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Contents

Black v Scotson [2019] QSC 272

Date: 2019

Court/Tribunal: Queensland Supreme Court

Judicial Officer/Tribunal Member: Ryan J

Legislation: *Evidence Act* 1977 (Qld); *Powers of Attorney Act* 1998 (Qld); *Succession Act* 1981 (Qld); *Uniform Civil Procedure Rules* 1999 (Qld)

Area of Law : Succession: Testamentary Capacity

Legal Issue: Did the deceased lack testamentary capacity or testamentary intention when executing his 2018 will?

Vulnerability Criteria: Physical injury, decline in cognitive ability, family influence

Facts: Mr McInally had been cared for by Mr and Mrs Black (his son-in-law and daughter respectively) for many years. Mr McInally had a fall in 2018 at the age of 86 and was admitted to hospital. In hospital, he signed his last will and testament (the 2018 will), revoking an earlier will from 2007. The 2007 will left his estate to his two daughters (Mrs Black and Ms Scotson) in equal shares, but the 2018 will (apart from a gift of $5,000 to his neighbour) left it to Mrs Black, Ms Scotson and Mr Black in equal shares. The 2018 will was prepared by Mr Black based on a conversation (instigated by Mr McInally) between Mr Black, Mrs Black and Mr McInally in late 2017. In that conversation, Mr McInally expressed a desire to thank those who helped him late in his life, namely, Mr Black and his neighbour. The will was later redrafted more formally by a solicitor. Mr McInally spoke to Carol Scotson prior to signing the will to inform her of the changes. Immediately before he signed the will, a witness read its contents to him very carefully to ensure that he understood it.

Following Mr McInally's death, Carol's daughter (the defendant), on behalf of Carol's estate, argued both that he did not have testamentary capacity to make the 2018 will and that it did not reflect his testamentary intention. In relation to testamentary intention, she raised (and the plaintiff accepted that there were) "suspicious circumstances" attending its execution. These suspicious circumstances were:

- Mr Black was involved in the preparation of the 2018 will, which added himself as executor and beneficiary;
- there was a mistake in the will, where Mr McInally's late wife Barbara was referred to instead of his dog, Mollie;
- Mr McInally did not know the solicitor who drafted the will, but Mr and Mrs Black did know him. The solicitor was also not present at the execution of the will;
- Mr McInally died within three weeks of executing the will;
- the 2018 will changed the long-standing scheme of dividing an estate equally between children, should his wife predecease him.

Legal Issue: Did the deceased lack testamentary capacity or testamentary intention when executing his 2018 will?

Legal Conclusion: The court concluded that Mr McInally had both testamentary capacity and intention regarding the 2018 will and that it was therefore valid. The evidence that the court considered included medical records, witness accounts (Mr McInally's doctors and the witnesses to the will on the day of signing) and Carol Scotson's "File Note" that showed her concerns about her father's understanding of the will. Although medical evidence demonstrated that his mental power was "below the ordinary standard", and he had displayed drowsiness and vagueness from time to time during his hospital admission, he was equal to the task of executing a will, and thus he had testamentary capacity. His conversation with Carol Scotson prior to the execution of the will demonstrated that he appreciated the effect of his testamentary act, as she may have been upset about her reduced share. The witness thoroughly went through the entire will until he was satisfied that Mr McInally understood prior to signing, and the court placed much weight on the witness's account. These (and other) matters also demonstrated that the 2018 will reflected his testamentary intention. Thus, the 2018 will was valid.

Link to Judgment: ***Black v Scotson*** **[2019] QSC 272**

Frizzo v Frizzo [2011] QSC 107

Year: 2011

Court/Tribunal: Queensland Supreme Court

Judicial Officer/ Tribunal Member: Applegarth J

Legislation: N/A.

Legal Issue: Did the deceased have testamentary capacity at the time she made the 2006 will?

Area of Law: Succession Law; Wills & Estates

Vulnerability Criteria: Medical issues; subsequent episodic delirium

Facts: Mrs Lydia Frizzo, an elderly widow, lived in a rural home by herself. Ms Marshall, a professional personal carer, tended to her for five days a week and every second weekend. Ms Marshall, described Mrs Frizzo as "on the ball".

On 20 January 2006, Mrs Frizzo fell and broke her hip. She was 81 years of age at the time. In hospital, Mrs Frizzo suffered an acute myocardial infarction (heart attack) and congestive cardiac failure. At various times in the following days, Mrs Frizzo suffered from episodic delirium. She received medical treatment, including analgesics and antipsychotic medication. Mrs Frizzo was advised of the risks of operating on her hip by medical staff, including the possibility that she might not survive the surgery.

By 27 January 2006, Mrs Frizzo's physical condition had improved such that medical staff advised that she should undergo surgery. The surgery was scheduled for 28 January 2006. On the morning of 28 January 2006 (during pre-operative procedures), Mrs Frizzo informed the doctors and nursing staff that she wished to change her will ('the 2003 will'). The 2003 will favoured her youngest son, Shane. After being informed of Mrs Frizzo's desire to change her will, doctors and the Nurse Madden assessed Mrs Frizzo's capacity to make a new will, and concluded that she did have capacity.

The terms of the will ('the 2006 will') were recorded by one of the doctors. In the 2006 will, Mrs Frizzo gave each of her children an equal share of her estate and expressed that she wanted to change the 2003 for two reasons. First, she regarded it as unfair to some of her children. Second, by leaving the property equally to her children, she wanted to avoid fights amongst them. The surgery on 28 January 2006 was successful. Mrs Frizzo died on 23 February 2008. Following this, a dispute arose over whether Mrs Frizzo had capacity to make the 2006 will.

The plaintiffs (including Shane), argued that there was a strong likelihood that Mrs Frizzo was suffering from delirium on the morning of 28 January 2006 and that she therefore did not have testamentary capacity at the time of making the 2006 will.

Legal Conclusion: Mrs Frizzo did not suffer from delirium on the morning of 28 January 2006 and had capacity to make the 2006 will. Consequently, the 2006 will was valid.

The conclusion that Mrs Frizzo did not suffer from delirium on the morning of 28 January 2006 was based on evidence given by nurses and doctors who assessed Mrs Frizzo on the morning of 28 January 2006. This evidence established that Mrs Frizzo spoke clearly and coherently in relation to the operation that she was to undergo, about her desire to change the 2003 will, the manner in which she wished to change the 2003 will, and the reasons for doing so.

The finding on delirium did not conclude the issue of testamentary capacity. The conclusion that Mrs Frizzo had testamentary capacity on the morning of 28 January 2006 rested on several factors. First, the differences between the 2006 will and the 2003 will were rational and explained by the explanation given in the 2006 will and other surrounding circumstances including the nature of her (somewhat strained) relationships with her children between 2003 and 2006. Second, the question of changing her will was not something that Mrs Frizzo suddenly confronted on the morning of 28 January 2006. Extrinsic evidence indicated that Mrs Frizzo had been

considering changing the 2003 will since 14 December 2005. Third, Mrs Frizzo's mild cognitive impairment was not of such a nature as to deprive her of testamentary capacity. The law does not require a "perfectly balanced mind". Fourth, the drugs which had been administered to Mrs Frizzo, did not affect her testamentary capacity on the morning of 28 January 2006. Fifth, Mrs Frizzo appreciated the significance of the legal act upon which she was to embark, namely making a new will. Sixth, Mrs Frizzo was aware, at least in general terms, of the nature and extent of her assets, principally rural property worth many millions of dollars and a substantial amount in cash. Seventh, Mrs Frizzo was aware of those who may reasonably be thought to have a claim upon her estate. Eighth, Mrs Frizzo had the ability to evaluate, and discriminate between, the respective strengths of the claims of her children.

Link: **Frizzo v Frizzo [2011] QSC 107**

Ruskey-Fleming v Cook [2013] QSC 142

Year: 2013
Court/Tribunal: Queensland Supreme Court
Judicial Officer/ Tribunal Member: Mullins J
Legislation: N/A
Area of law: Succession Law; Wills & Estates
Legal Issue: Did the deceased have testamentary capacity?
Vulnerability Criteria: Dementia/Alzheimer's; 'occasional delusions' and 'worsening memory'; left ischium fractured; test score for MMSE showing 'cognitive concerns'

Facts: The deceased passed away leaving two children (a daughter and a son) and an estate valued at approximately $2.6 million. The deceased had executed two wills. The first (the 2000 will), left interests in various real properties to the deceased's daughter (the plaintiff), and the deceased's son (the defendant) that were approximately equal in value. The second (the 2007 will), was made on 8 June 2007 when the deceased was 91 years of age, and gave a relatively greater amount to the daughter than the son. The daughter argued that the 2007 will was valid.
In June 2006, the deceased had injured his knee in a fall and was admitted to hospital. While in hospital, he fell from his bed and fractured his left ischium. An MMSE test was also administered, on which he scored 10 out of 30. The hospital discharge summary also recorded his background medical history as including a variety of other conditions including dementia/Alzheimer's. In September 2006, the deceased was transferred from the hospital to Talbarra Nursing home. From the time of his arrival, he was recorded as experiencing persistent episodes of restlessness, confusion, wandering and disorientation. In October 2006, he scored 16 out of 30 on an MMSE test.

In May 2007, a solicitor (Mr Devlin) prepared a new will for the deceased based on his daughter's instructions. Mr Devlin then attended the nursing home on 8 June 2007. He explained the will to the deceased and discussed the reasons for the

various provisions. The deceased then executed the will. On 11 June 2007, the deceased scored 8 out of 30 on a further MMSE test.

Legal Conclusion: The court concluded that the daughter had not discharged the onus of providing on the balance of probabilities that the deceased had testamentary capacity when he signed the 2007 will.

Although Mr Devlin believed that the deceased had testamentary capacity, his record of his conversation with the deceased indicated that the deceased could not provide any detail regarding his financial worth. The deceased did not explain why he was altering the relative amounts given to his son and daughter, and there was no obvious change in the deceased's relationships with them. As a result, in light of the evidence of the deceased's cognitive deficits (in conjunction with his advanced age and other illnesses), the court could not conclude that he had testamentary capacity at the relevant time.

Link: ***Ruskey-Fleming v Cook [2013] QSC 142***

Harrison v Petersen [2000] QSC 415

Year: 2000

Court/Tribunal: Queensland Supreme Court

Judicial Officer/ Tribunal Member: Mullins J

Legislation: N/A

Legal Issue: Did the deceased testator have testamentary capacity and testamentary intention when executing the will?

Area of Law: Succession

Vulnerability Criteria: Dementia, lack of cognitive ability, institutionalisation

Facts: This case concerns Cyril Madden's will, dated 21st of January 1997, of which the plaintiff is asking the court to pronounce the validity of.

From the early 1990s, the plaintiff (Mrs Wanda Harrison) provided neighbourly in-home assistance to Mr Madden (the deceased) and, until her move into care and subsequent death, his wife Mrs Madden. The frequency of assistance increased over time, with Mrs Harrison taking over cooking, taking them to doctors' appointments and to the shops. When Mrs Madden moved to a nursing home, Mrs Harrison continued to assist them both. Mr Madden was distressed by Mrs Madden moving into care and became depressed. Although their relationship had previously been warm, Mrs Delma Petersen (his daughter, the defendant) felt her father blamed her for his separation from his wife, as she assisted with organising the nursing home.

Mr Madden was diagnosed with dementia sometime between 1993 and 1996. In 1996, he was described as having poor short-term memory and fair long-term memory, as well as significant hearing impairments. He was recommended by a nurse specialist to be put in a hostel to receive support for his condition. He sold his house and land to pay for the $60k bond for the hostel.

Mr Madden's wife died in Nov 1996. He then expressed a desire to make a new will. Dr Marks (his regular general practitioner) gave the opinion that he was not of sound

mind to make a will. Dr Lloyd (his regular hostel doctor) at around the same time advised that, despite his medical conditions, he had requisite capacity to make a will because he was sure of what he wanted its contents to be. Dr Lloyd did not make notes of his mental capacity on the day he gave instructions for his will (16 Jan 1997) or the date of signing his will (21 Jan 1997).

The will left money to his elderly siblings (though he had a strained relationship with one of them), and half of the remaining estate to Mrs Harrison, and the other half to his daughter. When drafting the will, he could only make noises of assent to the solicitor's suggestions of what to include and say a few words at a time. Additionally, he did not have the will read to him prior to signing, and was illiterate, so he may have been unaware of the specifics of the contents of the will.

Legal Conclusion: It was held that the 1997 will was invalid, and thus the plaintiff was unsuccessful in her action.

There were "suspicious circumstances" surrounding the execution of the will, including:

- That Mr Madden was illiterate, and the terms of the will were not read out or explained; and
- That Mr Madden had dementia (since there was a failure of the solicitor to obtain a medical opinion as to capacity on instruction date or execution date of the will).

As a result of these circumstances, Mrs Harrison (plaintiff) had the onus to prove that Mr Madden knew and approved of the contents of the will. It is generally sufficient that a person instructs a solicitor to prepare a will in a particular way, even if they have not read or signed it. However, in this case, instructions were not unequivocal. Mr Madden merely agreed to things proposed by the solicitor, and his car was not included in the will, which raised questions as to whether Mr Madden was aware of his assets. The relationship between Mr Madden and his daughter was tense but his

daughter was also in a difficult position, which was not explained to Mr Madden. Additionally, he gave money to his siblings who were old, and with whom he had a strained relationship. There was insufficient evidence that Mr Madden knew and approved of the contents of his will when giving instructions to the solicitor or at the execution of the will and therefore the Plaintiff failed to meet the burden of proving her case.

Although not essential to the outcome given the finding that Mr Madden did not know and approve the content of the will, testamentary capacity was also found to be absent (Banks v Goodfellow). The court found that Mr Madden was suffering advanced progressive dementia and did not understand the consequences of disposing of assets in the making of a will. Thus, he did not understand the extent of property which he was disposing of.

Link: *Harrison v Petersen [2000] QSC 415*

Watkins v Christian [2008] QSC 345

Year: 2008

Court/Tribunal: Queensland Supreme Court

Judicial Officer/ Tribunal Member: Wilson J

Legislation: *Guardianship and Administration Act 2000* (Qld), s 174, s 180; *Powers of Attorney Act 1998* (Qld)

Legal Issue: Whether it is in the best interests for elderly plaintiff to have her nephew as litigation guardian. Whether the law firm should be prevented from acting for the elderly plaintiff in drafting a new will and power of attorney in favour of her litigation guardian.

Area of Law: Unconscionable conduct

Vulnerability Criteria: 'Weakened' mental capacity (legal incapacity), unable to care for herself, requires assistance with daily tasks, lives in aged care.

Facts: This case concerns an application in a case made by Deborah Christian (defendant – neighbour of plaintiff):

- for the removal of Peter Lambert (plaintiff's nephew) as the plaintiff's litigation guardian; and
- to further restrain any partner or employee of Quinn & Scattini from acting for the plaintiff in the proceeding.

The plaintiff, on her own and later via her litigation guardian, had made claims against the defendant for rescission of certain transactions, restitution for $314,960 and alternative relief. Subsequently, Mr Lambert consented to be her litigation guardian. The plaintiff alleged that her vulnerability had contributed to the defendant taking advantage of her, which included:

(a) the defendant inducing her to execute cheques in the defendant's favour totalling $154,960;

(b) the plaintiff executing an enduring power of attorney in favour of the defendant; and

(c) the defendant induced her to execute further cheques totalling $160,000.

The plaintiff contends that the defendant's conduct to induce her to execute the cheques were in breach of the defendant's fiduciary duties, that it was in breach of a statutory duty under *Powers of Attorney Act 1998* (Qld) and that the plaintiff was induced to execute the cheques by the defendant's undue influence and/or unconscionable conduct.

According to the defendant, she provided care, comfort and support to the plaintiff over the years. When Mr Lambert asked to see the plaintiff's will, he became aggressive and angry when he discovered the contents of the will – the plaintiff made several small bequests including $3,000 to Mr Lambert, and left the bulk of her estate to charities – and said words to the effect that he would have the plaintiff change it. Subsequently, he told the defendant he arranged for the will to be changed and that Quinn & Sacttinin had prepared this new will by way of which the plaintiff left her estate to him. Evidence was available that those solicitors attended on the plaintiff, obtained instructions for a new will and prepared one. However, there was no evidence of whether it was executed, and there is no copy of it is in evidence.

The defendant argued that Mr Lambert's interest in maintaining the validity of the plaintiff's new will and the power of attorney in his favour conflict with advancing the plaintiff's claim based on "weakened mental capacity" and undue influence. The court found there was no such conflict and dismissed the application. The court was, however, sufficiently concerned about allegations made by the proceedings, to order that the reasons be provided to the Adult Guardian. There was also no basis found for the removal of the solicitors.

Legal Conclusion: The applications were dismissed.

Link: *Watkins v Christian [2008] QSC 345*

Rowe v Sudholz [2019] QSC 306

Year: 2019
Court/Tribunal: Queensland Supreme Court
Judicial Officer/ Tribunal Member: Applegarth J
Legislation: N/A
Legal Issue: Did the deceased have testamentary capacity when he made a will on 28 November 2017? If not, did he have testamentary capacity when he made a previous will on 18 August 2016?
Area of Law: Succession: Testamentary Capacity
Vulnerability Criteria: Dementia and poor state of health (including heart and renal conditions and chronic obstructive pulmonary disease), rural/remote, hospitalised between late February and early June 2016.

Facts: The testator (Norm) developed a number of chronic health conditions in the final years of his life. Norm was a bachelor, with no children, who had lived with his parents until they died in the 1990s and then mostly alone. He increasingly relied on his neighbours, Justin and Vikki, for assistance. In February 2016, he made a will leaving his entire estate ($7million+) to them. Previously, in 2013, he had executed an enduring power of attorney in their favour.

In a series of tests in May 2016, Norm's general cognition for conversation was appropriate but his scores on the visuospatial, executive, delayed recall and orientation sections were poor. Norm's accountant also found him having trouble focusing on their discussions. In June 2016, he moved to a nursing home due to his declining health. He was upset when Justin and Vikki went on an overseas trip in July–August 2016. On 18 August 2016, he executed a new will that left a legacy of $500,000 to a long-time friend, Kathryn Sudholz (Kathy), who had visited him in the nursing home, and the remainder to Justin and Vikki. There was no suspicion or adverse allegation raised at any time in relation to the quality of the relationships between Norm and Justin, Vikki or Kathy, or about the support provided to him by Justin and Vikki.

Norm's physical and mental health continued to decline. By September 2017, he displayed 'extreme tiredness and confusion'. On 23 November 2017, he gave instructions to a solicitor (Mr Wilson) about a new will. On 25 November, Norm was observed 'cogwheeling', which led his doctor to suspect that he may have had Parkinson's Disease. On 28 November, Norm executed a will prepared by Mr Wilson in accordance with his previous instructions. This will increased the legacy to Kathy to $1.5 million. Norm did not explain why he made this change, and Mr Wilson did not ask. Norm was also noticeably unwell (likely due to urosepsis) on this date and remained so in the following days. Not long after this, Norm said he could not remember what he put in the will. A series of incidents also revealed Norm had some memory issues.

Legal Conclusion: The key issue was whether Norm had testamentary capacity on 28 November 2017 when he made his last will, and if not, whether he did on 18 August 2016 when he made the previous will. The judge placed limited weight on occasional bizarre statements and Norm's occasional confusion about where he was. Greater weight was placed upon Norm's persistent false claims about being overcharged by his nursing home, which he had been assured were false on several occasions, as they show that he had a poor memory of recent events and discussions. This did not itself prove a lack of testamentary capacity. However, the evidence indicated that Norm suffered from a significant cognitive impairment as a result of dementia. He was also physically unwell at the relevant time, which may have exacerbated his condition. The errors in his knowledge about his present assets and instances of confabulation raised further doubts about his memory loss and decision-making capacity. Further, there was no change in Kathy's situation that would explain his substantially increasing her legacy, which indicated that he may have been placing excessive weight on recent events due to his impaired memory. As a result, the court concluded that he did not have testamentary capacity at the time of making the November 2017 will.

The level of Norm's cognitive impairment and capacity to consider financial matters on 18 August 2016 was determined by his contemporaneous records and the

observations of persons who saw and spoke to him around that time. According to Norm's financial planner and accountant, Norm fully understood certain financial matters regarding superannuation and tax; as well as how much he had invested. Overall, Norm's understanding of his financial situation, including his investments and assets was excellent. According to evidence from Professor Byrne and Associate Professor Rosenfeld, it appeared that Norm's capacity was limited to his decision-making capacity. However, the evidence of the activities, conversations, family circumstances and relationships of the deceased and evidence from doctors is far more valuable than reports of expert specialist medical practitioners who have never seen the deceased (*Revie v Druitt*). The evidence indicated that Norm was aware of what he owned and its approximate value. A mild or even moderate impairment of memory or decision-making capacity does not indicate that Norm could not retain sufficient intelligence to understand and appreciate the testamentary acts. It was concluded that Norm was not so affected by dementia, depression or any other condition and thus he possessed testamentary capacity when he made the will on 18 August 2016.

Other cases referenced:

Banks v Goodfellow (1870)

Craig-Bridges v NSW Trustee & Guardian (2017)

Nicholson v Knaggs (2009)

Revie v Druitt (2005)

Link: ***Rowe v Sudholz [2019] QSC 306***

Campbell v Campbell [2023] QCA 003

Year: 2023

Court/Tribunal: Queensland Court of Appeal

Judicial Officer/ Tribunal Member: Mullins P, Morrison JA and Williams J

Legislation: N/A

Legal Issue: Whether the deceased had testamentary capacity when he made the last will and whether his dementia precluded proof of testamentary capacity.

Area of Law: Succession: Undue Influence

Vulnerability Criteria: Dementia, memory issues

Facts: This case involved an appeal to the Court of Appeal of a decision made by the primary judge that the final will made by Mr Graham Campbell (the deceased) was valid. The self-represented appellant, Ms Danielle Campbell was one of three daughters of the deceased, all from his first marriage which had ended in 1996. The deceased was survived by his third wife, Mrs Rosita Campbell (the respondent), whom he married on 17 October 2015, and his three children.

The deceased's last will was made on 16 Feb 2016 and stated that each of his children would receive $200,000 and that the residue of the estate would be given to Rosita. It also contained an express statement that the deceased had deliberately made no provision for his second wife Joan given their divorce and property settlement. The primary judge concluded that the timing of the last will was most likely related to the deceased's marriage to Rosita and the finalisation of the property settlement with Joan on 3 Feb 2016.

Mr Speakman (the deceased's solicitor) gave evidence of his taking of instructions for the last will and stated that he was satisfied that the deceased fully understood the nature of his last will. Danielle provided evidence that the deceased's sleep apnoea appeared to become more severe in or around late 2015. She also stated that in 2018, she engaged Anglicare to assist with caring for the deceased. The primary judge preferred the reports of the deceased's treating medical practitioners, who regarded

him as demonstrating mild cognitive impairment or dementia, as evidence of his condition over Danielle's general description of the deceased's behaviour over that period.

Professor Byrne, a psychiatrist, provided an expert opinion on whether the deceased had testamentary capacity at the time of making the last will through his expert report. He concluded that it was more likely than not that the deceased understood the nature and effect of making and signing the last will. This was on the basis of Mr Speakman's detailed file notes, the deceased's longstanding familiarity with legal documents and the last will being "a straightforward document." He also stated that mild cognitive impairment or dementia usually does not deprive a person of an understanding of the nature and significance of a will. The provisions of the last will indicated that the deceased was aware of those (namely his three children and his current wife) who may reasonably have had a claim on his estate. As the last will stated that the deceased's second wife was to receive nothing, his three children were to receive $200,000 each and Rosita was to receive the residue, that indicated that the deceased could judge the relative merits of the claims of these three classes of potential beneficiaries. It did not appear that the deceased was suffering from delusional beliefs, and he did not appear to be subject to undue influence. The primary judge accepted Professor Byrne's evidence.

Legal Conclusion: No error was demonstrated in the primary judge's reliance on Professor Byrne's evidence, or in the application of the test of testamentary capacity set out in *Banks v Goodfellow*. The deceased is more likely than not to have retained testamentary capacity on 16 Feb 2016, despite the presence of mild cognitive impairment or mild dementia. The appeal was dismissed. Danielle was ordered to pay Rosita's costs.

Link: *Campbell v Campbell [2023] QCA 3*

Hamill v Wright [2018] QSC 197

Year: 2018

Court/Tribunal: Queensland Supreme Court

Judicial Officer/ Tribunal Member: Applegarth J

Legislation: N/A

Legal Issue: Whether the deceased had testamentary capacity to make a will and to sever a joint tenancy.

Area of Law: Succession; Wills and Estates; Testamentary Capacity

Vulnerability Criteria: Delusions, reliant on the care of others, substantial health issues, poor physical health.

Facts: Mr Lloyd Wright (the deceased) and his wife, Shirley, were supported and cared for by one of their daughters, Susan, and her husband, Richard. (who also lived with them). Lloyd wished for Susan, who did not own her own home and who had little savings, to become the sole owner of the home they shared after he died. He did so in 2015 by creating a joint tenancy with her over the property. He made a will in 2015 making Susan his sole beneficiary (he made no provision for his other three surviving children, with whom he was less close).

In early 2016, Lloyd developed delusions. He wrongly believed that Susan and Richard had stolen a valuable coin collection, taken $26,000 belonging to him from their joint account, were trying to drug him and that he was under police surveillance. His general practitioner was concerned about his mental condition. The decline in Lloyd's mental health and the deterioration in his relationship with Richard and Susan coincided with his forming a relationship with a woman named Moira who accepted his delusions and told him she would take him to her own doctor because his current general practitioner was "hopeless". The false accusations that he made and his behaviour led to a breakdown in his relationship with Susan and Richard. He later moved to live with another daughter Lorraine.

He made another will dated 14 April 2016 which gave everything to another of his daughters, Lorraine. On 6 May 2016, he executed another will which gave Susan nothing and which divided his estate between his other three surviving children. On 30 June 2016, he gave notice of a purported severance of the joint tenancy over the property. Susan and Richard sought orders pronouncing against the force and validity of the 14 April 2016 and 6 May 2016 wills and declaring that Lloyd lacked the capacity to sever the joint tenancy.

Legal Conclusion: Lloyd suffered from non-bizarre delusions in 2016, including the time he made and executed the wills and gave instructions to sever any joint tenancy. Thus, the court was not satisfied that he had testamentary capacity to make the wills or sever the joint tenancy. The court declared that the joint tenancy continued until Lloyd's death and made orders pronouncing against the force and validity of the 14 April 2016 and 6 May 2016 wills.

Link: *Hamill v Wright* [2018] QSC 197

Swettenham v Wild [2005] QCA 264

Year: 2005

Court/Tribunal: Queensland Court of Appeal

Judicial Officer/ Tribunal Member: McMurdo P, Williams JA, Atkinson J

Legislation: N/A

Legal Issue: Should the court impose a constructive trust reflecting the breakdown of the joint endeavour between the elderly widower and his daughter?

Area of Law: Real property; constructive trusts; equitable interests; unconscionable conduct;

Vulnerability Criteria: Lack of family connection; abuse/exclusion; social isolation

Facts: Mr Swettenham (an elderly widower) wanted to live with his daughter for company and care. For this purpose, he purchased a property at Nerang in his own name, which included a granny flat for his own residence. The daughter and her family lived in the main house. Mr Swettenham paid the purchase price using mostly his own money, and borrowed the remainder. He intended that his daughter would receive the property after his death, and made a will to this effect.

It was agreed that the daughter and son-in-law would make all repayments in relation to the loan, but they failed to do so. It was then agreed that the property would be transferred to the daughter, who would take over financial responsibility for the property. The transfer was subject to Mr Swettenham retaining a right to reside in the property for his lifetime. The granny flat arrangement continued.

Very soon after the property was transferred, there was a serious falling out between Mr Swettenham and his daughter. Due to the daughter no longer providing him with care and removing his access to the garden and other family members, it became impossible for him to continue residing in the granny flat. As a result, Mr Swettenham purchased a unit in a retirement village, borrowing $105,000 to do so, and moved in. He then brought proceedings, claiming an equitable interest in the Nerang property.

At first instance, it was held that his interest in the property was such that he was limited to an entitlement to equitable compensation represented by the cost of his residing in similar accommodation for the rest of his life, which on the facts was $45,000.

On appeal, it was argued that the court should impose a constructive trust reflecting Mr Swettenham's contribution to the joint endeavour pursuant to which legal title in the property had been transferred to the daughter. His counsel relied on Muschinski v Dodds, where Mason and Deane JJ recognised that the court could impose a constructive trust consequent upon the joint venture between the parties because it was unconscionable for one party to assert his legal entitlement without recognising the considerable financial input from the other.

Legal Conclusion: The daughter's conduct was unconscionable and, in these circumstances, equity would intervene and impose a constructive trust. This is because the Mr Swettenham contributed virtually all of the purchase price of the house in question and did so due to an agreed joint endeavour intended to mutually benefit both parties, according to which Mr Swettenham would receive not merely a right to reside in the property but also the support and comfort of living in a family environment with his daughter and her family.

Thus, it would be unconscionable for the daughter to retain the beneficial interest in the whole property subject only to the widower's right to reside in the granny flat. Mr Swettenham was entitled to a proportionate share of the property relative to his contribution but only sought repayment of his contribution with interest from the time of the breakdown of the relationship: at [45]. The court therefore made a declaration that the daughter held her legal ownership of the property on constructive trust to repay Mr Swettenham's contribution to the purchase price plus interest.

Link: *Swettenham v Wild [2005] QCA 264*

Field v Loh [2007] QSC 350

Year: 2007

Court/Tribunal: Queensland Supreme Court

Judicial Officer/ Tribunal Member: Douglas J

Legislation: N/A

Legal Issue: Whether the plaintiff's significant contribution to the purchase price of the defendant's home constituted a non-refundable gift or entitled the plaintiff to an equitable proprietary interest in the property.

Area of Law: Equity; Resulting Trusts

Vulnerability Criteria: Widowhood, disability (vision impairment – legally blind), homelessness, disconnection with family

Facts: In early 2005, the plaintiff, Mrs Field, a 76-year-old widow, was asked to leave her daughter's home. Mrs Field subsequently met the defendants through their common attendance at a church and moved into their rented home. The plaintiff received $180,000 for the sale of a plot of vacant land she owned and agreed to use this money to contribute to the purchase of a property in which she would live with the defendants. The parties also agreed that the plaintiff would contribute half of her pension towards living costs. The property was purchased and registered in the defendants' name.

The evidence suggested that the $180,000 was given on the understanding that the plaintiff would live with the defendants for life and that she would be reimbursed if that arrangement ceased. A document executed by Mrs Field in support of a loan application by the defendants for the home suggested that the money was a non-refundable gift. However, the plaintiff's ability to read this document was limited due to her poor eyesight and she claimed that she was told that it was necessary to sign the document to stop her children claiming the money upon her death.

Due to the difficulties partly created by the extent of the plaintiff's possessions and her treatment and expectations of the defendants and their children, the defendants decided that the plaintiff could no longer live with them, and she moved out.

Legal Conclusion: It would be unconscientious for the defendants to hold Mrs Field to her description of the transaction as an unconditional gift, which the defendants had asked Mrs Field to provide for their own benefit in obtaining a loan, when they knew that the true nature of the transaction was that she would either continue to live with them or be repaid if the relationship deteriorated. Further, in executing the document, the plaintiff was in a position of relative disadvantage because of her age, vision impairment, and lack of accommodation.

The Court was not satisfied that the defendant exerted undue influence over the plaintiff. Nevertheless, the defendants' attempt to retract their promise of repayment and retain the benefit of Mrs Field's financial contribution was not consistent with principles of equity.

The court made a declaration that the property was held on resulting trust for Mrs Field in proportion to her financial contribution to the purchase price. The court also indicated that a constructive trust would also have been available, referring to *Swettenham v Wild*.

Link: *Field v Loh [2007] QSC 350*

Gillespie & Ors v Gillespie [2013] QCA 099

Year: 2013

Court/Tribunal: Queensland Court of Appeal

Judicial Officer/ Tribunal Member: Margaret McMurdo P, White JA and Margaret Wilson J

Legislation: N/A

Legal Issue: Was the transfer of the deceased's house to his children following his marriage to the respondent the result of undue influence and unconscionable conduct?

Area of Law: Succession: Unconscionable Conduct and Undue Influence

Vulnerability Criteria: Widowed, memory loss due to dementia

Facts: Mr Gillespie (the deceased) transferred a house and two home units to his children from his first marriage nine days after his marriage to his second wife (the respondent). At trial, it was found that the transfer of the house was a result of the unconscionable conduct and undue influence of Geoffrey (one of the children). Geoffrey suggested to the deceased that he would need to avoid death duties (which do not exist in Queensland), intending to motivate him to transfer the properties to the children before his death. The children arranged for the deceased to see a solicitor and his GP, who determined that he was competent to make legal decisions (despite having episodes of short-term memory loss). The solicitor recalled that the deceased was concerned that his wife would 'rip him off'. The solicitor assisted the deceased in transferring the house and home units to his children, as well as creating a new will and power of attorney. The deceased revoked the power of attorney the following day. When the respondent discovered the transfers, she was advised that it may be possible to have them reversed but it would be costly and protracted, so no action was taken. A new enduring power of attorney was executed in favour of the respondent.

Several months later, the respondent visited her daughter for a two-month period. While the respondent was away, the deceased asked Geoffrey to take over management of his accounts. The deceased also created a new power of attorney in

favour of Geoffrey, and a further new will appointing Geoffrey as the deceased's executor, which left his entire estate to his children. The will contained a declaration that the respondent had left the deceased, had no contact with him since leaving, and took money from his bank account.

Several years later, after being diagnosed with Alzheimer's disease, the deceased executed several new wills (drafted with the assistance of the respondent), the final of which provided that the respondent was to be the executor and sole beneficiary of his estate, excluding his children, on the basis that he believed they had taken unfair advantage of him. Additionally, it directed the respondent to pursue legal action to reverse the transfer of the house upon his death but allowed the children to retain ownership of the units.

Following the deceased's death (over eight years after the transfers), the respondent brought an application to reverse the transfer of the house. The trial judge set aside the transfer due to the unconscionable conduct and undue influence of Geoffrey. The appellants appealed the aspect of that decision that related to laches, arguing that there was an error in the finding that there had not been an unreasonable delay on the part of the respondent.

Legal Conclusion: The appeal was dismissed. There was no evidence that the deceased ever knew that he may be entitled to have the transfer reversed. Even taking the respondent's own conduct into account, the respondent had only received very limited legal advice in relation to setting the transfers aside. She and the deceased did not have money to pursue legal proceedings, and she also believed that taking steps to set the transfers aside would have been contrary to the deceased's wishes. Additionally, it was not unfair to the children to allow the claim. The delay did not result in a change in the quality of evidence (any evidence given by the deceased in his lifetime would have been poor quality due to his degenerating memory), and there was no evidence that the children had altered their affairs based on their ownership of the

house. In any event, any prejudice to the children was outweighed by the prejudice to the deceased's estate were the claim to be defeated by laches.

Link: ***Gillespie & Ors v Gillespie [2013] QCA 099***

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