SUPREME COURT OF QUEENSLAND

CITATION:	*Re Spencer (deceased)* [2014] QSC 276
PARTIES:	**In the will of WILLIAM MAURICE SPENCER deceased**
FILE NO/S:	11418 of 2013
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	6 November 2014
DELIVERED AT:	Brisbane
HEARING DATE:	2 September 2014
JUDGE:	Dalton J
ORDERS:	**1. Declare that the unsigned document dated 13 August 2013, which is exhibit ACP-5 to Court Document 17, is the last will of William Maurice Spencer;** **2. Order that probate of the unsigned will dated 13 August 2013 is granted to Aaron Cornelius Potts as executor, subject to the formal requirements of the Registrar.**
CATCHWORDS:	*Succession Act* 1981 (Qld) *Bailey v Bailey* (1924) 34 CLR 558 *Banks v Goodfellow* (1870) LR 5 QB 549 *Challen v Pitt & Anor* [2004] QSC 365 *Deeks v Greenwood* [2011] WASC 359 *Estate of Blakely* (1983) 32 SASR 473 *Estate of Peter Brock* [2007] VSC 415 *Estate of Schwartzkopff* (2006) 94 SASR 465 *Frizzo v Frizzo* [2011] QSC 107 *Hatsatouris v Hatsatouris* [2001] NSWCA 408 *In the estate of Masters; Hill v Plummer* (1994) 33 NSWLR 446 *In the Estate of Vauk* (1986) 41 SASR 242 *Le Bon v Lili; Will of Klara Lane* [2013] VSC 431 *Mitchell v Mitchell* [2010] WASC 174 *Parker v Felgate* (1883) 8 PD 171 *Perrins v Holland* [2011] Ch 270 *Phillpot v Olney* [2004] NSWSC 592 *Re Estate of Perriman (Dec)* [2003] WASC 191 *Re Stuckey* [2014] VSC 221 *Timbury v Coffee* (1941) 66 CLR 277

COUNSEL: Ms C A Brewer for Perpetual Trustee Company Limited
Mr L Stephens for Mr Graham Bell

SOLICITORS: McInnes Wilson Lawyers for Perpetual Trustee Company Limited
Williams Lawyers for Mr Graham Bell

[1] William Maurice Spencer died on 14 August 2013. There are competing applications as to what document ought be admitted to probate. Perpetual Trustee Company Limited (Perpetual), as the executor of a will dated 4 June 1991, applies for probate of that will. It benefits Mr Andrew Butcher and Ms Melinda Butcher, who are the deceased man's first cousins once removed. Mr Graham Bell, the deceased man's first cousin, cross-applies for a declaration pursuant to s 18 of the *Succession Act* 1981 (Qld) that an unsigned document, dated 13 August 2013, is the last will of Mr Spencer and asks for that document to be admitted to probate. That document benefits Mr Bell. It may be that he regards himself as not wholly beneficially entitled. I do not decide issues about that: they are not raised on the applications before me and not all persons interested in those questions were parties.

[2] Mr Aaron Potts, the solicitor who drew the document dated 13 August 2013, gave evidence. I thought he was an honest, reliable and careful witness and I accept his version of events. Mr Potts' recollection is supported by contemporaneous file notes which are in evidence.

[3] William and David Spencer were brothers. Neither married. They both lived to old age and resided together in a house which they held as joint tenants. They had no children. By the end of their lives their parents had died. In early 2013 Mr David Spencer died. Perpetual was his executor and, upon realising the small size of his estate, renounced those duties. Mr William Spencer was left to deal with the estate and in February 2013, in the course of doing so, consulted a solicitor, Mr Potts. Mr Potts assisted Mr Spencer to deal with the estate and they formed a friendly professional relationship. They found that they had quite a lot in common – t 1.14.

[4] While Mr David Spencer's estate was still under administration, on 29 May 2013, Mr Spencer engaged Mr Potts on his own behalf. He asked him to draw up an Enduring Power of Attorney (in favour of Mr Bell) and a new will. Mr Potts drew the Enduring Power of Attorney, and it was executed. As to the will, Mr Spencer instructed that he wanted a new will, because he "had some relatives who he said he wanted changed to be the beneficiaries" and "he didn't want what happened to his brother to happen to him" – t 1.7. This latter concern was a reference to Perpetual's renouncing administration of David Spencer's estate. Mr William Spencer told Mr Potts that he wanted his cousin, Graham Reyland Bell, to be the sole beneficiary, and that he wanted Mr Potts to be the executor – t 1.7. Mr Potts told Mr Spencer that he was unwilling to be the executor, as it was against the policy of Mr Potts' firm – t 1.8. Mr Potts suggested that Mr Bell be the executor, but Mr Spencer replied that he did not want that – t 1.8. Mr Spencer said that he would think about it, and contact Mr Potts to give further instructions – t 1.8.

[5] About 10 weeks later, on 9 August 2013, Mr Potts received a telephone call from Mr Spencer, who informed him that he was at the Mater Private Hospital in

Brisbane, and had been diagnosed with terminal pancreatic cancer. He said he had a month to live – t 1.8. Mr Spencer told Mr Potts that he needed a new will in terms of what they had discussed "last time" – t 1.8. Mr Potts reiterated his concerns about being executor but relented and agreed to be the executor – t 1.8.

[6] In evidence-in-chief Mr Potts said that he did not consider that he had "direct instructions to draw the will at that time" – t 1.8. In cross-examination, Mr Potts explained that "he hadn't given me any final instructions at that time. However, he had, again, clearly shown to me his testamentary intention again" –t 1.15. On close examination it seems that this issue (whether there were present instructions to draw a will) is only one of timing, ie., there was no uncertainty as to the provisions the will was to contain. In evidence-in-chief Mr Potts says, of the conversation of 9 August:

> "He said I'm in hospital. I've been – I've been given a terminal diagnosis of pancreatic cancer. I only have one – one month to live. I need a new will. He said I'd like the will as what we discussed last time. I said to him that – remember that I didn't want to be executor of the will. He said I really would like that to be my will. Given that those were his circumstances, I decided that I would agree to be the executor of his will. I then said to him would you like me to come up and see him over the weekend. He said to me that he was – he had a month to live and that he was being moved from the Mater to St Vincent's the following week and that, at that stage, he would get his affairs in order. I did not have direct instructions to draw the will at that time." – t 1.8.

[7] Mr Potts' file note of that conversation was in evidence and supports the idea that the only thing to be resolved was when the will should be drawn up and brought to Mr Spencer. Mr Spencer's idea was that he wanted to wait until he was in St Vincent's, the file note reads in part, "Wait till goes to St Vincent's – settle down. … He will call me when St Vincent's." – t 1.21.

[8] On 12 August 2013, Mr Potts was told by his clerk that Mr Bell had telephoned, saying that Mr Spencer wanted his will to be drawn up now. Mr Spencer was still in the Mater. At 8.17am on 13 August 2013, Mr Potts called the Mater Private Hospital in Brisbane and spoke to Mr Spencer. Mr Potts said that Mr Spencer's "voice had become weak… But he could still communicate with me. He communicated to me directly, clearly. I – as a layperson, I had no reason to believe that there was any issues with his – with his capacity to enter the will, but he did speak very weakly. In my lay-opinion, I thought he'd sounded like he was in pain" – t 1.8. Mr Potts' file note for that day reads: "*Same as Friday – yes*". In cross-examination, Mr Potts said that this file note reflected the conversation he had had with Mr Spencer: he asked Mr Spencer whether he wanted the same will as he had wanted on Friday 9 August 2013, and Mr Spencer said yes – t 1.16. Mr Spencer said he was being moved to St Vincent's Hospital that day. Mr Potts agreed to go to St Vincent's that afternoon.

[9] After this telephone conversation, Mr Potts drew up the document dated 13 August 2013 in accordance with the instructions given by Mr Spencer on 29 May and confirmed on 9 and 13 August– tt 1.19-20. It is a very simple document:

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WILL

I, **WILLIAM MAURICE SPENCER** of 3 Ethel Street, Camp Hill, Brisbane in the State of Queensland, Australia, Retired, **HEREBY DECLARE** this to be my last will:-

1. **I REVOKE** all former Wills and Testamentary dispositions
2. **I APPOINT** my solicitor **AARON CORNELIUS POTTS** to be the Executor of this my last Will. I understand that he as my legal representative will be entitled to claim legal fees and/or executor's commission for the administration of my estate.
3. I declare that I have never been married and never had any children or dependants.
4. My brother **DAVID LEONARD SPENCER** is deceased.
5. **I GIVE DEVISE AND BEQUEATH** all my estate both real and personal whatsoever to my first cousin **GRAHAM REYLAND BELL.**

IN WITNESS WHEREOF I have here unto set my hand to this last Will and Testament this 13th day of August 2013.

[proper provision is made for execution and attestation]."

[10] Mr Potts arrived at St Vincent's Hospital at approximately 4.00 pm that afternoon. Mr Bell was there. This was the first time Mr Potts had met or spoken to Mr Bell – t 1.9. A nurse assisted Mr Spencer to sit upright. Mr Potts sat beside Mr Spencer. He said, "Mr Spencer was what I can only describe – in a – in a very severe – what I would consider painful state. He had a lot of trouble talking – in my opinion, had a lot of trouble opening his eyes. And when he –and also, he had a lot of trouble even with movement, I found" – t 1.9. Mr Potts deposed that "I remember being quite shocked by how much I thought Bill's condition had deteriorated since I had spoken to him in that morning, when he was able to pick up his telephone and discuss his will with me".

[11] Mr Potts' evidence continued:

> "I sat down beside Bill, and I – I and I said hello, Bill. It's me. Do you know who I am? And he said, yes, Aaron Potts. And he had a lot of trouble talking. I then – I then said I brought you a will. I read the will to him clearly. It was a short will. I said, Bill, is this your will. He sort of gave a grunting yes. I considered it a yes. At that stage, he put his hand out. It was limp to the point where I was unsure as to whether or not he'd be able to sign, given how much pain and how weak he seemed. From – at that point, I decided that I should get a shift doctor, and I became concerned as to whether or not he might have been on drugs, in particular, and whether or not that might affect his capacity. I asked for a shift doctor. The nurse got the shift doctor and I was met by a Dr Mohammad Khan. And I said I'm concerned about capacity. Could you do a capacity – some sort of capacity exam to him. He agreed. He seemed to know how to do them, and he went over and he started asking Bill a number of questions. They tended to concern dates. I can't be 100 per cent sure, but it was things like what's the date today, who was the Prime Minister, when were you born, when's your mother's birthday: a number of questions. From my memory, I think he got a few wrong,

> but – and a few right. But the doctor looked at me and gave me a very clear indication and shook his head and said no. And I – he didn't actually say it to me but I got the distinct impression from that that he did not believe he had capacity. I then had a brief talk to the doctor. I said is he likely to get better. The doctor had a brief conversation to me with the point where he's just – where he – sometimes when they give them morphine in the morning they become more lucid. The best thing to do would probably be to – he's just been moved, apparently. That might have had some effect. And the best thing for me to do would be to call back in the morning." – tt 1.9-1.10.

[12] Mr Potts continued in evidence-in-chief:

> "Were you concerned about his physical capacity or his mental capacity?--- I would say both. I mean, the overriding impression to me was that he was weak and in pain. And from that I got the impression that it was highly likely that he would have been administered drugs and that was probably my overriding concern was that those drugs may have affected his capacity. But I'm not a doctor. I was never informed what he had been administered. I don't know any further than that was my opinion.
> Did you think he understood the will when you read it over to him?--- My impression was from the response which I got which was a mere yes. I thought that that was enough – for me to believe that he was likely to have understood that I was his solicitor and I was there for the will and he understood it was the will that we'd spoken about in the morning." – t 1.10.

[13] On the morning of 14 August 2013, Dr Khan informed Mr Potts by telephone that Mr Spencer was still too drowsy. Later that day, Mr Potts was informed by a text message from Mr Bell that Mr Spencer had died.

Testamentary Capacity

[14] It was not argued that Mr Spencer did not have testamentary capacity when he made the will of 4 June 1991 but it was raised as an issue in relation to the document of 13 August 2013.

[15] *Banks v Goodfellow* states the classic test for testamentary capacity:

> "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."[1]

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1 (1870) LR 5 QB 549, 565.

[16] In *Timbury v Coffee*, Dixon J added that "in order that a man should rightly understand these various matters it is essential that his mind should be free to act in a natural, regular, and ordinary manner."[2]

[17] This test was recently discussed by Justice Applegarth in *Frizzo v Frizzo*:[3]

> "The *Banks v Goodfellow* test does not require perfect mental balance and clarity; rather, it is a question of degree. As Cockburn CJ put it in that case, 'the mental power may be reduced below the ordinary standard' provided the testatrix retains 'sufficient intelligence to understand and appreciate the testamentary act in its different bearings'"[4]

[18] I accept the authorities as to evaluating the evidence with care, in accordance with the *Briginshaw* principle.[5] Where there is a duly executed will, there will be a presumption of capacity.[6] In the absence of a duly executed will, there is no presumption of capacity in the relevant sense.[7] In *Phillpot v Olney*, White J said, in considering the onus of proving testamentary capacity where there was an informal will:

> "The onus of proving that the deceased had testamentary capacity lies upon the plaintiff. If the Court is not affirmatively satisfied that she had such a capacity it is bound to pronounce against the documents. Where a document has been duly executed in accordance with the formal requirements for the making of a will and is rational on its face, such execution raises a prima facie case that the person is of competent understanding which may place an evidentiary onus on the person disputing that the document is the deceased's will to adduce evidence raising doubts as to the deceased's competency... In this case no such evidentiary onus is thrown on the defendant."[8]

[19] In this case, the onus of proving testamentary capacity in relation to the document dated 13 August 2013 was on Mr Bell.

[20] Mr Potts said that at 29 May 2013, he had "no reason to doubt [Mr William Spencer's] capacity at all" – t 1.14. There was no evidence that Mr Potts asked Mr Spencer any general questions to establish that he understood the nature of his act in making a will, the extent of his property, or the claims to which he ought to give effect, either on 29 May 2013, or any other time. The evidence was also that Mr Potts did not use a checklist in his estate planning consultations (t 1.13), and had a fairly rudimentary understanding of the legal test for capacity: "somebody would have clear capacity to make decisions about their intentions and not be interfered by drugs or – or – you know, or medical incapacity" and "to be of clear mind, would be a good way to sum it" (t 1.16).

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2 (1941) 66 CLR 277at 283, citing Hood J in *In the Will of Wilson* (1897) 23 VLR 197, 199.
3 [2011] QSC 107, affirmed by the Court of Appeal [2011] QCA 308.
4 [2011] QSC 107 at 22.
5 *Fast v Rockman* [2013] VSC 18, [48]; *In the Estate of Schwartzkopff* (2006) 94 SASR 465, 474-475; *Estate of Peter Brock* [2007] VSC 415, [45]-[47] per Hollingworth J.
6 *Frizzo* (above), [23], [24].
7 Cross on Evidence (Service 172, 2014) at [7240] and [7090].
8 [2004] NSWSC 592 per White J at [12].

[21] Mr William Spencer was 79 years old when he died. Nonetheless he lived independently and there is no evidence that he had any illnesses, such as dementia, which might interfere with his capacity. To the contrary, the evidence was that Mr Spencer was perfectly competent in his everyday life, up to and including the time he took himself to hospital on 5 August 2013. The evidence as to this comes from Mr Potts, but also from two neighbours who were longstanding friends of Mr Spencer: Ms Lynch and Mr Hattin. Both Ms Lynch and Mr Hattin are people who would benefit if the unsigned document of 13 August 2013 were to be admitted to probate and if Mr Bell, who was named as the sole beneficiary in that document, were to distribute according to what he says were Mr Spencer's wishes. For these reasons I was careful to scrutinise the evidence of both Ms Lynch and Mr Hattin. However, I thought they both gave evidence in a perfectly straightforward way, and both seemed reliable. Neither one was cross-examined. Accordingly I accept their evidence, which I now outline.

[22] Kevin Hattin had been one of Mr Spencer's neighbours for about 10 or 11 years. Mr Hattin gave evidence about his conversation with Mr Spencer on the evening of 5 August 2013, when Mr Spencer admitted himself to hospital. Mr Hattin said:

> "Do you recall the day that he went to hospital?--- Yes. I do.
> Can you just tell us what happened in your own words?--- It was late evening – 7, 7.30 in the evening. And we were in the kitchen and we received a phone call and it was Bill Spencer ringing to say that he was going to admit himself to hospital and if – you know, could I come down and take the keys from him. And he had a few things organised that he wanted us to look after for him. For instance, he had his gas bill he wanted to make sure it was paid and the electricity bill to be paid. And so we quickly raced down there – I quickly raced down there and saw him.
> Now, it's been suggested that he might have been confused or had some sort of mental incapacity. What would you say about that?--- That would be – completely contrary to that. I think Bill was quite of sound mind. He'd organised himself. He had – he had his bag packed. He'd already rung a taxi, because I said, look, we'll run you in. And he said no, no. I've already – I've already got a taxi organised. And he had everything sort of organised ready for us to hand the keys over and---
> And what do you say about Bill's acuity or sharpness of mind. What do you say about that?--- He was very sharp. He knew what was going on. He was very sharp of mind. Yes.
> You had no – no reason to doubt that?--- Not at all. Not in the whole – not in the whole time we knew Bill.
> ... And did you report at any stage to any of the hospitals that he was confused?--- No. Bill wasn't confused at all." – t 1.25.

[23] Ann Lynch was Mr Spencer's long-standing neighbour and close friend. She described him as like an uncle to her children. She has qualifications as a nurse. Generally her evidence was that, "Bill had a memory that was amazing and I kept saying to him that I really needed to get someone in to talk to him, his memory was so sharp and he'd remember the fathers' names, the nephews' names, he remembered people who lived in our street and their brothers and sisters and their names and their dates of birth, he just was amazing. So, you know, to say Bill didn't have any mental capacity was really embarrassing. I think he was sharp as a

tack, though he was actually in pain." She also said, "I can say, relying on my medical training that Bill was not suffering from dementia or incapacity. My mother is in a dementia wing, I know what dementia is and I know when people have a mental [in]capacity or a problem, I can usually spot it quite well. I think that Bill was *compos mentis* to the very last, I definitely would say he seemed to be aware of what was going on around him."

[24] On 5 August 2013, Mr Spencer rang Ms Lynch to tell her that he was taking a taxi to the Mater Hospital. Ms Lynch met Mr Spencer later that night at the hospital, and visited him twice a day from the date he was admitted up until the day he died. Ms Lynch visited Mr Spencer on 7 August. It was his birthday. She described him as "still very with it. He was sharp. He spoke about what was happening with him. He was able to tell me what the doctor said. And his time limit – they gave him up to three months. He said he was going to make some phone calls. And, yeah, he was very, very with it." – t 1.57. She saw Mr Spencer on 9 August and took photos and made a short video of him that day. I have looked at the photos and video. They are certainly not determinative of any issue but they give no cause for concern as to Mr Spencer's capacity. Of that occasion Ms Lynch said, "Bill had deteriorated in health but he was still talking and making perfect sense". That is borne out by the video and photographs.

[25] Ms Lynch saw Mr Spencer on the morning of 13 August when he was having his breakfast. She was shocked to find that he was not sitting up properly to eat but she said, "Bill was fully – fully in control of his mind and what he was doing. And he was obviously very ill but very sound of mind." Of the entire admission to hospital she said, "I didn't find Bill to be confused at any point in time in any of the conversations I had with him from the time he went to the hospital to the time when I last seen him."

[26] The other evidence which bears upon Mr Spencer's capacity is from Mr Graham Bell and his wife, Ms Kathleen Durbidge. Mr Bell and Ms Durbidge stand to benefit if the document of 13 August 2013 is admitted to probate. That was reason to scrutinise their evidence carefully. As well, their evidence is odd in its substantive content in a way which is capable of reflecting on their credit. My conclusion is that they both gave honest evidence, and that they both acted honestly in their dealings concerning Mr Spencer. Both witnesses were advanced in years. Both gave evidence about conduct on 10 and 12 August 2013 and on 24 September 2013, at which times I accept they were dealing with difficult emotional issues – the unexpectedly quick demise of Mr Spencer and the difficult relationship between themselves and Mr Butcher. It seems that, however muted the conflict, this was not a happy family relationship and my impression is that both Mr Bell and Ms Durbidge wished to do what they considered was correct having regard to their perception of what Mr Spencer wanted, but also not to bring themselves into open conflict with Mr Butcher. I think this latter consideration also inhibited them explaining themselves in Court as fully as they might have.

[27] Mr Bell said that he and Mr Spencer had a close relationship. They had been in close contact for many years. They were of about the same age. Mr Bell assisted Mr William Spencer when his brother David became ill (over some years), and died, and assisted Mr William Spencer as his own health began to fail in 2013. Mr Spencer had appointed Mr Bell as his Enduring Power of Attorney.

[28] On 10 August 2013, Mr Bell and Ms Durbidge visited Mr Spencer at Mater Private Hospital. Mr Bell said that Mr Spencer "appeared to be his usual self, was on the ball and notwithstanding that he was in pain, was in good spirits": paragraph 26, exhibit 3. In his evidence he said Mr Spencer was ... "quite bright. He was quite – he was not confused."

[29] Mr Bell said that during this visit Mr Spencer sought "certain assurances from me about his affairs". Mr Spencer told Mr Bell he wanted him to:

1. pay his bills and make sure everything was in order for his funeral;
2. give $50,000 to his friend Ann Lynch;
3. give $50,000 to his neighbour Leigh Hattin;
4. give one quarter of the rest of the estate to Andrew Butcher;
5. keep the residue of the estate.

[30] Mr Bell said that Mr Spencer spoke about the debts which were to be paid, such as car insurance and Telstra.

[31] Mr Bell said that he was "very upset" on 10 August when Mr Spencer was talking about his wishes and that "I was having difficulty following what he wanted to do" – t 1.36. He said that the confusion and upset was his, not Mr Spencer's – "he was – he was good. I was very unhappy." – t 1.29.

[32] Ms Durbidge gave similar evidence, adding that Mr Spencer "kept repeating – he kept saying to Graham, Graham, you've go to do this for me. You've got to do this for me" – t 1.42. This version of events is supported by notes written by Ms Durbidge, which both Mr Bell and Ms Durbidge said were written as the discussion with Mr Spencer was taking place. These notes are detailed and are in evidence – exhibit 5.

[33] At some stage Mr Bell wrote down that the estate was to be divided between Ann Lynch, Leigh Hattin, Andrew Butcher and himself equally: that is, a quarter to each. Mr Bell said that his note did not reflect Mr Spencer's wishes, and that he "wrote it down under some pressure, I think, and I – I just wrote a quarter, a quarter, a quarter, a quarter; split it up among everybody and all will be happy".[9] This document was not in evidence. It does not seem to have been disclosed – tt 1.37-38. It was shown to Mr Butcher by Mr Bell and Ms Durbidge when they visited Mr Butcher on 24 September 2013. They told Mr Butcher that the note represented Mr Spencer's wishes. Both Mr Bell and Ms Durbidge said the meeting was difficult and referred to Mr Butcher's two small children interrupting it.

[34] On 12 August Ms Durbidge typed up a "home made" will based on that equal (quarter) shares distribution. Mr Bell explained this, "We were worried about his condition. Mr Potts was extremely busy." This is in the context of Mr Potts' evidence that it was 12 August when Mr Bell contacted his clerk about Mr Spencer's will and he (Mr Potts) was not available. It also fits with Ms Lynch's evidence that she was quite shocked to notice the decline in Mr Spencer's condition on 13 August 2013 and more broadly with Mr Potts' evidence that he was shocked at the decline on 13 August 2013. I thus understand why Ms Durbidge and Mr Bell decided to make a home-made will on 12 August.

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[9] t 1.36. This is consistent with his evidence at t 1.31 and t 1.32 that he came up with this "equal shares" arrangement.

[35] It is more difficult to understand why they produced a document dividing the estate into equal shares, rather than in accordance with Ms Durbidge's notes taken at the hospital on 10 August. The equal shares version is less favourable to Mr Bell than the version written down by Ms Durbidge at the hospital, so the motivation for Mr Bell originally writing an equal shares note; showing that to Mr Butcher, and for Ms Durbidge including the equal shares version in the home-made will was not to benefit themselves. I find that the origin of the equal shares idea was to forestall anticipated argument from Mr Butcher. In explaining the equal shares version Mr Bell said, "so I decided, okay, there's four beneficiaries. At the moment, I'll just divide it up into quarters, and we'll see what happens." – t 1.31. Further, "... the one that I showed Andrew Butcher was the one that I wrote down. But we – we decided that he would – we would show him that and see what he – he had to say about it." t 1.34. I find that he was trying to deal in a diplomatic and non-confrontational way with the difficult situation between himself and Mr Butcher.

[36] Likewise, there is no logically satisfying explanation for why Ms Durbidge would make such careful notes on 10 August then type up something different on 12 August and present something different to Mr Butcher in September. Ms Durbidge says that she was not "in a very good state" at the time she typed up the will. In accordance with Mr Spencer's instructions to them on 10 August, she and her husband had just arranged Mr Spencer's funeral; another friend had rung up and said that he thought Mr Spencer was not very well, and while she was typing Mr Bell and their son were waiting for her to finish so that they could take the home-made will to the hospital – t 1.45. In the event Mr Spencer was not asked to sign the home-made will. The impression I have is of flustered, rather than rational, action on the part of Mr Bell and Ms Durbidge, and in the circumstances I understand why this was so.

[37] The relevance of the conversation of 10 August between Mr Spencer and Mr Bell and Ms Durbidge is really only as to Mr Spencer's mental capacities and whether he had a firm testamentary intention or whether it fluctuated in the days prior to his death. I am not concerned with the testamentary effect, if any, of the words spoken by Mr Spencer that day.

[38] From the conversation on 10 August, Mr Bell understood Mr Spencer to mean that his estate was to be divided between four people. He was very surprised when he found what Mr Spencer had instructed Mr Potts – t 1.28. Mr Spencer's conversation with Mr Bell on 10 August is consistent with Mr Spencer having the intention to leave the entire estate to Mr Bell, with for instance, precatory words. Indeed, Mr Spencer's insistently wanting assurances from Mr Bell that Mr Bell would distribute the estate according to his wishes is entirely consistent with Mr Spencer having the intention that the entire estate be left to Mr Bell as the sole beneficiary and extracting a promise as to precatory words.

[39] Technically it seems that Mr Spencer was asking Mr Bell to undertake some executorial duties, such as organising the funeral and paying Mr Spencer's bills. In that sense it might be argued that there was a deviation from Mr Spencer's instructions to Mr Potts that he did not want Mr Bell to be the executor. This point is so minor that it does not persuade me that Mr Spencer's testamentary intention was uncertain at any relevant time.

[40] Mr Spencer told Mr Potts on 29 May 2013 what he wanted by way of his will. He was not willing to compromise about Mr Bell being the executor. That remained the position when the matter was again discussed on 9 August 2013. The conversation on 13 August was brief but it was a reaffirmation of the instructions which had been given on the two earlier dates. On 12 August 2013, Mr Spencer told Mr Bell that he had called Mr Potts, and asked Mr Bell to follow this up "as he wanted to make sure he got his will signed". Mr Bell found an envelope in Mr Spencer's room marked up ready to contain a written will. When Mr Potts visited on the afternoon of 13 August 2013 Mr Spencer understood who he was and what the visit was about. I think consistently from 29 May 2013 until that visit on the afternoon of 13 August 2013 Mr Spencer was expecting and intending that a written will be drawn up by Mr Potts and executed. His health was deteriorating much faster than expected. On 9 August Mr Spencer thought he had ample time to organise himself, but by 12 August he was becoming increasingly concerned to have Mr Potts prepare a will for his signature – this is evident from his conversation with Mr Bell on 12 August and his telephone conversation with Mr Potts on the morning of 13 August. Mr Spencer did not have any illness, such as dementia, which might make him forgetful or inconsistent in his intentions.

[41] Against this background I see the conversation of 10 August not as a fluctuation in testamentary intention, but instead as the expression of informal desires (precatory words) to Mr Bell, and consistent with a course of conduct aimed at having Mr Potts implement his instructions of 29 May 2013 in a written will.

Conclusions as to Testamentary Capacity

[42] I find Mr Spencer had testamentary capacity as at 29 May 2013. He was certainly elderly by this stage, but that of itself is no impediment to making a will.[10] He lived independently. There is no evidence that he had any illness which might have affected his mental abilities. The evidence from Ms Lynch, Mr Hattin and Mr Potts was all to the effect that he behaved consistently with someone of full mental capacity. Mr Potts in particular had been working with him administering his brother's estate, so that he was well placed to observe if Mr William Spencer struggled with understanding legal concepts, as opposed to simply being able to perform everyday activities.

[43] It is true that Mr Potts conducted no formal examination of Mr Spencer, specifically directing attention to elements of the *Banks v Goodfellow* test. However, Mr Potts did make inquiries as to his family circumstances – for example, that he had no children and that he was not married – t 1.20; that the only family member he was in contact with was Mr Bell – t 1.21. Mr Spencer's affairs were very simple and his will was very simple. As Isaacs J stated in *Bailey v Bailey* (above), p 570, point 6, the quantum of evidence necessary to establish testamentary capacity must always depend on the circumstances of each case because the degree of vigilance to be exercised by the Court varies with the circumstances. There is only lay evidence, but it is all to the effect that he had capacity at that time. In circumstances where there is no real reason to doubt Mr William Spencer's capacity as at 29 May 2013 that is sufficient.[11] Of course there was no will drawn at that point. Nonetheless

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10 *Bailey v Bailey* (1924) 34 CLR 558, 570.

11 See eg., *Fielder v Burgess* [2014] SASC 98, [25]-[32].

Mr Potts took instructions for a will at that point; everything but who was to be the executor was resolved.

[44] Likewise I think that the evidence is that Mr Spencer had capacity on 9 August 2013. On 5 August he was able to organise to go to hospital. He did this in an organised and detailed way, notwithstanding physical illness. He made appropriate arrangements with neighbours about his house keys and about bills that needed to be paid. On 9 August, when he spoke to Mr Potts, he had a sensible conversation, confirming the instructions he had given a matter of 10 weeks earlier. He accurately described his medical condition and his impending move from the Mater to St Vincent's Hospital. He persuaded Mr Potts to be the executor, against Mr Potts' inclination. Again the evidence from Ms Lynch is relevant here. She was well-positioned to make observations, spending time with Mr Spencer twice a day through his hospital admission and time with him on 9 August, when she took photographs and made a video. There is no evidence that there was any medical reason for Mr Spencer not to continue to be fully in command of his mental faculties at this time. I find that he was. On that day he gave Mr Potts instructions. The outstanding point as to who was to be executor was resolved. Mr Potts was to wait until Mr Spencer moved to St Vincent's Hospital before bringing the will to him for execution. There was no doubt about the provisions the will was to contain.

[45] I do not find it necessary to decide whether or not Mr Spencer had testamentary capacity on the morning of 13 August 2013. Consistently with what he had discussed with Mr Bell the day before, and consistently with his dramatically worsening health, Mr Spencer asked Mr Potts to bring the will to the hospital that day. Mr Spencer was ill but he could still use the telephone; he talked clearly and directly to Mr Potts; he knew that he was moving hospital that day and made a sensible arrangement to meet with Mr Potts that afternoon. There is no indication that he had lost testamentary capacity but, in my view, the times relevant to judging whether he had it were the times he gave instructions as to the actual contents of his will – 29 May 2013 and 9 August 2013.

[46] I find that Mr Spencer did not have testamentary capacity at the time of Mr Potts' visit to the hospital on 13 August 2013. Mr Potts wondered whether he had capacity. The evidence of Dr Khan, although hearsay, was received without objection. It was to the effect that Mr Spencer did not have capacity by then.

[47] It was argued on behalf of Perpetual that the exclusion of the Butchers in the 13 August 2013 document gave cause to doubt Mr Spencer's capacity. I do not think this is so. Mr Spencer had no close relations. He changed from benefitting two of his first cousins once removed to benefitting a cousin. There is nothing on its face irrational about this. The evidence which was uncontested was that he had a very close relationship with Mr Bell throughout his life. Certainly at some stage Mr Spencer had a relationship with Andrew Butcher close enough that he invited Andrew Butcher to live with him. However, that may be the reason for the change in the will. Mr Bell's evidence was that the period of Mr Butcher's living with Mr Spencer was not happy and did not end happily – see exhibit 3, paragraph 14. This was not contradicted in cross-examination or by Mr Butcher's evidence. There was no evidence from Mr Butcher that he was particularly close to Mr Spencer after that. Mr Spencer does not seem to have informed Mr Butcher of his illness, or in any case Mr Butcher did not visit him in hospital. Mr Bell says that although he informed Mr Butcher on 13 August 2013 that Mr Spencer was in hospital

Mr Butcher did not visit. I do not draw anything from the fact that Mr Butcher did not respond in the very short time available to him after receiving that information from Mr Bell. Nonetheless, there was no evidence of an ongoing close relationship between Mr Butcher and Mr Spencer. When Mr Spencer first gave Mr Potts instructions about his will – on 29 May – he said that he wished to change the beneficiaries. That is, Mr Spencer was well aware that he was making a change. Mr Potts did not inquire as to the reasons for this. There are no circumstances about the change which would cause me to have doubts about Mr Spencer's testamentary capacity.

Section 18 of the Succession Act

[48] Obviously enough, the document of 13 August 2013 does not satisfy s 10 of the *Succession Act* 1981 (Qld). Section 18 of the *Succession Act* allows the Court to dispense with execution requirements for a will in certain circumstances. It provides:

> **"18 Court may dispense with execution requirements for will, alteration or revocation**
>
> (1) This section applies to a document, or a part of a document, that—
>
> (a) purports to state the testamentary intentions of a deceased person; and
>
> (b) has not been executed under this part.
>
> (2) The document or the part forms a will, an alteration of a will, or a full or partial revocation of a will, of the deceased person if the court is satisfied that the person intended the document or part to form the person's will, an alteration to the person's will or a full or partial revocation of the person's will.
>
> (3) In making a decision under subsection (2), the court may, in addition to the document or part, have regard to—
>
> (a) any evidence relating to the way in which the document or part was executed; and
>
> (b) any evidence of the person's testamentary intentions, including evidence of statements made by the person.
>
> (4) Subsection (3) does not limit the matters a court may have regard to in making a decision under subsection (2).
>
> ..."

[49] In *Hatsatouris v Hatsatouris*, Powell JA, in considering the New South Wales equivalent to s18, said:

> "... the questions arising on applications raising a question as to the applicability of s 18A are essentially questions of fact, the particular questions of fact to be answered being:
>
> (a) was there a document;
>
> (b) did that document purport to embody the testamentary intentions of the relevant Deceased?

> (c) did the evidence satisfy the Court that, either, at the time of the subject document being brought into being, or, at some later time, the relevant Deceased, by some act or words, demonstrated that it was her, or his, *then* intention that the subject document should, *without more on her, or his, part* operate as her, or his, Will?"[12] (original emphasis)

[50] Priestley JA agreed, adding that "among the situations to which s 18A applies is the situation where a subsequently deceased person intended that a particular document, in existence at the time of the manifestation of that person's intention, should, without more on that person's part, operate as that person's will".[13]

[51] The idea that there must be at a single point in time both an extant document and an intention that the document operate immediately as a will was reiterated in the case of *Estate of Peter Brock*, where Hollingworth J said:

> "It is necessary, but not sufficient, that the document sets out the deceased's true testamentary intentions. The deceased must *also* have intended that the document in question operate as a will. In enacting s 9, the legislature did not intend that *any* document expressing or reflecting testamentary intentions could be probated under s 9; the testator must have intended the *particular* document to constitute a will, and for the document to immediately operate as his or her will at the time it was created or completed."[14]

[52] Further, in *Re Estate of Perriman (Dec)*, Barker J said that:

> "[T]he words 'the document' referred to in s 34 mean a particular document of which the deceased had some knowledge and not merely 'a document' which happens coincidentally to conform to the deceased's testamentary intentions as he may have expressed them, for example, orally to another person."[15]

[53] It is clear that the circumstances which may fall within s 18 are many and varied and that each case will depend upon its own facts. *In the estate of Masters; Hill v Plummer*[16] Priestley JA was prepared to countenance a document not originally intended to operate as a will, but later so intended, as falling within the remedial power. There have been cases where a document never seen by the deceased has been admitted into probate. In the case of *In the Estate of Vauk*,[17] the testator instructed the Public Trustee to prepare a will for him. The day before the will was due to be signed, the testator committed suicide. However he left a note that the unsigned will was to be valid. Legoe J was satisfied that the draft will, despite not ever being seen by the testator, was intended by him to constitute his will. However, I proceed on the basis that there must simultaneously be an extant document and the requisite intention, in order to satisfy the requirements of the section.

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12 [2001] NSWCA 408, [56], cited in *Re Garris* [2007] QSC 181 at [8].
13 [2001] NSWCA 408, [1].
14 [2007] VSC 415, [29]-[30].
15 [2003] WASC 191, [31].
16 (1994) 33 NSWLR 446, 469.
17 (1986) 41 SASR 242.

[54] The cases provide examples of testators who change their mind after seeing a draft will prepared by solicitors. One consequence of having a will drawn up by a solicitor is that there is an obvious intention on the part of the intending testator that the document be properly executed and take effect once it is properly executed. Nonetheless, there are cases where courts have declared formally drawn, but unsigned, documents to be wills.[18]

[55] There are cases where a will prepared by a solicitor is obviously only a draft for consideration – eg., *Estate of Schwartzkopff*.[19] However, I think this case contrasts. It is like *Mitchell v Mitchell*.[20] There the testator was admitted to hospital with a diagnosis of a brain tumour and an uncertain time to live. He gave instructions to a solicitor, who prepared a will. The trial judge was satisfied the will did accurately reflect the deceased man's testamentary intention. The deceased man wished to sign his will but unexpectedly collapsed and died before he did so. Heenan J applied the remedial section. He noted that in a case such as that one (and indeed this one) the requirement from *Hatsatouris* that the deceased person have an intention that the subject document would operate without more as their will could not be satisfied, for clearly enough the deceased intended to execute the will. However, Heenan J noted that this requirement did not come from the section itself, and indeed it is not imposed by s 18 of the Queensland legislation. He noted, quite correctly in my view, that, "One must be careful to avoid placing any gloss upon the statutory language". One must also in my view be careful not to make distinctions which are "too nice" in this remedial area of the law.[21]

[56] In this case I am satisfied that there is a document which purported to state the testamentary intentions of Mr Spencer which has not been formally executed – the requirements of s 18(1) of the Act, and the first two of the *Hatsatouris* requirements, are satisfied. More difficult questions arise as to whether I can be satisfied that Mr Spencer intended the document to form his will – see s 18(2). I proceed on the basis that the intention required by the statute had to be in relation to the particular document which Mr Potts drew on 13 August 2013 and took to the hospital. The argument on behalf of Perpetual was that there could not be the intention which s 18(2) required, because Mr Bell has not proved that Mr Spencer had testamentary capacity on 13 August 2013.

[57] This case raises an interesting point of intersection between the operation of s 18 of the *Succession Act* and the requirement for testamentary capacity. Section 18(2) of the *Succession Act* does not require that the person with testamentary intent have full testamentary capacity at the time of the intention mentioned at s 18(2). It does occur that sometimes both questions are raised in the same proceeding and are dealt with as distinct questions within that proceeding. In a case where the deceased person suffers from some longstanding impairment which affects capacity, the decision about testamentary capacity will often determine the outcome of the s 18 application. Sometimes, however, both questions will be determined independently, eg., documents produced shortly before a suicide.[22] I have declared a document produced in such circumstances to be a will pursuant to s 18 of the *Succession Act*

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18 *Estate of Blakely* (1983) 32 SASR 473, *Deeks v Greenwood* [2011] WASC 359, 56 and in particular [72].

19 (2006) 94 SASR 465.

20 [2010] WASC 174, particularly at [36] and [41].

21 Mahoney JA in *Estate of Masters* (above), p 457.

22 eg., *Fielder v Burgess* (above), [25], [33].

on the express basis that the parties would then contest capacity – there seemed little point in incurring the expense necessary on the capacity issues in that case if the s 18 declaration was not made, so that a staged approach seemed sensible.

[58] There is a passage in *Re Stuckey*[23] which deals with the intersection of a s 18 analogue and the law as to testamentary capacity, it is worth setting out in full:

> "[40] Section 9 of the Act enables the Court to dispense with the formal requirements for the execution of a will when admitting a will to probate. It is important to note that the power of the Court to admit a will to probate is not a power granted by the Act, but is a power that was granted to the Court on its establishment and that remains with the Court pursuant to the Constitution Act 1975. A will that has not been validly executed, and that satisfies the requirements of s 9, could still in theory be refused probate where the testator lacked testamentary capacity, did not know and approve of the will, or was affected by undue influence in making the will.
>
> [41] However, the manner in which s 9 has been interpreted and applied by this Court makes those requirements in a sense obsolete. If the deceased lacked the capacity to make a will, then the Court could not be satisfied that the deceased intended the document to be her will. If the deceased did not know and approve of the document, then the Court could not be satisfied that the deceased intended the document to be her will. And if the deceased was unduly influenced in the sense recognised by the Courts of Probate, such that her will were overborne, then the Court could not be satisfied that the deceased intended the document to be her will.
>
> [42] For that reason, I consider that issues arising related to the capacity of the deceased, and the knowledge and approval of the deceased, are relevant factors in considering whether the informal codicil satisfies s 9 of the Act. However, I would not go so far as to express any concluded views on whether, in the circumstances of this case, the Court could be satisfied that the informal codicil would be admitted to probate had it been executed in accordance with s 7 of the Act. That question is not before the Court."

[59] Here, Mr Spencer had testamentary capacity at the time he gave instructions to Mr Potts as to the content of the will he wanted Mr Potts to prepare. By the time it was brought to him for execution, Mr Spencer had lost that testamentary capacity, whether through the progress of his illness or because he was under the influence of pain-relieving drugs. However, at the time of Mr Potts' visit to the hospital Mr Spencer was not beyond a forming intention. He knew who Mr Potts was. He acknowledged the contents of a very simple will and put out his hand to sign it. Had he signed it in accordance with the requirements of s 10 of the *Succession Act,* I would admit the will to probate under the principle in *Parker v Felgate.*[24]

[60] In *Parker v Felgate* the testator fell suddenly ill after having given instructions to a solicitor to prepare a will. She fell into what the report calls a coma, but she could be roused and answer questions by making signs in response. She could no longer

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23 [2014] VSC 221, [40]-[42].

24 (1883) 8 PD 171.

sign her name; someone signed for her. She executed her will in the following circumstances:

> "On the 29th Dr Tanner was called in that a fresh opinion might be taken at the time when it was proposed to have the will executed. He stated that she opened her eyes, put out her hand, and smiled; that he consulted Dr Palmer, rustled the will in front of her face, and thus roused her; that he said, 'This is your will. Do you wish this lady [Mrs Flack] to sign it?' And that she replied, 'Yes'. Dr Tanner added, 'I have no doubt about it;' and he further added, 'As far as I could judge, she understood what she did.' ... A nurse, however, who stood at a further corner of the bed said that she could not hear the 'yes' distinctly, but she understood the sound to mean 'yes'."

[61] Hannen P said:

> "If a person has given instructions to a solicitor to make a Will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good Will, if executed by the testator, is that he should be able to think thus far, 'I gave my solicitor instructions to prepare a Will making a certain disposition of my property. I have no doubt that he has given effect to my intention and I accept the document which is put before me has carrying it out'... A person might no longer have capacity to go over the whole transaction, and take up the thread of business from the beginning to the end, and think it all over again, but if he is able to say to himself 'I have settled that business with my solicitor. I rely upon his having embodied it in proper words, and I accept the paper which is put before me as embodying it'; it is not, of course, necessary that he should use these words, but if he is capable of that train of thought in my judgment that is sufficient."[25]

[62] In the matter of *Le Bon v Lili; Will of Klara Lane*[26] Macaulay J gives a very comprehensive outline of the authorities since *Parker v Felgate,* showing that that case has been consistently followed in both England and Australia and was emphatically affirmed in 2011 by the English Court of Appeal in *Perrins v Holland.*[27] In *Perrins v Holland* the Court of Appeal explained the reason for the rule as lying in the Court striving to give freedom to testamentary disposition, uphold transactions and the pragmatic recognition that the testator has no further opportunity to give expression to his or her wishes.[28]

[63] The facts in *Le Bon* were similar to those in both *Parker v Felgate* and the present case. The testator gave instructions at a time when she had testamentary capacity but did not execute the will until some seven weeks later, at a time when it was conceded that she no longer had capacity. That case concerned what state of mind must be established as being sufficient at the moment of execution of the will – [19]. The "succinct expression of the rule" in Theobold on Wills was approved – "a will prepared in accordance with the testator's instructions is valid, though at the

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25 (Above) 173-174.

26 [2013] VSC 431.

27 [2011] Ch 270. See the Queensland authority *Challen v Pitt & Anor* [2004] QSC 365, [61]-[62] and the cases cited there.

28 (Above) [23], at [23] in *Lane.*

time of execution the testator remembers only that he has given instructions and believes the will to be in accordance with them." – [21].

[64] In my view, the requirements of s 18(2) of the *Succession Act* are satisfied. Mr Spencer intended the unsigned will of 13 August 2013 to form his will – that was clear from his behaviour when Mr Potts attended at the hospital. Accordingly I declare that document to be the last will of William Maurice Spencer and, subject to the requirements of the Registrar, grant probate of that document to Aaron Cornelius Potts as executor.

[65] I will hear the parties as to costs.