When reading over is not enough

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1. INTRODUCTION

1.1. In 2023 there were 414 proceedings commenced in the Equity Division of the Supreme Court of NSW described as Probate (Contentious Matters). This compares to 968 family provision matters[1]. Those described as Probate (Contentious Matters) will include applications:

a. To determine which of one or a number of documents are a deceased person's last Will.

b. For a declaration pursuant to s 8 of the *Succession Act* 2006 (NSW) concerning an informal testamentary document.

c. To revoke a grant of probate or administration.

d. For rectification of a Will.

e. To determine entitlement in and/or a grant of administration in an intestate estate.

1.2. Occasionally the following applications might be described as Probate (Contentious matters):

a. Applications concerning rights to disposal of the body (more frequently dealt with in the Duty or Expedition List).

b. For a Statutory Will (although if the application concerned a person under a financial management and/or guardianship order, an application could be commenced in the Protective List).

c. Applications concerning administration of estates, or for construction of a Will (although such applications might traditionally have been commenced in the General List of the Equity Division).

1.3. On an application to determine which of one or a number of documents are a deceased person's last Will (excluding informal testamentary documents) the following issues may be pleaded[2]:

a. Lack of testamentary capacity.

[1] Preliminary statistical data for the Supreme Court of NSW for 2023 published at 29 January 2024 available for download at <supremecourt.nsw.gov.au/about-us/statistics/.html

[2] Probate Law & Practice: An Introduction, paper presented for NSW Bar Association by Lindsay J on 3 March 2022 paras [91] – [110], available for download at: <https://www.supremecourt.justice.nsw.gov.au/Pages/sco2_publications/SCO2_judicialspeeches/sco2_speeches_current_judicialofficers.aspx#lindsay>

b. Lack of knowledge and approval.

c. The Will was procured by undue influence

d. The Will was procured by fraud.

1.4. This paper will address testamentary capacity and knowledge and approval.

1.5. Suspicious circumstances may be deployed in aid of a plea that the deceased did not know and approve of the contents of a Will but they are not an independent basis for determining that a Will is not a valid testamentary instrument. Suspicious circumstances must be fully particularised.

1.6. This paper will address the extent to which reading over of a Will is an answer to a plea of suspicious circumstances; the relationship between testamentary capacity and knowledge and approval; and the ways in which issues concerning suspicious circumstances and knowledge and approval have been recently resolved.

1.7. This paper does not address solicitor's duties in respect of testamentary capacity.

2. TESTAMENTARY CAPACITY AND KNOWLEDGE AND APPROVAL

2.1. In *Banks v Goodfellow* (1870) LR 5 QB 549 at 565, Cockburn CJ set out the locus classicus test for testamentary capacity, in the following terms:

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

2.2. In *Carr v Homersham* (2018) 97 NSWLR 328 at [5] – [6] Basten JA (with whom Leeming JA agreed) said that the concept is sometimes divided into component parts with affirmative and negative elements, the affirmative elements being:

a. The capacity to understand the nature of the act of will making and its effects;

b. Understanding the extent of the property the subject of the Will; and

c. The capacity to comprehend moral claims of potential beneficiaries.

2.3. The negative elements ("disorder of the mind which poisons testamentary affection" and/or "insane delusions") identify conditions which might be understood to interfere with testamentary capacity and are only relevant to the extent that they are shown to interfere with the testator's normal capacity for decision making.

2.4. In *Chant v Curcuruto* [2021] NSWSC 751 at [658] – [660] and [663], Hallen J said:

> [658] "…it is convenient to remember, by way of preamble, what was written in *Croft v Sanders* [2019] NSWCA 303 at [126] (White JA, Bathurst CJ and Gleeson JA agreeing):
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> > "…Capacity to make a will is to be assessed having regard to the particular will made. While the test of capacity remains the same, the application of that test will vary according to the complexity and the officiousness or inofficiousness of the will … As the High Court said in *Gibbons v Wright* (1954) 91 CLR 423 at 438; [1954] HCA 17 the mental capacity required in respect of any instrument is relevant to the particular transaction which is being effected by means of the instrument."
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> [659] ("Inofficious" in this context means where no provision, or an apparently inadequate, or unfair, provision, is made for those who ought to be the objects of the will-maker's bounty: Brown v McEnroe (1890) 11 NSWR Eq 134 at 138 (Owen CJ in Eq); McNamara v Nagel [2017] NSWSC 91 at [263] (Robb J)).
>
> [660] The retrospective task of the Court is to assess whether a will is valid; the test for testamentary capacity being understood in the context that it is time, situation, person, and task, specific. That is to say, whether the particular will-maker, suffering from his, or her, particular medical, or mental, conditions, in the particular situation, was able to make the particular will, at the time it was made. As has been written, the test of capacity is not monolithic, but is tailored to the task in hand: Hoff
> v Atherton [2005] WTLR 99; [2004] EWCA Civ 1554 at 109."

2.5. In *Kerr v Badran; Estate of Badran*, Windeyer J said at [49]:

> "In dealing with the Banks v Goodfellow test it is, I think, necessary to bear in mind the differences between life in 1870 and life in 1995. The average expectation of life for reasonably affluent people in England in 1870 was probably less than 60 years and for others less well off under 50 years: the average life expectation of males in Australia in 1995 was 75 years.
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> Younger people can be expected to have a more accurate understanding of the value of money than older people. Younger people are less likely to suffer memory loss. When there were fewer deaths at advanced age, problems which arise with age, such as dementia, were less common. In England in 1870, if you had property it was likely to be land or bonds or shares in railway companies or

> government backed enterprises. Investment in ordinary companies was far less common than now. Older people living today may well be aware that they own substantial shareholdings or substantial real estate, but yet may not have an accurate understanding of the value of those assets, nor for that matter, the addresses of the real estate or the particular shareholdings which they have.
>
> Many people have handed over management of share portfolios and even real estate investments to advisers. They may be quite comfortable with what they have; they may understand that they have assets which can provide an acceptable income for them, but at the same time they may not have a proper understanding of the value of the assets which provide the income. They may however be well able to distribute those assets by will. I think that this needs to be kept in mind in 2004 when the requirement of knowing "the extent" of the estate is considered. This does not necessarily mean knowledge of each particular asset or knowledge of the value of that asset, or even a particular class of assets particularly when shares in private companies are part of the estate. What is required is the bringing of the principle to bear on existing circumstances in modern life."

2.6. In *Revie v Druitt* [2005] NSWSC 902 Windeyer J said at [34]:

> "As I have pointed out quite recently in Kerr v Badran, lay evidence of the activities, conversations, family circumstances and relationships of the deceased and evidence from doctors, often general practitioners who were treating doctors during the lifetime of the deceased, usually is of far more value than reports of expert specialist medical practitioners who have never seen the deceased."

2.7. The most compelling evidence of understanding is reliable evidence of a detailed conversation with the deceased at the time of making of the Will displaying understanding of the deceased's assets, the deceased's family and the effect of the Will. It is extremely unlikely that medical evidence that the deceased did not understand these things would overcome the effect of evidence of such a conversation: *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197 at [65]; [89].

2.8. The evidence of a solicitor taking instructions for and attending on the execution of a Will is important, because solicitors become attuned to recognising when the capacity of a client may be suspect: *Drivas v Jakopovic* (2019) 100 NSWLR 505; [2019] NSWCA 218 at [52] per Macfarlan JA (with whom Bell P and McCallum JA agreed).

2.9. To establish knowledge and approval is to establish that the Will represents the deceased's testamentary intentions (*Robertson v Barker* [2021] NSWSC 1682 at [494]).

2.10. In *Gill v Woodall* [2010] EWCA Civ 1430; [2011] Ch 380 at [71], Lloyd LJ said that

it must be established that the testator understood (a) what was in the Will when he or she signed it; and (b) what its effect would be.

2.11. In *Lim v Lim* [2022] NSWSC 454 at [353] Hallen J said

> [353] "In comprehending the nature of what the deceased was doing, and its effects, it is not necessary to establish the she, or he, was capable of appreciating the legal effect of all the clauses of the disputed will. However, it does need to be shown that the deceased understood that she, or he, was executing a will and the practical effect of the central clauses in that document…"

3. PROBATE PRESUMPTIONS

3.1 *Bailey v Bailey* (1924) 34 CLR 558 at 570 (Isaacs J) and *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 704-707 (Powell J) set out certain presumptions of proof said to apply in contested probate matters.

3.2 In *Bailey v Bailey*, Isaacs J referred to the following propositions (citations omitted):

a. The onus of proving that an instrument is the Will of the alleged testator lies on the party propounding it; if this is not discharged the Court will pronounce against the instrument;

b. This onus means the burden of establishing the issue. It continues during the whole case and must be determined upon the balance of the whole evidence;

c. The proponent's duty is, in the first place, discharged by establishing a prima facie case;

d. A prima facie case is one which, having regard to the circumstances so far established by the proponent's testimony, satisfies the Court judicially that the will propounded is the last will of a free and capable testator;

e. A man may freely make his testament, how old soever he may be; for it is not the integrity of the body, but of the mind, that is requisite in testaments;

f. The quantum of evidence sufficient to establish a testamentary paper must always depend upon the circumstances of each case, because the degree of vigilance to be exercised by the Court varies with the circumstances;

g. As instances of such material circumstances may be mentioned: (a) the nature of the will itself regarded from the point of simplicity or complexity, or

of its rational or irrational provisions, its exclusion or non-exclusion of beneficiaries; (b) the exclusion of persons naturally having a claim upon the testator; (c) extreme age, sickness, the fact of the drawer of the will or any person having motive and opportunity and exercising undue influence taking a substantial benefit;

h. Once the proponent establishes a prima facie case of sound mind, memory and understanding with reference to the particular will, for capacity may be either absolute or relative, then the *onus probandi* lies upon the party impeaching the will to show that it ought not to be admitted to proof;

i. 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 mental faculties as to make them unequal to the task of disposing of his property;

j. The opinion of witnesses as to the testamentary capacity of the alleged testator is usually for various reasons of little weight on the direct issue;

k. While, for instance, the opinions of the attesting witnesses that the testator was competent are not without some weight, the Court must judge from the facts they state and not from their opinions;

l. Where instructions for a will are given on a day antecedent to its execution, the former is by long established law the crucial date;

3.3 The application of the burden of proof, and the presumptions which apply with respect to testamentary capacity and knowledge and approval were summarized by Meagher JA (with whom Basten and Campbell JJA agreed) in *Tobin v Ezekiel* (2012) 83 NSWLR 757; [2012] NSWCA 285 at [44] – [48] as follows (citations omitted):

"[44] The starting point is that the onus of proof lies upon the proponent of the will to satisfy the court that it is the last will of a “free and capable” testator.

To establish that a document is the last will, it must be proved that the testator knew and approved its contents at the time it was executed so that it can be said that the testator comprehended the effect of what he or she was doing:

[45] If the will is rational on its face and is proved to have been duly executed, there is a presumption that the testator was mentally competent. That presumption may be displaced by circumstances

which raise a doubt as to the existence of testamentary capacity. Those circumstances shift the evidential burden to the party propounding the will to show that the testator was of "sound disposing mind".

That doubt, unless resolved on a consideration of the evidence as a whole, may be sufficient to preclude the court being affirmatively satisfied as to testamentary capacity:

[46] Upon proof of testamentary capacity and due execution there is also a presumption of knowledge and approval of the contents of the Will at the time of execution. That presumption may be displaced by any circumstance which creates a well-grounded suspicion or doubt as to whether the will expresses the mind of the testator. In Thompson v Bella-Lewis [1996] QCA 27; [1997] 1 Qd R 429 McPherson JA (dissenting in the result) said (at 451) of the circumstances able to raise a suspicion concerning knowledge and approval that, except perhaps where the will is retained by someone who participated in its preparation or execution or who benefits under it, "a circumstance must, to be accounted 'suspicious', be related to the preparation or execution of the will, or its intrinsic terms, and not to events happening after the testator's death". Once the presumption is displaced, the proponent must prove affirmatively that the testator knew and approved of the contents of the document:

[47] Evidence that the testator gave instructions for the will or that it was read over by or to the testator is said to be "the most satisfactory evidence" of actual knowledge of the contents of the will:

What is sufficient to dispel the relevant doubt or suspicion will vary with the circumstances of the case; for example in Wintle v Nye [1959] 1 WLR 284 the relevant circumstances were described (at 291) as being such as to impose "as heavy a burden as can be imagined". Those circumstances may include the mental acuity and sophistication of the testator, the complexity of the will and the estate being disposed of, the exclusion or non-exclusion of persons naturally having a claim upon the testator, and whether there has been an opportunity in the preparation and execution of the will for reflection and independent advice. Particular vigilance is required where a person who played a part in the preparation of the will takes a substantial benefit under it.

In those circumstances it is said that such a person has the onus of showing the righteousness of the transaction: Fulton v Andrew at 472; Tyrrell v Painton at 160. That requires that it be affirmatively established that the testator knew the contents of the will and appreciated the effect of what he or she was doing so that it can be said that the will contains the real intention and reflects the true will of the testator

[48] In this context the statements prescribing "vigilance" and "careful scrutiny" and referring to the court being "affirmatively satisfied" as to testamentary capacity and knowledge and approval are not to be understood as requiring any more than the satisfaction of the conventional civil standard of proof: see Worth v Clasohm at 453. What such statements do is emphasise that the cogency of the

> evidence necessary to discharge that burden will depend on the circumstances of each case and in particular the source and nature of any doubt or suspicion in relation to either of these matters. They also recognise that deciding whether a document is indeed a person's last will is a serious matter, so any decision about whether the civil standard of proof is satisfied should be approached in accordance with Briginshaw v Briginshaw [1938] HCA 34; 60 CLR 336 or, now, s 140(2) of the Evidence Act 1995."

3.4 After referring to *Tobin v Ezekiel* (2012) 83 NSWLR 757; [2012] NSWCA 285 Basten JA said in *Carr v Homersham* at [46] – [47]:

> "There is a ready temptation to reformulate these propositions in the language of presumptions and shifting burdens, and by reference to burdens of adducing evidence and burdens of proof. However, such complexity is unlikely to be helpful and may distract from a determination of what is in substance a purely factual issue, the resolution of which will turn on the nature of the particular matters raised, and by whom.
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> To speak of there being a "doubt" as to testamentary capacity is to say little more than that a real issue has been raised on the evidence, which requires the resolution of the court. Unless such an issue has been raised, testamentary capacity need not be addressed; its existence will be presumed. Once the issue is raised, the court must resolve it; that must be done by a consideration of all the evidence and the inferences which may be drawn from it. It is true that the court must be affirmatively satisfied as to testamentary capacity, but in doing so, it should be alert to the fact that to find incapacity and thus invalidate a formally valid will is, in the words of Gleeson CJ, "a grave matter." A doubt which does not preclude the probability that the testator enjoyed testamentary capacity cannot warrant a finding of invalidity."

4. SUSPICIOUS CIRCUMSTANCES

4.1 Suspicious circumstances, in the context of knowledge and approval, must be capable of throwing light on whether the testator knew and approved of the contents of the will: *Tobin v Ezekiel* [2012] NSWCA 285; 83 NSWLR 757 at [55].

4.2 In *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 704-704, Powell J set out principles relevant to testamentary capacity and knowledge and approval. The tenth principle was:

"Facts which may well cause suspicion to attach to a document include:

i. That the person who prepared, or procured the execution of, the document, receives a benefit under it;

ii. That the testator was enfeebled, illiterate or blind, when he executed the document;

iii. Where the testator executes the document as a marksman when he is not".

4.3 The fifteenth principal was that facts which, if established, may provide evidence contrary to the presumption that a duly executed will was made by a person of competent understanding, included:

a. The exclusion of persons naturally having a claim on the testator's bounty; and

b. Extreme age, or sickness or alcoholism.

4.4 In A Learmonth QC, C Ford, T Fletcher, Master Clark and Master Shuman (eds), *Theobold on Wills 19th Edition*, Sweet & Maxwell 2021, the following were also referred to as examples of suspicious circumstances at [4-049]:

a. where a person was active in procuring the execution of a will, by, for instance, suggesting the terms of a will to the testator and instructing a solicitor chosen by that person.

b. A radical departure from testamentary dispositions long adhered to requires explanation, especially if the person in whose favour the change is made possesses great influence and authority with the deceased and originates and conducts the whole transaction. See also A Learmonth, C Ford, J Clark and J Ross Martyn (eds), *Williams, Mortimer & Sunnucks on Executors, Administrators and Probate* (21st ed) 2018 Sweet and Maxwell at [10-36] cited in *Lim v Lim* [2022] NSWSC 454 at [354].

4.5 In *Mekhail v Hana; Mekail v Hana* [2019] NSWCA 197, Leeming JA referred at [171] to suspicious circumstances as requiring the "vigilant and careful scrutiny appropriate given the way in which this will came to be prepared and executed".

4.6 The concept is best illustrated by factual examples. In *Nock v Austin* [1918] 25 CLR 520 at 525-526, Barton and Gavan Duffy JJ described the facts as follows:

> "In the present case the will was drawn by one of the executors, Mr. A. J. Morgan, a solicitor. The instructions were taken by his co-executor, Mr Austin, from the lips of the testator, and brought to Mr. Morgan in his office. These two gentlemen participate largely in the residue. Not too much is to be made of the fact that two months earlier the testator had made a will in which the proportion allotted to these two gentlemen was larger. The testator left only a few pounds a week to his wife, and nothing to his son (of whose drinking habits he did not approve) until after her death. Then on he was to have £3 a week for his life, the balance of income going to Austin during the son's life, while after his death there was a trust for conversion and

> division in equal parts between two Queensland hospitals and the two executors."

4.7 Probate of the Will was granted, after the evidence of testator's capacity and as to knowledge and approval was "minutely given", and "tested by most searching cross-examination".

4.8 More extraordinary were the facts of *Wintle v Nye* [1959] 1 All ER 552 which were described as follows:

> "In 1937 a lady of sixty-six years of age, unversed in business, whose property had been managed by her brother until his death in 1936, was being advised in the preparation of her will, by the respondent, her solicitor, who had for many years been her family solicitor and then had the management of her property. The value of her estate at that time was estimated at £38,000 after allowing for death duties. By the first draft of her will her executors were to be the respondent and a bank, and her residuary estate was to be given to charities.
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> Between the first consultation on October 1936, and the execution of the will, there were some twenty interviews between the testatrix and the respondent at which her will was discussed. The will that she ultimately executed appointed the respondent to be her sole executor and gave the residuary estate to him, a clause being included requesting him to apply the same in accordance with a letter not yet written; there were other bequests, including an annuity of £300 to the testatrix' sister with a provision that on her death one-third of the funds set aside for the annuity was to be given to charities. The residuary gift, however, was of substantial value.
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> The will was drawn by the respondent and executed in his office. The testatrix had no independent advice, but the respondent deposed that he had advised her to consult a separate solicitor and that she had declined to do so. The respondent deposed that the testatrix' reason for leaving him her residuary estate was that she did not want to leave her sister in control of more of her estate than a limited income, that the respondent could supply further funds for her sister's maintenance and that there was no one whom the testatrix preferred or could rely on, other than the respondent, to look after her sister.
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> In 1939 the respondent advised the testatrix to execute a codicil, which he drew, revoking the gifts to charities on the death of the testatrix' sister; the respondent testified that he gave this advice as a consequence of reading of the depreciation in value of estates and of their possible inadequacy to meet legacies. The testatrix executed the codicil. The consequence of the revocation of the gifts to charities was that their amount fell into residue. The testatrix died in 1947 and the respondent proved the will and codicil. Her estate was assessed for death duty at £115,000."

4.9 At first instance, the Will was admitted to Probate, following decision by a jury. However, the appeal was allowed, due to a misdirection.

5. THE IMPORTANCE OF READING OVER

5.1 In *Hoff v Atherton* [2004] EWCA Civ 1554, Chadwick LJ set out the following statement of principle at [64]:

> "Further, it may well be that where there is evidence of a failing mind - and, a fortiori, where evidence of a failing mind is coupled with the fact that the beneficiary has been concerned in the instructions for the will - the court will require more than proof that the testator knew the contents of the document which he signed. If the court is to be satisfied that the testator did know and approve the contents of his will – that is to say, that he did understand what he was doing and its effect - it may require evidence that the effect of the document was explained, that the testator did know the extent of his property and that he did comprehend and appreciate the claims on his bounty to which he ought to give effect. But that is not because the court has doubts as to the testator's capacity to make a will. It is because the court accepts that the testator was able to understand what he was doing and its effect at the time when he signed the document, but needs to be satisfied that he did, in fact, know and approve the contents – in the wider sense to which I have referred."

5.2 *Hoff v Atherton* was referred to by White J in *Estate of Stanley William Church* [2012] NSWSC 1489 at [65] – [67] and by the NSW Court of Appeal in *Church v Mason* [2013] NSWCA 481 at [19], but it was not decided whether the proposition would be accepted in this jurisdiction. The principle was again set out by White J in *Estate of George Aeneas McDonald; Howard v Sydney Children's Hospital* [2015] NSWSC 1610, but again it was not necessary to decide because in that case there was no evidence of a failing mind.

5.3 In *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831, Robb J said at [471]:

> "In my view, where it is shown that a testator suffered from a mental disability at the time he or she made the will, and that the will was read by or read over to the testator before it was executed, so that in that sense the testator knew of the contents of the will, it will not necessarily follow from a finding that the testator had testamentary capacity that the will contains the real intention and reflects the true will of the testator. There may be cases where the testator's mental disability has had the consequence that, by one means or another, the process by which the will was prepared and executed has miscarried, so that, in whole or in part, the will does not reflect the true will of the testator."

5.4 In *Lewis v Lewis* [2021] NSWCA 168 Leeming JA (with whom Meagher JA and Payne JA agreed) at [137] – [188] referred to many authorities in which the importance of the reading over of the Will was considered.

5.5 At [170] his Honour said:

> "There are all manner of ways in which suspicious circumstances may be established, but a familiar instance is where a beneficiary has played a part in the drafting or execution of the will. In such a case, it would be usual for the propounder to seek to establish that the testator knew and approved that the effect of the will was to confer a benefit on that person. Another way of making that point is as follows. It will not much assist a person seeking to propound a will where there are suspicious circumstances merely to establish that the testator knew the contents of the will, in a case where that alone did not carry with it knowledge that the effect of the will was to confer a benefit on that person. The probate court's vigilant and jealous scrutiny will not greatly be allayed by demonstration that a capable testator whose knowledge and approval is in question knew the contents of the will, but failed to understand its effect."

5.6 In addition, his Honour said:

a. At [182] - sometimes knowledge of the words contained in the will without more will be invariably sufficient to discharge the onus of establishing knowledge and approval, and other times it might not.

b. At [185] "…it is not the law that a valid testamentary disposition is effected by a capable testator accepting what is put forward by another, if the testator does not himself or herself understand its general tenor."

c. At [186] – "…it will depend on the degree to which the circumstances are suspicious, the sophistication of the testator, the complexity of the will, and the other facts of the case…"

d. At [187] "Nothing in the foregoing requires a precise legal understanding of the will… It will be sufficient if the testator is shown to know and approve of the gravamen of the will".

5.7 Whilst reading over may not be conclusive, there are too many decisions of high authority which establish that it is a very important part of the process to establish knowledge and approval where suspicious circumstances are an issue.

6. EVALUATING THE WHOLE OF THE EVIDENCE

6.1 Although evidential burdens might be relevant to an application for an order that a caveat cease to be in force, they are in many cases less important once a contested probate application has been the subject of a multi day hearing before a Judge.

6.2 In *Chant v Curcuruto* [2021] NSWSC 751 Hallen J said at [663]:

> "Attention to the evidential and persuasive burdens may be decisive in a case in which the evidence is in short supply. But, in

> other circumstances, it is simply a tool to enable the Court to identify, and weigh, the relevant elements within the evidence, the ultimate task being to consider all of the evidence available, and to draw such inferences as the Court can from the totality of that evidence, to conclude whether those propounding the disputed will have discharged the burden of establishing that it represents the testamentary intentions of the will-maker."'

6.3 In *Starr v Miller; Starr v Miller* [2021] NSWSC 426 at [472] – [474], Hallen J said that the analysis of a two-stage approach, involving presumptions, has been considered to be artificial and the better approach is for the Court to consider all the relevant evidence available and then, drawing such inferences as it can from the totality of that material, reach a conclusion as to whether the propounder of the disputed Will had discharged the burden of establishing that the will-maker knew and approved the contents of the disputed Will.

6.4 In "*Probate Law & Practice: An Introduction*", paper presented for NSW Bar Association by Lindsay J on 3 March 2022, Lindsay J said at [84]:

> "The utility of presumptions, by that name, is less clear in the conduct of a final hearing by a judge, sitting alone, in a case in which parties have been required to adduce most of their evidence in the form of affidavits filed and served before the commencement of the hearing. In such a case, the task of the judge is essentially to draw such inferences bearing upon the validity of a will as may be drawn from the whole of the evidence".

6.5 In *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125 at 141, Tadgell JA said (cited in *Chant v Curcuruto* at [755] and in *Robertson v Barker* at [453]):

> "The evidence is to be evaluated as a whole in order fairly to consider whether the party bearing the onus of proof has established what is ultimately sought to be proved. The object of the exercise of evaluation is to discover whether the evidence paints a picture reflecting real life, rather than to place a tick or a cross against paragraph after paragraph of torpid pleading. A true picture is to be derived from an accumulation of detail. The overall effect of the detailed picture can sometimes be best appreciated by standing back and viewing it from a distance, making an informed, considered, qualitative appreciation of the whole. The overall effect of the detail is not necessarily the same as the sum total of the individual details."

6.6 Critical in many of these cases appears to be:

a. The presence or absence of important witnesses and evidence, particularly as to:

i. The parties and their relationship with the deceased up to and including the act of will making;

1. The events leading to, and at the time of, the instructions for, preparation and execution of, the disputed will.

b. The extent to which important evidence is documented or corroborated.

6.7 For illustrations compare the facts and outcome in *Chant v Curcuruto* [2021] NSWSC 751 and *Robertson v Barker* [2021] NSWSC 1682.

7. SEVERENCE CASES

7.1 One way in which the Court has grappled with evidence that a testator knew and approved of part only of a Will is sever the part not known or approved from the document admitted to probate: *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831 at [475] – [476] and [620] – [638]; *Lewis v Lewis* at [189] – [212].

7.2 This is relatively uncommon but appears to be available on the authorities notwithstanding the power to rectify in s 27 *Succession Act* 2006 (NSW).

7.3 The power to sever clauses from a will before it is admitted to probate must be affected by the extent to which the Court is satisfied that the testator knew and approved of the effect of the balance of the Will.

8. WHEN READING OVER IS NOT ENOUGH

8.1 The statement by Chadwick LJ in *Hoff v Atherton* at [64] should not be read as conflating testamentary capacity and knowledge and approval.

8.2 Assuming that a testator has testamentary capacity, what is required to demonstrate actual understanding will vary according to:

a. Characteristics personal to the testator, such as age, sophistication, capabilities, literacy and language; and

b. The simplicity or the complexity of the Will.

8.3 If instructions are taken by a solicitor directly from a testator in conference, establishing actual understanding should not arise as an issue because the solicitor will prepare the will in accordance with instructions received from a testator without outside influences.

8.4 Suspicious circumstances, such as the provision of instructions to the solicitor by

a beneficiary, create a knowledge and approval evidentiary or persuasive problem because upon that occurring the solicitor will usually not be able to give admissible evidence that the instructions came from the testator.

8.5 Even in the cases where the solicitor took the initial instructions in conference directly from a testator, the instructions will usually be taken on a different day to the making of the Will, or instructions may be updated by telephone or email following provision of a draft Will.

8.6 In every case the Will should be read out aloud and explained before it is executed.

8.7 The process should be documented in some way, such as by contemporaneous file note.

8.8 At the conclusion of the reading over process the testator's understanding can be checked by asking non-leading questions as to the testator's understanding of the Will, and the questions and answers recorded in the file note.

8.9 In the case of a simple will involving a revocation clause, the appointment of an executor and substitute executor, specific gifts, a residue clause, and substitute beneficiary clauses, the reading over should not take too long.

8.10 In the case of a testator with a complex estate, and a will with terms invoking the constitution or articles and memorandum of association of a private company, or the provisions of a discretionary trust deed, those documents should be available for the purpose of review of the relevant provisions, and confirmation that the testator understands the effect of the will provisions.

8.11 In the case of beneficiaries identified by class, a family tree should be obtained at the time of the taking of instructions, and instructions obtained as to whether yet unborn children are to benefit and, if so, when the class is to close. The effect of the class gift should then be explained at the time of reading over.

8.12 In the case of a generic gift (that is, a class of property capable of diminution or increase - *Pohlner v Pfeiffer* [1964] HCA 8; (1964) 112 CLR 52 per Windeyer J at [27] referring to *Brown v. Butcher* (1922) 22 SR (NSW) 176; 39 WN 44), the testator's understanding can be checked by seeking confirmation of instructions as to the property which would be disposed of by the gift if the testator died later that day. This is a satisfactory proxy noting that a will speaks as to the property disposed of by it as if it had been executed immediately before the death of the

testator – s 30 *Succession Act* 2006 (NSW).

8.13 In the case of a gift of residue, the testator's understanding of the effect of the gift can be checked by seeking confirmation of the instructions as to the property which would be disposed of by the gift if the testator died later that day.

8.14 The effect of any special provisions, such as a will made in contemplation of marriage and charging clauses, should be explained as they are read.

8.15 For complex testamentary trusts, the broad effect of each clause should be explained, particularly the initial trustee, the powers of the appointor to remove and appoint the trustee, the power of the trustee in relation to income and as to capital, the termination date for the trust including the power of the trustee to bring forward the termination date, the power of the trustee to amend the trust deed, the primary and general beneficiaries (and in fact, whether there is any real difference in the trust deed between them), whether income defaults to certain beneficiaries or is accumulated, and the default capital beneficiaries.

8.16 For rights of residence or life interests, the following should be explained: the asset(s) to be settled on the fund, the obligations as to payment of outgoings, repair and maintenance and insurance, whether the beneficiary is able to leave trust property and receive the rent, whether the gift is portable and if so how the transaction costs are to be borne, the termination date for the fund, the remainder beneficiaries, and what will occur if the remainder beneficiaries die before the life tenant.

8.17 If trustee powers are important for continuing trusts they must be explained although if there are no ongoing trusts they might be explained by a potted summary.

8.18 The testator should be advised as to the circumstances which might cause him or her to review their Will – such as the sale of a property specifically given, a new relationship, or further children.

8.19 Generally:

a. If the testator does not wish for the Will to be read aloud and explained to them, ask the testator to tell you the effect of the Will, and record their responses in a detailed file note. If the responses confirm that they understand the effect of the Will, then proceed. If the responses do not match the terms of the Will, check the instructions and make any necessary

amendments.

b. If the Will is too long to read aloud and explain, the testator should make a simpler Will.

c. If the testator is not able to demonstrate, in conference, an understanding of a more complex Will, that Will should not be made, and instructions should be sought for a simpler Will.

d. Testamentary trust Wills should not be attempted unless there are likely to be real asset protection and/or tax benefits.

8.20 If there is no other evidence that the testator understood the Will that was made, reading over may not be enough where:

a. The testator's personal characteristics (age, sophistication, capabilities, literacy and language) give rise to the potential for misunderstanding; or

b. The complexity of the Will, or part of the Will, means that a testator will not understand the effect, even if read aloud, without explanation.

8.21 Personal characteristics may also make it difficult to affirmatively establish knowledge and approval through evidence of conversation, in the absence of reading over – see for example *Lim v Lim* [2022] NSWSC 454 at [448] – [459].

8.22 The risk is increased where part of the instructions are communicated or confirmed through the medium of another person.

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