The duties of a solicitor who takes instructions for and who has a will executed

***Chant v Curcuruto*; *Chant v Curcuruto* [2021] NSWSC 751 (25 June 2021) Hallen J**

Hallen J, from [737]

Involvement of a Solicitor in 2017 Wills

It has been observed that if a duly executed will has been professionally prepared and then explained to the maker by an independent, and experienced, solicitor, it will be markedly more difficult to challenge its validity on the grounds of lack of capacity than in a case where those prudent procedures have not been followed.

Even though a solicitor may genuinely believe that the testator had testamentary capacity at the time he or she executed the will, that opinion does not displace the Court's role in deciding whether in fact the testator had testamentary capacity: *Rowe v Sunholz* [2019] QSC 306 at [148]; *Ruskey-Fleming v Cook* [2013] QSC 142 at [63] and [71].

Because it played a major part in the submissions, it is necessary to say something about the duties of a solicitor who takes instructions for and who has a will executed.

In *Jarman on Wills*, 8th ed (1951) London, Sweet and Maxwell, Vol. 3, page 2073, it is said:

> "Few of the duties which devolve upon a solicitor, more imperatively call for the exercise of a sound, discriminating, and well-informed judgment, than that of taking instructions for wills."

In Petrovski v Nasev; The Estate of Janakievska [2011] NSWSC 1275 at [89] I referred to *Pates v Craig & Anor The Estate of Cole* (NSWSC, 28 August 1995, unreported) where Santow J made some general comments regarding circumstances where a legal practitioner receives instructions from an established client to prepare a will on behalf of another person, where that client is to be the principal, or major, beneficiary under the proposed will and, in particular, where the client instigates that will. It is not necessary to repeat what was written.

In *Nicholson v Knaggs*, Vickery J, at [664], recommended a "considered and appropriately structured interview with the testatrix" and emphasized that "in order to establish knowledge and approval of a will by a testator, more is required than 'merely establishing that the testator executed it in the presence of a witness after it had been read to, or by, him' (at [387])". I respectfully agree.

In my view, this is not a case in which the words of Young J in *Re Crooks Estate* (Supreme Court (NSW), Young J, 14 December 1994, unrep), at 29, apply. In that case, his Honour stated that evidence from a solicitor who has considerable experience, including in dealing with elderly clients and their testamentary wishes, is valuable evidence of testamentary capacity because:

> "An experienced solicitor or solicitor's secretary gets used to dealing with people making wills and are usually attuned to the red lights that flash when a person who is of suspect capacity comes across their paths [*sic*]."

The passage quoted above was referred to, with approval in *Drivas v Jakopovic* (2019) 100 NSWLR 505; [2019] NSWCA 218 at [52] (Macfarlan JA, Bell ACJ and McCallum JA agreeing).

However, the Court must also consider whether the particular instance before it "may stand apart from the ordinary [case]": *Drivas v Jakopovic* at [54].

In *Petrovski v Nasev; The Estate of Janakievska* , I also wrote at [89], referring to *Pates v Craig & Anor; The Estate of Cole* that a solicitor taking instructions where capacity is potentially in doubt has a duty to take particular care to gain reasonable assurance as to the testamentary capacity of the will-maker. In this case, I am not satisfied that particular care was taken.

However, in *Veall v Veall* (2015) 46 VR 123; [2015] VSCA 60 at [192], Santamaria JA, with whom Beach and Kyrou JJA agreed, wrote:

> "A solicitor who prepares a will comes under professional duties to exercise proper care and attention. In the United Kingdom, there are several decisions that inform the duty of a solicitor when taking instructions from an infirm testator. In *Kenward v Adams*, and *Re Simpson*, Templeman J said that, where a solicitor is making a will for an old or infirm testator, the solicitor should ensure that the making of the will is witnessed by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and findings. Needless to say, this is a counsel of prudence that must be subject to the circumstances of the case. The exigencies of the situation may make it impracticable; nor would it need to be followed where, despite the age of the testator, he is obviously well and is proposing to make a will that distributes his estate in a manner which is uncontroversial. Where it is evident that a will may be controversial and a solicitor does not take elementary precautions, the court will have to look elsewhere if it is asked to determine capacity and knowledge and approval. In *Ashkettle v Gwinnett*, Christopher Pymont QC, sitting as a Deputy Judge in the Chancery Division, referred to the judgments of Mummery LJ and Sir Scott Baker in *Hawes v Burgess* to the effect that 'it is 'a very strong thing' for a judge to find lack of testamentary capacity when the will has been prepared by an experienced and independent solicitor following a meeting with the testator, when it had been read through and explained to her and when the solicitor had formed the view

that the testator was capable of understanding the will, the terms of which were not, on their face, inexplicable or irrational'. Nonetheless, he said:

> 'I accept the wisdom of these comments though I observe that they do not go so far as to suggest that, in every case, the evidence of an experienced and independent solicitor will, without more, be conclusive. Any view the solicitor may have formed as to the testator's capacity must be shown to be based on a proper assessment and accurate information or it is worthless; and (as Mummery LJ acknowledges) the terms of the will may themselves suggest that the solicitor's assessment was not soundly based'." (Citations omitted)

Hallen J continuing from [748]

Applegate J did not go as far as Santamaria JA in *Veall v Veall*, but preferred to say "if the solicitor's view as to testamentary capacity was not based on a proper assessment and accurate information, it may be worth very little"*: Rowe v Sunholz* at [149].

The weight to be given to the solicitor's evidence will depend on her, or his, experience, training, and understanding of the test of testamentary capacity; her or his, ability to make an assessment of capacity, taken with the quality of the assessment made as appears from any contemporaneous notes and records; her or his, knowledge of, and familiarity, with the will-maker, including the age and state of health of the will-maker; and her or his, independence; the will-maker's presentation to the solicitor, and whether there are any "red flags" suggesting a possible challenge to capacity. It will also depend on "the level of enquiry and discussion on the part of the lawyer of, and with, the deceased": *Loosley v Powell* [2018] 2 NZLR 618; [2018] NZCA 3 at [51].

In the present case, as I have previously noted, there were a number of red flags including the fact that both Ken and Irene had each recently received medical attention; that medical reports had been provided that raised significant questions about the capacity of each of them; where an independent expert to consider his, and her, capacity had been foreshadowed but was not proceeded with; that neither Ken nor Irene was an existing client of the firm at which Ms Blackadder was employed; that at least some instructions were being provided by one or both of the sole substitute beneficiaries; and where each of Ken and Irene was making a significant change to his, or her, will in appointing Jeffrey, who had never been a beneficiary, as a beneficiary in circumstances where the contents of the earlier Wills had not been considered in any material way.

It is difficult to accept that Ms Blackadder sufficiently considered these red flags.

Because it is relevant to the issues in this case, I also refer to *Key v Key* [2010] WLR 2020; [2010] EWHC 408, in which there was a reference to what has been described, in the United Kingdom, as "the golden rule", namely, that in "the case of an aged testator or a testatrix who has suffered a serious illness there is one golden rule which

should always be observed ... the making of a will by such a testator ought to be witnessed or approved by a medical practitioner who satisfies himself of the capacity and understanding of the testator...".

There is no so-called "golden rule" in Australia. At its highest, what is described elsewhere as a rule provides guidance only and any failure to obtain the view of a medical practitioner does not automatically invalidate the Will; nor does compliance guarantee its validity. The duty of the solicitor instructed to make a will is to take reasonable steps to satisfy herself, or himself, that the will-maker has testamentary capacity. This requires the exercise of her, or his, judgement. [753]