendy and Steven (the plaintiffs), he left the bulk of his estate to Yvette.

Wendy and Steven argued that transfer of the half interest in the property to Yvette was void as a result of undue influence or unconscionable conduct by Yvette. They relied on *Powers of Attorney Act 1998* (Qld) s 87, which establishes a presumption of undue influence in transactions between a principal and their attorney. They also



applied for further and better provision from his estate pursuant to *Succession Act 1981*.

Wendy and Steven argued that the deceased was in a state of decline as he was becoming very frail, wheelchair-bound, and slurring his speech, and had difficulty with day-to-day matters and identifying people from early in 2018. They alleged that Yvette isolated him and prevented members of his family and his close friends from visiting or having telephone contact with him. They argued that Yvette was in a position of dominance over him and exercised control over his life, particularly his chattels. They argued that given his isolation and Yvette's dominance, the deceased was completely reliant on her assistance and for the provision of daily domestic services.

Yvette argued that the deceased was a determined and opinionated senior citizen who had capacity at all relevant times. She submitted that prior to creating the joint tenancy, the deceased received independent legal advice and provided letters to his solicitors, providing an explanation for leaving his entire estate to Yvette.

Ms Mehmet (a solicitor for the deceased), gave evidence that the deceased could not remember what was in his last will or in his bank account as early as January 2018. Ms McDonald (a nurse for the deceased) gave evidence that the deceased was on medication for long-term depression and was self-administering morphine for months before his death. Further evidence revealed that as early as January 2018, the deceased did not know what day it was, what was in his will, how much he had in his bank account and could not recall the changes he made with his solicitor on her previous visit. In April 2018, his condition deteriorated and in May 2018, he was in a very poor state. Evidence revealed that Yvette actively discouraged Wendy and the deceased's friends from visiting and that she would regularly tell them that the deceased was not available to see them or speak to them. There was also a consistent account from a number of independent witnesses that Yvette was aggressive to them during their visits to the deceased during the last months of his life. There was also a



consistent body of evidence that the deceased was isolated by Yvette from his friends and family in the nine months prior to his death.

Legal Issue: Whether the transfer of the deceased's real property to the defendant was the result of undue influence or unconscionable conduct on the part of the defendant; Whether further and better provision should have been made from the deceased's estate for the benefit of his other surviving children.

Legal Conclusion: Yvette's argument that the deceased was mentally alert to the end of his life, and had received independent legal advice about the transaction, was not borne out by the evidence. Thus, the presumption that Yvette's undue influence had induced his decision to make her a joint tenant was not rebutted. Ordinarily, such a finding would result in the transaction being set aside. However, Yvette subsequently borrowed money from CBA and a mortgage was registered against the property. As a result, there should be a declaration that the Yvette holds the property on trust for the estate. Given the court's conclusion regarding the question of undue influence, it was not necessary to consider the unconscionable conduct aspect of the claim.

Additionally, the plaintiffs submitted an application for further and better provision which is governed by Section 41 of the *Succession Act 1981* (Qld). It was determined that the plaintiffs met the threshold required to seek further provision under this section as their proportion of the estate was not adequate considering the plaintiffs' low incomes. It was also determined that the plaintiffs' had a 'strong moral claim' for further provision as they were both supportive of their father. This moral claim was particularly strong for Wendy, who was a carer for the deceased and visited him for many years.

When considering the financial position of Steven, Wendy, and Yvette, it was determined that each child had assets of similar value, similar expenses, and minimal incomes. In the Judge's view, a notional and just testator would distribute the estate equally amongst the children. However, Yvette had received multiple financial benefits before and after the death of the deceased (a sum of \$110,570). It was therefore



determined that the estate should be distributed equally amongst the children while accounting for the benefits that Yvette had already received.

Link to Judgment: [Wylie v Wylie](#)



Buchan v Young [2020] QDC 216

Date: 2020

Court/Tribunal: Queensland District Court

Judicial Officer/Tribunal Member: Long SC DCJ

Legislation: *Civil Proceedings Act 2011* (Qld)

Area of Law : Equity; Trusts

Legal Issue: Whether the plaintiff (mother/in law of married defendants) had transferred money to defendants by way of gift or pursuant to a joint endeavour; Whether it was unconscionable for the defendants to retain beneficial ownership of the whole property; and if so, whether the plaintiff was entitled to an equitable remedy.

Vulnerability Criteria: Social isolation

Facts: The plaintiff (a retiree of advanced years), was the mother of the first defendant (Gary), and mother-in-law of the second defendant (Kim).

In 2010, the defendants settled on the Sunshine Coast in a rental property. In 2014, the plaintiff expressed a desire to live with the defendants in Australia, which was embraced by the defendants. The parties (principally Kim) exchanged communications about the prospect of buying a property on the Sunshine Coast and the plaintiff expressed a desire to provide funds towards the purchase. The parties made an agreement to the effect that, at a later time, the plaintiff would come to live on the property to be acquired.

In 2016, the defendants contracted to purchase Kentish Road ('KR') Property, which the plaintiff had transferred the defendants money totalling AUD\$321,748 from the sale of her own residence in the UK. The funds were applied to purchase price of the KR property. The legal title to the property was registered solely in the name of the defendants.

The plaintiff came to stay with the defendants in Australia in April 2016, but an irretrievable breakdown of the relationship between the parties later occurred. The plaintiff claimed that this occurred due to events such as: the defendants chastising



the plaintiff for not cleaning the house properly; the defendants withdrawing their customary social interaction with the plaintiff and speaking in an unfriendly way; the defendants were dismissive about helping the plaintiff fill out sponsorship forms pertaining to her Australian visa.

Legal Issue: Whether the plaintiff (mother/in law of married defendants) had transferred money to defendants by way of gift or pursuant to a joint endeavour; Whether it was unconscionable for the defendants to retain beneficial ownership of the whole property; and if so, whether the plaintiff was entitled to an equitable remedy.

Legal Conclusion: It was held that the payments made by the plaintiff to the defendants supported the finding that the arrangement involved a common intention aligned with the joint endeavour to provide for the accommodation of the parties, rather than in the nature of a bare gift by the plaintiff. It was found that although the joint endeavour had failed, there was no attributable blame to any party. Furthermore, it was held that it was unconscionable for the defendants to retain full beneficial ownership of the KR Property without recognising any interest of the plaintiff, having regard to her contribution to the purchase of the property.

It was held in the circumstances that the defendants be ordered to repay the remaining contribution to the plaintiff for the purchase of Kentish Road, together with an allowance for interest as compensation for the present value of that contribution and period during which the plaintiff has not had the benefit of those funds.

Link to Judgment: [Buchan v Young](#)



Campbell v TL Clacher No 2 Pty Ltd [2019] QSC 218

Date: 2019

Court/Tribunal: Queensland Supreme Court

Judicial Officer/Tribunal Member: Jackson J

Legislation: N/A

Area of Law : Equity; Trusts

Legal Issue: Whether a youngest daughter exercised undue influence or unconscionable conduct over her father, resulting in him cutting off his two older daughters and removing them from any share of his property.

Vulnerability Criteria: Widowed, suffered from medical conditions including depression, hypertension, renal impairment and reflux, reliant on others for the management of daily affairs.

Facts: The applicants were the two elder daughters of Mr Thomas Clacher. The respondents were Mr Clacher, a long-standing family trust established by him, and a family trust established by his youngest daughter. After a lifetime otherwise characterised by close family relationships, in 2014 Mr Clacher (then in his late 80s) suddenly changed his financial arrangements through a series of transactions to exclude his two elder daughters and their families from any benefit.

Mr Clacher (as sole shareholder and director of the trustee company) removed the two excluded daughters as beneficiaries of the Clacher Family Trust. Later, the favoured daughter's husband typed two letters for Mr Clacher which stated that he would transfer properties and shares from the Clacher Family Trust to the Blumke Family Trust (the favoured daughter and her husband were directors and shareholders of the trustee company) of his own free will and that after his death, the excluded daughters would not have a claim to them. The properties, shares and cash were then transferred to Blumke Family Trust.



The excluded daughters claimed that the transactions were invalid and should be set aside. It was argued that the elderly man's cognitive abilities were impaired. Additionally, the excluded daughters alleged that the favoured daughter exercised undue influence over the elderly man by making false accusations that the excluded daughters wanted to put him in an aged care home and were mounting a legal case against him.

Legal Issue: Whether a youngest daughter exercised undue influence or unconscionable conduct over her father, resulting in him cutting off his two older daughters and removing them from any share of his property.

Legal Conclusion: As a result of the favoured daughter and her husband's conduct, the elderly man formed the view that the excluded daughters were trying to put him into an aged care home and had mounted a case against him. Thus, he believed that the way to protect himself from the threat was to transfer all of the property from Clacher Family Trust and all or most of his property to Blumke Family Trust.

The transactions were made invalidly and in breach of trust by reason of unconscionable conduct by the favoured daughter and her husband which resulted in the elderly man failing to give real and genuine consideration to the exercise of powers to distribute his income or property [at 342]. It was ordered that the favoured daughter re-transfer the relevant property held by her.

Link to Judgment: [Campbell v TL Clacher No 2 Pty Ltd](#)



Pinter v Pinter & Anor [2016] QSC 314

Date: 2016

Court/Tribunal: Queensland Supreme Court

Judicial Officer/Tribunal Member: Douglas J

Legislation: *Powers of Attorney Act* 1998 (Qld): ss 33(1), 43(2)(e), 87

Area of Law: Equity

Legal Issue: Whether there was a statutory presumption under s 87 of the *Powers of Attorney Act* 1998 (Qld) that Giacomina was induced to enter the transaction by the first defendant's undue influence.

Vulnerability Criteria: Cognitive Ability

Facts: In 2003, Eduardo Pinter and Giacomina Pinter transferred a block of flats they owned at Mooloolaba to one of their sons (the first defendant) and his wife (the second defendant) in exchange for a half interest in a new house that was to be constructed by the defendants. Giacomina executed the transfer of the Mooloolaba flats in her own right and in her capacity as attorney for Eduardo. Eduardo and Giacomina had each executed a power of attorney in favour of the other, the first defendant, and their other child (the plaintiff). The new house was built, and Giacomina and Eduardo then lived in it with the first and second defendants for several years and were cared for by them. Both Giacomina and Eduardo died in 2011.

The plaintiff claimed that there was an oral agreement that he and his brother would share ownership in the Mooloolaba property after their parents died. In addition, the plaintiff argued that the Mooloolaba transaction was presumed to have occurred due to undue influence by the first defendant and was liable to be set aside. This was supported by her age (approximately 75 years), emotional vulnerability, the fact that she was likely suffering from dementia and impaired cognition. The plaintiff also relied on *Powers of Attorney Act* s 87, which creates a presumption of undue influence in transactions between a principal and attorney.



Legal Issue: Whether there was a statutory presumption under s 87 of the *Powers of Attorney Act 1998* (Qld) that Giacomina was induced to enter the transaction by the first defendant's undue influence.

Legal Conclusion: The plaintiff's case was dismissed. The court found that medical evidence did not show that Giacomina, the first defendant, lacked capacity to look after her own interests when she signed the transfer. The court was not satisfied that the plaintiff had established that there was any actual undue influence involved in the transaction, or that Giacomina lacked the capacity to understand what she was doing or was in a position of special disadvantage in her dealings with the first defendant. She had also received independent legal advice. Therefore, the presumption of undue influence in s 87 of the *Powers of Attorney Act* was rebutted. Even if there had been an exercise of undue influence, it was not one where the defendants had acted fraudulently as they clearly believed they were acting in the interests of their parents

Link to Judgment: [Pinter v Pinter & Anor](#)



Jones v Jones [2014] QDC 150

Date: 2014

Court/Tribunal: Queensland District Court

Judicial Officer/Tribunal Member: Long SC DCJ

Legislation: *Property Law Act 1974* (Qld) - ss 11, 12(1); *Uniform Civil Procedure Rules 1999* (Qld) reg 658

Area of Law : Real Property; Equity; Trust and Trustees – Resulting Trust

Legal Issue: Whether the defendant had acted unconscionably in evicting the plaintiff and then selling the property; and if so, whether the plaintiff would be entitled to equitable relief.

Vulnerability Criteria: Widowhood; caring duties for grandchild

Facts: The plaintiff Hazel (79 years old at the time of proceedings) cared for her granddaughter Kelly for some years following her son and Kelly's father Darren's (the defendant) divorce from Kelly's mother.

When she initially took on care of Kelly, Hazel was living in her own home in Buddina but found it difficult to transport Kelly to and from school in Sippy Downs. Hazel claimed that, not wanting his daughter to move schools, Darren told her that if she sold her property and paid him \$100,000, he would allow her a life tenancy at his property in Sippy Downs. Hazel then sold her property at Buddina and paid \$100,000 to Darren. She lived in Darren's property from August 2002, until she was evicted in July 2008 when Kelly, by then aged 17, left the property.

Hazel also contended that, at Darren's suggestion, she falsely represented to Centrelink that the \$100,000 given to Darren only included a gift amount of \$10,000, and that the remaining sum was made in consideration of repayment of a loan, vehicle purchase and a loan to assist Darren with his divorce settlement payment. Hazel also received Rent Assistance Allowance from Centrelink dishonestly, with Darren's confirmatory declaration as landlord. Hazel explained she did these things at Darren's



direction as she was frightened of him; he struck her and she ended up in a garden bed; he treated her badly and had verbally insulted her; he was disrespectful and threatening and it made her feel sick.

After Hazel moved out, Darren sold the property and retained the entire proceeds of the sale. Hazel contended that a constructive trust arose in respect of the life tenancy. Hazel also contended the transfer of \$100,000 to Darren was an unconscionable transaction because of her special disadvantage. Hazel also contended that the undertaking by Darren (that she could remain at Sippy Downs for life upon payment of \$100,000) was not honoured and she had lost the benefit of life tenancy or interest. Darren contended that Hazel had made the voluntary decision to sell her own home, that the arrangement for her residence in Sippy Downs was mutually beneficial to the parties, and that Hazel had ample opportunity but did not take any independent advice about the transaction.

Legal Issue: Whether the defendant had acted unconscionably in evicting the plaintiff and then selling the property; and if so, whether the plaintiff would be entitled to equitable relief.

Legal Conclusion: The court had trouble readily accepting the evidence submitted by the parties as the fallout between them had happened more than a decade ago. Regarding the Centrelink issue, the court concluded that Hazel was a willing and knowing participant of the deception and that she ultimately did not present as a person who was completely and meekly susceptible to simple compliance to such influences by Darren.

However, it was found that the evidence provided by Hazel was sufficient to enable a finding that a constructive trust arose in order to defeat Darren's repudiation of his undertakings to her: at [28].



It was found that it was inherently unlikely that Hazel would have agreed to and made such a change to her established security and move to live at Sippy Downs property and pay Darren most of her financial resources, without concern for her position for the remainder of her life and therefore without there being an undertaking that she could live there for the remainder of her life. Furthermore, the court found Darren's denial and contrary explanations as to a different position unconvincing.

Since Darren had disposed of the property, a declaration that he held the property on constructive trust would no longer be effective. The court instead awarded equitable compensation for the loss of an ongoing right of life tenancy. It was also found that Hazel was entitled an award of interest on a compound basis for the period between 2008 and 2014.

Link to Judgment: [Jones v Jones](#)



Birt and Anor v The Public Trustee of Qld and Anor **[2013] QSC 13**

Date: 2013

Court/Tribunal: QSC

Judicial Officer/Tribunal Member: Ann Lyons J

Legislation: *Powers of Attorney Act 1998* (Qld)

Area of Law: Wills & Estates

Legal Issue: Whether the deceased's will should be set aside on the basis that she lacked testamentary capacity at the time she executed the will; whether the deceased was subject to undue influence.

Vulnerability Criteria: Impaired capacity

Facts: Mrs Brooks passed away on 22 January 2010 and was survived by her daughters Dale and Deborah (the first and second plaintiffs), and her son Bill (the second defendant). In September 2004, Mrs Brooks executed a will ('the 2004 Will') where she left her entire estate to Bill. Mrs Brooks' previous will was made in 1990 and left her estate to her surviving children in 'equal shares'. Dale and Deborah argued that the 2004 Will was not valid for two reasons. Firstly, because Mrs Brooks lacked testamentary capacity at the time she executed the 2004 Will. Secondly, because the will was the product of undue influence by Bill over Mrs Brooks.

In 2003 and 2004 Mrs Brooks' health deteriorated due to multiple strokes and she was receiving considerable daily assistance in her daily activities. Mrs Brooks experienced a marked decline in her mental functioning during 2003 and 2004 with the Guardianship and Administration Tribunal finding that she lacked capacity to manage her financial affairs. Additionally, Mrs Brooks was diagnosed with dementia. During this period, Bill resided with Mrs Brooks.

Dale gave evidence that she witnessed Bill taking Mrs Brooks' money, calling her a 'slut' and a 'liar' and exhibiting controlling behaviour over his mother. Dale further



testified that Bill disconnected Mrs Brooks' phone and told her that 'Dale is going to take all your money'.

Legal Issue: Whether the deceased's will should be set aside on the basis that she lacked testamentary capacity at the time she executed the will; whether the deceased was subject to undue influence.

Legal Conclusion: The court held that Bill was verbally abusive to his mother. While Bill managed to convince Mrs Brooks that Dale was taking over the house and removing her from the will, there was no evidence to show that he exercised undue influence which caused Mrs Brooks to change her will and leave her entire estate to him. The testamentary capacity test in *Banks v Goodfellow* states that it is essential that the person executing the will understands firstly the nature of his or her acts and consequences, the extent of the property he or she is disposing, the claims to which he or she ought to consider, and that no disorder of the mind is influencing the will and bringing about a disposal which would not have been made had the person been of a sound mind.

The court held that Mrs Brooks understood the nature and extent of her estate and who had a claim over it. However, the testamentary capacity test in *Banks v Goodfellow* was not satisfied as Mrs Brooks had a fixed belief that Dale would take her house. This fixed view resulted in the court concluding that she did not possess testamentary capacity when making the 2004 Will as this fixed belief poisoned her affections and perverted her sense of right. Her fixed and forceful view that she had to change her will and give it all to Bill meant that she did not actually understand the true nature of the will and when a will took effect. The plaintiffs were entitled to an order that the court reject the force and validity of the 2004 Will.

Link to Judgment: [Birt and Anor v The Public Trustee of Queensland and Anor](#)

Other Cases Referenced: *Banks v Goodfellow* (1870) LR 5 QB 549



R v Nielsen [2012] QSC 029

Date: 2012

Court/Tribunal: Queensland Supreme Court

Judicial Officer/Tribunal Member: Dalton J

Legislation: *Criminal Code Act 1899* (Qld) - section 311

Area of Law: Criminal law - sentencing

Legal Issue: Sentencing of Nielsen, who aided the suicide of the deceased

Vulnerability Criteria: Isolation, no relatives in Australia

Facts: Mr Frank Ward (deceased) was a seventy-six-year-old, 'isolated, elderly man' who had previously cared for his wife, who had multiple sclerosis, for some 20 years prior to her death. Mr Nielsen had a long relationship with the deceased but not a close friendship. In 2007 the deceased suffered a stroke and believed he was going to die. During this period, Mr Nielsen made considerable efforts to organise medical assistance and care for the deceased resulting in their relationship strengthening. The deceased made Mr Nielsen his Power of Attorney and the sole beneficiary of his will.

Over the two years between Mr Ward's stroke in 2007 and his death in 2009, Mr Nielsen contacted a pro-euthanasia group on the deceased's behalf. There was no doubt on the evidence that the deceased wished to take his own life, he was experiencing declining independence and a reduced quality of life. In the period immediately before Mr Ward's suicide, Mr Nielsen travelled to Mexico to obtain Phenobarbital, which he gave to Mr Ward.

Medical evidence showed that Mr Ward was killed by Phenobarbital. Mr Nielsen's personal financial benefit from the deceased's death was not his main motive but could not be ignored as there was a conflict of interest since he was the deceased's Power of Attorney and sole beneficiary of his will. At the time, Mr Nielsen had almost no money in the bank and a \$12,000 credit card debt



Legal Issue: Sentencing of Mr Nielson, who aided the suicide of the deceased.

Legal Conclusion: The court considered Mr Nielson's attitude to the offence nothing that there was no indication he understood the reality or seriousness of his conduct. He was also dishonest, which made it difficult to be clear about his motive, and lacked remorse. He was also the deceased's Power of Attorney and the sole beneficiary to the deceased's estate. Considering other cases, Mr Nielsen was sentenced to three years imprisonment for aiding suicide, of which six months would be served in custody.

Link to Judgment: [R v Nielson](#)



Peterson v Hottes [2012] QCA 292

Date: 2012

Court/Tribunal: Queensland Court of Appeal

Judicial Officer/Tribunal Member: Muir and Gotterson JJA and Henry J

Legislation: N/A

Area of Law: Real Property; Constructive Trusts

Legal Issue: Whether the respondent held the property on a constructive trust in proportion to the parties' contributions.

Facts: Diana Peterson (the appellant) was in her early 70s when she provided \$70,911.01 to her daughter Julianna Hottes (the respondent) to purchase a house with the intention of living there together. The purchase price of the house was \$278,000. When purchased, the property was to be in the sole name of the respondent so that she could obtain a first homeowner's grant. Mother and daughter lived there together from 2001 until their relationship broke down irretrievably in 2007 when Ms Peterson left the property. Ms Peterson claimed a beneficial interest in the property to reflect the contribution she had made to the purchase price on either a resulting trust or a constructive trust basis. Ms Hottes asserted it was a gift. At first instance it was held that upon the breakdown of the relationship, Ms Hottes became liable to repay the sum of \$70,911.01 to Ms Petersen as the primary judge held that the intention was to make a conditional gift rather than obtain a proportionate interest in the property. An appeal was brought to Queensland Court of Appeal on the basis that, inter alia, the primary judge erred in not finding the daughter Ms Hottes held the property on constructive trust in proportion to parties' contributions to the purchase of the property, despite finding that Ms Peterson made the payment pursuant to a joint endeavour to secure a right to reside at the property. The appellant submitted multiple grounds of appeal, and one was accepted.

Legal Issue: Whether the respondent held the property on a constructive trust in proportion to the parties' contributions.



Legal Conclusion: The Queensland Court Appeal found that the primary judge failed to have regard to the principle that a constructive trust “may be imposed regardless of actual or presumed agreement or intention to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle” (*Baumgartner*).

Further, equitable principle does not permit a party in a joint endeavour to retain the benefit of the relevant property to the extent that it would be unconscionable for him to do so (*Muschinski*). The problem with the primary judge’s initial order was that although each party made contributions to their joint endeavour, only the respondent will reap the benefit of any accretion in value of the property. Even if there was no valuation evidence, it is permissible for the court to conclude it is likely the property increased in value substantially since it was acquired; and would be appropriate for co-venturers to share in any accretion in value or bear any losses in proportion to their respective contributions. Thus, the order made initially was not an appropriate equitable remedy, as it was unconscionable for the respondent to retain full title to, and benefit of, the property and it should be declared that the respondent holds her interest in the property on trust for the appellant beneficially as to 25 per cent and for herself as to 75 per cent.

Link to Judgment: [Peterson v Hottes](#)

Other Cases Referred to: *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 148 per Mason CJ, Wilson and Deane JJ. *Muschinski v Dodds* (1985) 160 CLR 583 at 622.



Smith v Glegg [2004] QSC 443

Date: 2005

Court/Tribunal: Queensland Supreme Court

Judicial Officer/Tribunal Member: McMurdo J

Legislation: *Powers of Attorney Act 1998* (Qld) – sections 66 and 87

Area of Law: Equity; Trusts

Legal Issue: Whether the conveyance of the widow's house to the ultimate benefit of the widow's daughter was the result of the daughter's undue influence or breach of fiduciary duty.

Vulnerability Criteria: Widow, disability (vision impairment – 'legally blind', could not read), depression, high level of dependence on the defendant, socially isolated

Facts: In 2000, the plaintiff (Ms Smith) and her daughter (Ms Glegg), the defendant, went to a solicitor's office, where Ms Smith executed a transfer of her house in favour of Ms Glegg's son. At the time, Ms Glegg was also an attorney for her mother under an Enduring Power of Attorney granted in 1999. A year later the house was sold by Ms Glegg, acting as her son's attorney, and Ms Glegg used the sale proceeds for her personal benefit. Ms Smith gave evidence that she had transferred the property to avoid a retirement home bond, that the house was being transferred into Ms Glegg's name and that it would either be re-transferred back to her later, or if sold, that the sale proceeds would go to her. Ms Glegg argued that her mother intended the transfer to be an unconditional gift. Ms Smith sought equitable relief by arguing that the transaction was procured by undue influence, and that the transaction involved a breach of Ms Glegg's fiduciary duties to Ms Smith as her attorney.

Legal Issue: Whether the conveyance of the widow's house to the ultimate benefit of the widow's daughter was the result of the daughter's undue influence or breach of fiduciary duty.



Legal Conclusion: The court accepted that a presumption of undue influence arose under both *Powers of Attorney Act* s 87 (given that the transaction was between an attorney and principal) and the general law. There was ‘a very high level of dependence and trust in this relationship which makes the case for a presumption of influence a compelling one’: at [41]. This presumption was not successfully rebutted by Ms Glegg, especially as Ms Smith did not receive independent advice.

Ms Smith was totally dependent upon Ms Glegg’s assistance, and the existence of a fiduciary relationship was not disputed. Ms Glegg profited from sale of the home and was therefore liable to account for that sum or repay it as an equitable debt. Ms Smith was entitled to an equitable charge over the new home purchased by Ms Glegg to the amount Ms Glegg profited from the sale.

The house could not be restored as it was sold to a third party. Equitable compensation was available and ordered.

Link to Judgment: [Smith v Glegg](#)





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