

Elder Law Periodical

2026 Volume 2, Issue 2

in partnership with Caxton Legal
Centre

2026



Authors

Student Authors

Luke Taylor (Student Leader)

Jennifer Barnes

Chantelle Carney

Arlo Nightingale

Caitlin Yeh

Academic Supervisors

Dr Andrew Fell and Dr Kate Falconer



This work is licensed under a Creative Commons Attribution-Non Commercial Licence. This allows others to distribute, remix, tweak and build upon the work for non-commercial purposes with credit to the original creator/s (and any other nominated parties).

Disclaimer

The paper is intended to give general information about the law. It has been prepared by law students and the content does not, and cannot, constitute legal advice. To the maximum extent permitted by law, the University of Queensland and the contributors to this paper are not responsible for, and do not accept any liability for, any loss, damage or injury, financial or otherwise, suffered by any person acting or relying on information contained in or omitted from this paper.

The University of Queensland make no claims, guarantees or warranties about the accuracy, completeness, timeliness, quality or suitability for a particular use of this information. It is the responsibility of the user to verify the accuracy, completeness, timeliness, quality or suitability for a particular use of this information.



Contents

<i>BAR [2018] QCAT 278</i>	4
<i>Birch v Birch [2018] QSC 289</i>	7
<i>Blumke v Campbell [2020] QCA 217</i>	10
<i>BSJ [2022] QCAT 51</i>	12
<i>Green v Critchley [2004] QSC 22</i>	15
<i>R v Atwell [2000] 266</i>	17
<i>R v Castle; Ex parte Attorney-General [2014] QSC 276</i>	19
<i>Smith v Sahner [2007] QSC 102</i>	22
<i>The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban [2011] QSC 380</i>	24
<i>VMH v SEL [2016] QSC 148</i>	26



BAR [2018] QCAT 278

Year: 2018

Court/Tribunal: Queensland Civil and Administrative Tribunal

Member: Member Joachim

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

Legal Issue: Whether the respondent unduly influenced the appellant into transferring financial gifts and testamentary control.

Area of Law: Guardianship and Administration; Property Law

Vulnerability Criteria: Lack of capacity for financial matters, depression, and isolation

Facts: BAR was an 81-year-old former farmer who had lived in northern NSW before moving to the Gold Coast. BAR was married to NWR for 37 years and raised two adopted children, SY and HL. After NWR's passing, BAR experienced deep depression and isolation. In June 2015, BAR met SW, who became a close companion. BAR later developed a deep attachment to SW, who (according to BAR) played a significant role in his emotional recovery.

Initially, BAR had appointed his wife and children as attorneys for financial and personal matters through an enduring power of attorney (EPOA) in 2010. After NWR's death, he executed a new EPOA in June 2010 in favour of his children and daughter-in-law. In October 2015, BAR revoked the June 2010 EPOA by appointing SW as his attorney with respect to both financial and personal matters. However, on 25 January 2016, SW purported to resign from this role.

In February 2016, BAR gifted SW \$420,000, which she used to purchase a property in Surfers Paradise. The property was later sold, with the proceeds held in a solicitor's trust account. SW also allegedly received multiple vehicles from BAR, including a Subaru and two BMWs, further contributing to BAR's financial decline. The tribunal found significant sums unaccounted for, estimating \$350,000–\$400,000 missing.



BAR's daughter-in-law (DY) and son (SY) submitted applications seeking the appointment of a guardian and administrator, alleging financial abuse and mismanagement by SW. In January 2018, QCAT made an interim order appointing the Public Trustee of Queensland as administrator pending further review.

Legal Conclusion: The tribunal sought expert opinions on BAR's mental capacity. Ms Kaylene Alderton found BAR to have mild frontal lobe damage and impulsive tendencies, making him vulnerable to poor financial decisions. However, she initially concluded that BAR had the capacity to make personal and financial decisions. In her supplementary report, Ms Alderton revised her view slightly, suggesting that BAR needed assistance with complex financial matters. Dr Simone Baker, another neuropsychologist, confirmed that BAR had the capacity to manage his financial affairs but highlighted his susceptibility to undue influence from SW due to his emotional attachment.

Testimony from BAR's solicitor, Mr William Campbell, indicated that BAR's decisions regarding his will were affected by SW's influence. Campbell refused to execute a new will after observing BAR change his instructions following a confrontation with SW, believing that BAR was acting under duress. BAR's children argued that since meeting SW, their father had become isolated from them, made irrational financial decisions, and exhibited poor judgement in managing his property transactions.

The tribunal concluded that BAR lacked capacity for significant financial matters, citing (among other things) his inability to account for missing funds, his apparent failure on several occasions to have regard to the consequences of his decisions, and SW's level of influence over him. The tribunal revoked the appointment of the Public Trustee and appointed Australian Unity Trustees as administrator to manage BAR's finances. However, the application for guardianship was dismissed as BAR was found capable of making personal decisions.

The administrator, Australian Unity Trustees, was instructed to recover funds from SW where possible and manage BAR's finances to protect his interests. The tribunal declined BAR's request for costs, finding no exceptional circumstances to justify it.



Link: [BAR \[2018\] QCAT 278](#)



Birch v Birch [2018] QSC 289

Year: 2018

Court/Tribunal: Supreme Court of Queensland

Member: Douglas J

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

Legal Issue: Whether the transfer of the one-third interest in a rural property by the plaintiff to her son should be set aside on the grounds that it had been procured by undue influence.

Area of Law: Property Law

Vulnerability Criteria: Emotional distress from the recent death of husband, physically ill, frail, and feeble, suffered from heart attacks and had diabetes

Facts: The plaintiff (Betty) had six children, including the defendant (Doug). Betty and her late husband (Jim) purchased a leasehold farming property ('Fairyland'). In 2008, they transferred a one-third interest in Fairyland to Doug by way of gift. They also executed corresponding wills, under which they each left a life interest in their remaining (one-third) interests to their surviving spouse. Upon that spouse's death, the interest would then go to Doug, subject to him paying each of his siblings 6.66% (that is, one-fifth of one-third) of the value of Fairyland.

In 2009, Betty executed an enduring power of attorney by which she appointed Jim and Doug as her attorneys. Jim died in June 2011. In August 2011, Betty signed a transfer document at the office of JA Carroll and Son (a firm of solicitors) transferring her one-third interest in Fairyland to Doug 'by way of gift'. In 2012, Betty executed a further will and did not refer to Fairyland as it had already been transferred to Doug. She wrote a letter to her children explaining the 2011 transfer to Doug.

After solicitors were consulted by Betty or on her behalf, Betty commenced proceedings contending that the 2011 transfer was the result of undue influence, unconscionable conduct and/or breach of fiduciary duty by Doug. Betty had appointed one of her other sons (Geoffrey Birch), as her litigation guardian. It was argued that Doug had pressured her into transferring the interest to him, relying on



her age, the recent death of her husband, the emotional distress following it, and that she was physically ill, frail, and feeble. She had also suffered two heart attacks and diabetes. Doug resisted the claim on the basis that the transfer was made freely and voluntarily by Betty who had full understanding of the nature and effect of the transfer.

Legal Conclusion: As Betty's attorney, it was presumed that Doug procured the transfer of Betty's interest in Fairyland by undue influence.

Evidence showed that in 2011 Betty was still capable, engaged in normal social activities and although frail, was in good health. The solicitor who advised her in relation to the transfer described her as alert and receptive, and stated that she appeared to understand what was being said to her. Although Doug instructed the same solicitor on other matters, the legal advice that Betty received about the transfer was independent. Betty consulted the solicitor herself. Doug received separate legal advice about the transfer from a different solicitor.

There was no evidence that Doug pressured Betty to transfer her interest. That interest was not her only significant asset. The transfer would also have no practical effect on her income (since the farming business on Fairyland was conducted by a trust of which she remained a beneficiary). It was also consistent with her intention that Doug would ultimately receive her one-third interest in Fairyland.

It was also relevant that Betty later sought further independent legal advice in relation to preparing a fresh will that was consistent with the view that she had already made an effective gift of Fairyland to Doug. The letter sent to her children explaining the reasons for the transfer demonstrated she understood the legal effect and consequences of the transfer.

The court therefore concluded that Doug had rebutted the presumption of undue influence. For similar reasons, his acceptance of the gift was also not a breach of fiduciary duty as Betty had given informed consent.



The transfer was also not procured by unconscionable conduct by Doug. Although Betty suffered from heart attacks, the evidence showed she recovered from them fully and although she suffered from diabetes, no evidence was available to show that it affected her ability to make judgements in her own best interests. Thus, it was not established that Betty was subject to any special disadvantage or that Doug knew or ought to have known of such disadvantage. Betty's claim was dismissed.

Link: [Birch v Birch \[2018\] QSC 289](#)



Blumke v Campbell [2020] QCA 217

Year: 2020

Court/Tribunal: Queensland Court of Appeal

Member: Morrison and Philippides JJA and Henry J

Legislation: *Succession Act 1981* (Qld)

Legal Issue: Whether a Court will impose a statutory will for the elderly person in circumstances where he was a victim of unconscionable conduct and undue influence by his daughter.

Area of Law: Succession Law

Vulnerability Criteria: Lack of testamentary capacity at the time of making the last will

Facts: The appellant and respondents are sisters. The respondents, Suzanne and Wendy, were previously granted an order by a Supreme Court judge authorising the making of a statutory will on behalf of their elderly father, Thomas. At the time the order was made, Thomas did not have testamentary capacity. The court found that the appellant, Janine, had engaged in unconscionable conduct and undue influence against her father.

The draft of the statutory will included a 'hotchpot clause', which adjusted Janine's one-third share of the estate by considering any diminution of the estate since 2014 (before there were any adverse dealing with Thomas' assets). This clause operated to determine the value of Thomas' "notional estate", to ensure his estate were shared between his daughters equally.

In this appeal, Janine argued that the 'hotchpot clause' did not allow for the theoretical possibility that there may have been a diminution in the value of Thomas' assets which did not arise in connection with her & her husband's misconduct. She argued that the judge below erred by not properly considering this disadvantage to her.



Legal Conclusion: The Court agreed with Janine's argument that the clause did not account for losses that might not have arisen from her misconduct. However, the proper test for the efficacy of a statutory will is whether the will is one that the deceased would have likely made if they had testamentary capacity. A statutory will will not fail if it was simply not as well drafted as it could be and is not an 'inherently precise exercise.' It is in the nature of an application for a statutory will that more than one potential draft will could meet the prerequisites of a successful application

Janine would need to establish that the drafting issue complained of was so concerning that it was not reasonably open to conclude a will so drafted was a will which the deceased would likely have made if he had testamentary capacity and understood the finding of Janine's misconduct. A mere 'theoretical disadvantage' will not suffice to show that the statutory will was drafted improperly. Actual or likely material risk of disadvantage must be shown by the appellants.

Janine's appeal failed.

Link: [Blumke v Campbell \[2020\] QCA 217](#)



BSJ [2022] QCAT 51

Year: 2022

Court/Tribunal: Queensland Civil and Administrative Tribunal

Member: Member Ann Fitzpatrick

Legislation: *Guardianship and Administration Act 2000* (Qld); *Human Rights Act 2019* (Qld); *Powers of Attorney Act 1998* (Qld)

Legal Issue: Whether the presumption of undue influence during a transfer of property was successfully rebutted.

Area of Law: Property Law; Succession Law

Vulnerability Criteria: Widowed, lacked capacity

Facts: The case concerned an elderly man, BSJ, who transferred ownership of his primary residence to his daughter, ML, in late 2018. The transfer was done under a purported gift arrangement. BSJ's other children, BM and HM, raised concerns regarding the legitimacy of the transfer, alleging that BSJ lacked the capacity to make such a decision and that the transfer was induced by undue influence exerted by ML.

BSJ had appointed ML as his attorney under an Enduring Power of Attorney in 2003, covering both financial and personal/health matters. BSJ lived on one part of the property, while ML and her family lived on the other part, having paid a nominal rent since 1987. Over time, ML and her husband took on more financial responsibilities related to the property, such as paying utility bills and insurance, particularly after BSJ's wife passed away in 2017.

The transfer of the property occurred following a series of consultations involving BSJ, ML, a solicitor (S), and BSJ's general practitioner, Dr M. Dr M conducted a Mini Mental State Examination (MMSE) and deemed BSJ to have testamentary capacity at the time. BSJ's primary reason for transferring the property, as conveyed to the solicitor, was to ensure that ML would secure the home and avoid potential conflicts or claims from other family members after his death.



A handwritten 'granny flat agreement' was also prepared after the transfer, purportedly to allow BSJ to live on the property for the remainder of his life. This agreement, however, lacked clarity regarding BSJ's rights and the responsibilities of ML.

Legal Conclusion: The Tribunal found that the presumption of undue influence under s 87 of the *Powers of Attorney Act 1998* (Qld) applied in this case because ML was BSJ's attorney, and the transaction was between the principal (BSJ) and the attorney (ML). Despite ML's argument that BSJ's decision was independently made and reflected a long-held intention to gift the property to her, the Tribunal ultimately determined that ML had not rebutted this presumption. The Tribunal noted that ML's statements on BSJ's long-held intention were not sufficiently supported by the evidence admitted. Factors such as BSJ's age, his reliance on ML, the speed of the transaction, the secrecy of the transfer, and the lack of comprehensive independent advice were all material to the conclusion that the presumption was not rebutted. The court distinguished the facts from *Birch's* case in this regard.

The Tribunal stated that BSJ lacked the capacity to make the decision to transfer the property. The Tribunal determined that testamentary capacity as assessed by a medical professional is not determinative of an individual's capacity. As the Tribunal noted, on the facts, BSJ did not appear to have an adequate ability to 'evaluate and discriminate between the respective strengths of the claims of his children to his estate'.

The Tribunal highlighted that the advice provided by the solicitor was insufficient in protecting BSJ from the significant risks associated with transferring his primary asset. These risks included the loss of BSJ's primary asset as a form financial security, the impact it would have on BSJ's pension and entitlements, the lack of a binding and secure contract, and his vulnerability to the actions of ML in the future. Additionally, S did not provide BSJ with written advice, which would have allowed BSJ to reflect more over the transfer of the property and fully understand its implications.



The Tribunal directed submissions from the parties on its jurisdiction to declare a constructive trust and potentially order the return of the property to BSJ.

Link: [BSJ \[2022\] QCAT 51](#)



Green v Critchley [2004] QSC 22

Year: 2004

Court/Tribunal: Supreme Court of Queensland

Member: Atkinson J

Legislation: *Uniform Civil Procedure Rules 1999* (Qld); *Succession Act 1981* (Qld)

Legal Issue: Whether the elderly testator had testamentary capacity, and if so, did undue influence occur in the creation of the will.

Area of Law: Succession Law: Wills & Estates

Vulnerability Criteria: Severe stroke; atrial fibrillation; cerebrovascular disease

Facts: Thomas Green (applicant) and Evelyn Critchley (respondent) were brother and sister and were the only children of Margaret Lawrence (testator) who died in 2003, age 88. Thomas applied to the Court for the revocation of a grant of probate to Evelyn as executor of Margaret's will, under which Evelyn and her daughter Jennifer were the only beneficiaries, on the basis that Margaret did not have testamentary capacity at the time of executing the will.

Thomas gave evidence that, in mid-2000, Margaret suffered a severe stroke. which left her largely incapacitated physically and mentally. For a period, she was unable to walk, required assistance to go to the toilet, could not swallow, eat, talk or communicate and required full nursing care.

Margaret's will was drafted by Mrs Kelly, a solicitor with extensive experience in wills and estates, in November 2000.

Mrs Kelly gave evidence that, firstly, Margaret attended her office in 2000 accompanied by Evelyn and Jennifer. Secondly, Margaret's instructions were effectively that her estate was to be left to Evelyn and Jennifer, with nothing being left to Thomas (because of his infrequent contact with her). And lastly, Margaret had suffered from a stroke and had been in hospital and nursing homes for rehabilitation and respite but was nonetheless able to attend privately with Mrs Kelly and to give clear instructions including about not wishing to benefit her son Thomas.



Legal Conclusion: Because Margaret was old and had suffered from a stroke when she made the will, the circumstances required the court to exercise a higher degree of vigilance. However, the evidence showed that Margaret attended Mrs Kelly's office on two separate occasions, told Mrs Kelly of her instructions and had considered her son, and read the will to her in the absence of the beneficiaries to ensure it conformed with her wishes.

Atkinson J referred to the following passage from *Bailey v Bailey* (1924) 34 CLR 558, 571–2 (Isaacs J): “To displace a prima facie case of capacity and due execution, mere proof of serious illness is not sufficient: there must be clear evidence that undue influence was in fact exercised, or that the illness of the testator so affected his [or her] mental faculties as to make then unequal to the task of disposing of his [or her] property.”

The application was dismissed because Margaret had the testamentary capacity and exercised the freedom that a testator must bestow their property as they wish.

There was insufficient evidence of undue influence leading to the execution of the will or that Margaret did not understand the effect of the will.

Link: [Green v Critchley \[2004\] QSC 22](#)

Other cases referenced (if important/ relevant): *Bailey v Bailey* (1924) 34 CLR 558



R v Atwell [2000] 266

Year: 2000

Court/Tribunal: Queensland Court of Appeal

Member: Davies JA, McPherson JA, and Thomas JA

Legal Issue: Whether the applicant's criminal sentences for rape, attempted rape, burglary, burglary with violence, disabling in order to commit an indictable offence, assault, and aggravated assault were manifestly excessive.

Area of Law: Criminal Law

Vulnerability Criteria: Women aged from 59-86, some disabled such as being deaf or having one leg. Mostly low socioeconomic status and living alone in state Housing Commission homes

Facts: In the initial hearing at the District Court of Queensland in Brisbane, the applicant (47 years old at the time of sentencing) was convicted on pleas of guilty for two counts of rape, three counts of attempted rape, 10 counts of burglary, one count of burglary with violence, three counts of assault, one count of aggravated assault, and one count of disabling in order to commit an indictable offence against eleven elderly women. He was effectively sentenced to life imprisonment.

The offences occurred at night or in early mornings. The evidence indicated that a degree of planning and preparation was involved in the commission of the offences and that the applicant must have selected the victims beforehand, as they were single women living alone in units or flats. The applicant entered their homes in various ways, such as by cutting through screen doors. In the majority, if not all, of the cases, the women were asleep and woke to discover the applicant already in their bedrooms, or in some cases, already upon them. A common method employed by the applicant in order to sexually assault or rape them was to put his hands over their mouths or to place a pillow over their faces.

Since these events took place, some of the women were forced to move from their homes due to fear, and most, if not all, suffered from a sense of isolation from



society and from men specifically. Many of the women were not very well off and lived in State Housing Commission homes.

Legal Conclusion: The court (McPherson JA, Davies JA and Thomas JA agreeing) concluded that the penalty imposed on the applicant was appropriate.

While the applicant's behaviour could be explained by his challenging life circumstances, such as absence of a father, parental loss, child loss and divorce, they did not excuse his behaviour.

According to medical experts, he lacked insight into his behavioural problems, which made it unlikely that they could be solved. He had also been suffering from a condition of depressive disorder, which did not amount to a mental illness.

The court held that the most aggravating aspects of the applicant's crimes were the large number of attacks during a short period of time, and the fact that the victims were all older or elderly women and were attacked in their own homes. As McPherson JA put it: 'If women, and particularly elderly women, are not to be secure in their own homes, then it is difficult to see where they can hope to be safe.'

The Court also commented that although he entered a plea of guilty, he did so after being apprehended through extensive and intensive detective work and his admissions were not entirely full and frank.

It was concluded that all the sentences were appropriate and therefore that the application for leave to appeal should not be granted.

Link: [R v Atwell \[2000\] QCA 266](#)



R v Castle; Ex parte Attorney-General [2014] QSC 276

Year: 2014

Court/Tribunal: Queensland Court of Appeal

Member: Muir and Fraser JJA and Mullins J

Legislation: *Corrective Services Act 2006* (Qld); *Penalties and Sentences Act 1992* (Qld)

Legal Issue: Whether the respondent's sentence for causing grievous bodily harm and serious assault to two elderly complainants was manifestly inadequate.

Area of Law: Criminal Law

Vulnerability Criteria: Mr Law had cancer and a hip replacement

Facts: The complainants were two elderly men aged 73 years old (Mr White) and 64 years old (Mr Law). The men had been out for dinner and drinks as Mr Law was about to receive cancer treatment the following day. While they were having drinks, the respondent (Castle) walked past them a few times and stared. He then said that they were too old to be in a hotel. The complainants left after they finished dinner, and the respondent followed them. CCTV footage showed that the respondent pushed the complainants to the ground and hit, kicked and punched them. The blows and kicks landed were aimed and heavy.

Mr Law fell to the ground and rolled onto his hip, which had been replaced in 2007 and gave in. The kicks caused bleeding on his hands and forearms. His cancer treatment had to be cancelled. His cheekbone, eye socket and sinuses were fractured, and he sustained bruising and abrasions.

Mr White sustained lacerations to his ear and forehead (the former requiring sutures), a blood clot in the brain, a fractured nose and ribs and cheek paresthesia. He required surgery and developed headaches, nightmares and fear of going into public places.

The respondent was 24 years old. He did not recall the offences as he was intoxicated with alcohol and methamphetamine. He had a history of offences



including public nuisance, unlawful stalking, common assault and had previously served a custodial sentence for this offending.

The respondent was convicted of the offences of causing grievous bodily harm and serious assault to the complainants. He was sentenced to four and a half years imprisonment for the first offence and a concurrent term of three years imprisonment for the second offence. He was eligible for parole after serving 18 months (one third) of the head sentence.

The Attorney-General appealed on the ground that the sentence was manifestly inadequate due to the aggravating features of the attack. These included the vulnerability of the appellants, who were assaulted without warning by a significantly larger and younger man. Furthermore, the attacks were prolonged, unprovoked and unjustified, with the respondent continuing to assault the victims even when they were on the ground, targeting their heads, and returning multiple times to inflict further harm. Lastly, the respondent was on notice of his propensity to violence when intoxicated.

The Attorney-General also argued that the sentencing judge should have declared under *Penalties and Sentences Act 1992* (Qld) s 161B that the respondent had been convicted of a 'serious violent offence'. This would have had the consequence that he could not be eligible for parole before serving 80 per cent of the head sentence.

Legal Conclusion: The Court noted that the exercise of sentencing discretion should only be overturned if it is affected by a specific legal error or if the sentence is otherwise 'unreasonable or plainly unjust'. In this case, the court found no such error in the sentencing judge's decision.

In this case, the prosecution did not argue for a 'serious violent offence' declaration at the trial level, making it difficult for the appellant to challenge the sentence on appeal. The court also considered precedent cases and found that, while the respondent's conduct was serious, the sentence was within the acceptable range.



The sentencing judge had already accounted for aggravating and mitigating factors, including the respondent's remorse, early guilty plea, and criminal history. The court concluded that the sentence was not manifestly inadequate and did not warrant appellate intervention.

The appeal was dismissed.

Link: [R v Castle; Ex parte A-G \(Qld\) \[2014\] QCA 276](#)

Other cases referenced (if important/ relevant): *R v McDougall and Collas* [2007] 2 Qd R 87; *House v The King* (1936) 55 CLR 499



Smith v Sahnner [2007] QSC 102

Year: 2007

Court/Tribunal: Supreme Court of Queensland

Member: Cullinane J

Legal Issue: Whether the testator had testamentary capacity at the time of giving instructions or executing his 2002 will and whether he was subject to undue influence and fraud.

Area of Law: Succession Law: Wills & Estates

Vulnerability Criteria: Elderly testator had motor neurone disease and had suffered a stroke. He was disabled, could not use his right hand, and suffered slurred speech

Facts: The deceased died on 8 September 2002. The plaintiff sought probate of a will executed by the deceased on 15 April 2002, of which the plaintiff was the sole executor and beneficiary. The defendant counterclaimed seeking probate of an earlier will, executed on 2 June 1998, of which the defendant was sole executor and beneficiary.

The defendant was the daughter of the deceased and the plaintiff. She was born during the plaintiff's marriage to another person. The defendant and the deceased were close while she was growing up and in her adult life.

In 2001, the deceased was diagnosed with motor neurone disease. His condition progressively worsened. He also suffered a stroke. He could not use his right hand and suffered from slurred speech. He nevertheless did not suffer any mental disease or illness. Both the plaintiff and defendant provided substantial care and assistance to the deceased.

In early 2002, the deceased and the plaintiff visited Mr Browne (a lawyer), where the deceased expressed that he had discharged the mortgage of the defendant and her husband as they had been supportive and caring of him during his illness. As well as this, he did not want to give a direct financial benefit to the defendant in his will since he had already given her and her husband a financial benefit during his lifetime, did



not trust the defendant's husband in handling money, and felt like the money would go to waste. Furthermore, the deceased was confident that by benefiting the plaintiff, the plaintiff would benefit the defendant upon her death.

Mr Browne noted that, although the deceased was 66 years old and suffered from illnesses which rendered him disabled, he had excellent mental capacity and was able to properly communicate when giving instructions of his testamentary wishes.

Legal Conclusion: The circumstances surrounding the execution of the 2002 will did not give rise to any suspicion about the deceased's capacity or that it was executed as a result of undue influence. He was an independent man who exercised his own judgement.

Although the deceased, shortly before his death when he informed the defendant that he had changed his will, told the defendant that the plaintiff would be the 'caretaker' of the deceased's property for the plaintiff, there were several possible explanations for this, including the deceased's desire to soften the blow on the defendant and avoid a hurtful explanation, and his confusion resulting from abuse of alcohol and his prescribed drugs. None of these things affected the validity of his will as determined at the time of its execution.

The defendant's argument was effectively that her claim on the deceased's bounty was so strong that undue influence or lack of capacity were the only possible explanations for his executing the 2002 will. However, the shift in testamentary direction could be adequately explained by money paid to the defendant to discharge her mortgage and the deceased's reservations about the defendant's husband, as had been expressed to his lawyer, Mr Browne.

The 2002 will was therefore valid.

Link: [Smith v Sahner \[2007\] QSC 102](#)



The Public Trustee of Queensland (as Litigation Guardian for ADF) v Ban [2011] QSC 380

Year: 2011

Court/Tribunal: Supreme Court of Queensland

Member: Boddice J

Legislation: *Uniform Civil Procedure Rules 1999* (Qld); *Powers of Attorney Act 1999* (Qld)

Legal Issue: Whether there existed a 'conflict transaction' under s 73(2) of the Power of Attorney Act.

Area of Law: Succession Law

Vulnerability Criteria: Dementia

Facts: ADF was a retired lawyer, who suffered with dementia. The defendant, a current lawyer, was close to ADF and was appointed by ADF as his attorney under an enduring power of attorney.

Following a visit to the hospital on 28 July 2009 concerning ADF's cognitive decline, the defendant executed a draft contract of sale of a property at Park Ridge owned by ADF and opened a joint bank account with ADF's authority. It was arranged that ADF would be represented by a firm of solicitors in relation to the sale.

On 28 October 2009, the contract of sale was completed by the defendant executing a transfer of the property to the purchaser on ADF's behalf. The defendant did this due to her 'belief or concern that ADF lacked the capacity to do so'.

On 29 October, the defendant instructed ADF's solicitors to pay the proceeds of sale into the joint account. She alleged that ADF had personally instructed the solicitors to the same effect on 2 August 2009.

The defendant admitted that, from at least 28 October, ADF lacked sufficient capacity to engage in these transactions and that the defendant knew this.



The plaintiff alleged that, between November 2009 and May 2010, the defendant used \$1.37 million from the joint account for her personal benefit and not for the benefit of ADF.

The defendant alleged by way of counterclaim that, on 28 August 2009, ADF executed a transfer of land that he owned at Greenbank in favour of the defendant and himself as joint tenants. The transfer was not registered.

Legal Conclusion: In an application for summary judgment by the plaintiff, the plaintiff sought a declaration that the proceeds of sale in the joint account were held on trust for ADF.

Even if ADF had instructed the solicitors to pay the proceeds into the joint account, this instruction was revoked upon ADF losing capacity, which the defendant admitted had occurred by the time the sale was completed (when ADF became the owner of the proceeds). Thus, the only legal authority for paying the proceeds into the joint account was the enduring power of attorney.

The payment of the proceeds of sale into the joint account was a 'conflict transaction' within the meaning of *Powers of Attorney Act 1999* (Qld) s 73 since the defendant had a personal interest in the transaction as joint account holder. The court therefore made the declaration sought by the plaintiff.

However, the court did not grant summary judgment in the plaintiff's favour in relation to the counterclaim. Whether the transfer of the Greenbank property was complete in equity depended on factual matters (whether ADF had authorised his solicitors to deliver the instrument of transfer and certificate of title to the defendant) that were in dispute and not the subject of any admission.

Link: [The Public Trustee of Queensland \(as Litigation Guardian for ADF\) v Ban \[2011\] QSC 380](#)

Other cases referenced (if important/ relevant): *Smith v Glegg* [2004] QSC 443;
Corin v Patton (1990) 169 CLR 540



VMH v SEL [2016] QSC 148

Year: 2016

Court/Tribunal: Supreme Court of Queensland

Member: Jackson J

Legislation: *Succession Act 1981* (Qld)

Legal Issue: Whether an order should be made under the *Succession Act 1981* (Qld) to authorise a will to be made on behalf of a person without testamentary capacity, and if so, what the terms of the will should be.

Area of Law: Succession Law: Wills & Estates; Guardianship & Administration

Vulnerability Criteria: Dementia; exploitation (theft) by friend and carer; social isolation

Facts: CEK was a 91-year-old woman without testamentary capacity. An application was made by her nephew, VMH, to authorise a will to be made on CEK's behalf. In December 2014, CEK's estate was valued at approximately \$2.4 million. The (active) respondents were CEK's nieces (Lyn and Susanne). The applicant and respondents both submitted that the court should make an order authorising a will to be made but were in dispute about what the terms of the proposed will should be.

CEK's previous will, made in February 2014, named Mr and Mrs B (her friends) and Bobby (her friend and former carer), among other persons, as beneficiaries. Mr B also held a power of attorney and enduring power of attorney for CEK.

Bobby took care of day to day matters such as shopping. There was evidence that Bobby withdrew large amounts from CEK's bank account that were unexplained or misused.

On 5 March 2015, a doctor assessed CEK's mental state and concluded that she was able to make her own legal decisions.

In late March 2015, CEK contracted to purchase a house in Townsville, with the intention for herself and Bobby to move in together. Mr B was against the move, as he did not think the house was suitable for CEK's needs and was aware of the bank



withdrawals Bobby was making. CEK saw Mr B's opposition as an attempt to control her affairs. From this point on, there was a dispute over whether CEK was capable of managing her own affairs and, if not, who should manage them.

CEK told VMH that Mr B had taken her bank card from her, cancelled the contract to purchase the house without telling her, and became upset when she asked for her bank statements. From this point, VMH became heavily involved in CEK's financial affairs and tried to remove Mr B from them. Lyn also assisted in various ways in looking after CEK.

On 1 May 2015, the doctor provided a second report which stated that CEK required further review of her mental state and expressed concern that she may have dementia.

In May 2015, VMH arranged for CEK to attend a lawyer. CEK instructed the lawyer to remove Mr B as her attorney and appoint VMH as her new attorney. The lawyer advised CEK to obtain a medical report regarding her mental state. Based on the report findings, the lawyer advised CEK that she would not have capacity to make a new power of attorney.

On 23 May 2015, CEK told VMH that she felt Mr B had taken advantage of her and that she wanted to change her will to leave her estate to VMH. On 1 June 2015, CEK executed documents revoking Mr B's enduring power of attorney and appointing VMH as her attorney. Both these actions were subsequently declared invalid by QCAT due to her lack of capacity.

On 25 June 2015, CEK executed a new will, which instead left the remainder of her estate to VMH, with a gift over to Lyn if VMH did not survive CEK. In September, a complaint was made to the police regarding Bobby's misuse of CEK's funds. Soon after, CEK executed a new will revoking the gifts to Bobby. This was the end of Bobby's care of CEK. Lyn was unaware of either of the 2015 wills and continued to assist CEK with her care and arrangements.

Meanwhile, Mr B had filed an application to QCAT to appoint him as CEK's financial administrator or guardian. CEK and VMH set about defending the application. On 20 October 2015, QCAT made orders revoking Mr B's power or attorney, and appointing



VMH as her administrator for financial matters. QCAT held that CEK was vulnerable to the influence of any person who might gain her trust, and she was incapable of ensuring that her interests were adequately protected.

In March 2016, Lyn became aware of the 2015 wills and a conflict between Lyn and VMH occurred, as Lyn considered that VMH had taken advantage of CEK.

In early 2016, following a separate application, QCAT ordered that VMH may use her funds to bring an application in the Supreme Court under *Succession Act 1981* (Qld) s 21 for a court-authorized will. By this time, VMH was preventing communication between CEK and Lyn. It was plain by that time that CEK did not have testamentary capacity.

Legal Conclusion: In examining the Court's power to authorise a will to be made on behalf of a person without testamentary capacity, the Court considered *Re Fenwick* (2009) 76 NSWLR 22, where Palmer J examined various kinds of incapacity cases in interpreting the wide discretionary power granted by s 21 and supported by s 25.

The Court highlighted that it need not be satisfied that the incapacitated person has previously manifested an actual testamentary intention that aligns with the proposed will. An example was given of a testator who provides for a friend in their will, but where it becomes apparent after the testator loses capacity that the intended beneficiary had been stealing from the testator. The testator is no longer able to change the will due to their loss of capacity, yet there is little doubt they would have done so had they had capacity. The absence of any prior actual intention to this effect is irrelevant.

The Court decided that an order authorising a new will should be made for various reasons. This included CEK's wishes (although their weight was reduced by her lack of capacity), and the fact that both the February 2014 and June 2015 wills made substantial gifts to Bobby, and it would be inappropriate in light of discovering Bobby's misuse of CEK's funds not to authorise a new will.



In deciding the terms of the will, various considerations were mentioned. CEK's present desire was to leave nearly all her estate to VMH, and if he does not survive her, to his immediate family. Yet, the Court highlighted several considerations preventing this desire from having determinative weight.

The Court was critical of VMH's 'injection' of himself into CEK's life, with no concern over her becoming dependent on him. Consequently, the Court gave less weight to CEK's statement of wishes due to his position of dominance and influence over her. CEK's fragile mental state was acknowledged, with Jackson J stating: "CEK changes her tune about her testamentary intentions depending on who is the listener and what she thinks they want to hear".

The Court mentioned that both VMH and Lyn had been caring for CEK, albeit with VMH doing more. The differences in care and responsibility for CEK assumed by VMH and the respondents should be recognised, as well as CEK's wishes — whether misguided or not. Accordingly, the Court concluded that VMH should receive 40% and the respondents should each receive 30% of the residue of the estate. The Court also ordered that the costs for VMH, Lyn and Susanne should be paid from CEK's estate.

Link: [VMH v SEL \[2016\] QSC 148](#)





THE UNIVERSITY
OF QUEENSLAND
AUSTRALIA

CREATE CHANGE

Pro Bono Centre



For more information:
probono@law.uq.edu.au
law.uq.edu.au/pro-bono