

## ***Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007 – Testamentary capacity**

### **Catchwords**

Testamentary capacity – Taking instructions from persons who may lack capacity

### **Executive Summary**

The Plaintiffs' father ('Testator') had a new will drawn by the Defendant in 2013, replacing his 2011 will. The Defendant could not satisfy the legal burden of demonstrating the 2013 will was the last will of a free and capable testator.<sup>1</sup> The Court found that the issues not addressed in the Defendant's file notes were reasons for the Court's substantial doubt as to the testamentary capacity of the Testator.<sup>2</sup>

### **Background Facts**

The Testator and his de facto partner had been clients of the Defendant for many years and the Defendant knew them well.<sup>3</sup>

The Plaintiffs stood to benefit equally under the Testator's 2011 will on the basis that there was an agreement or understanding between the Testator and his de facto partner that they would be financially separate and that neither would make a claim against each other's assets.<sup>4</sup> Under the Testator's 2013 will, also drawn up by the Defendant, the Plaintiffs were to share the Testator's Estate with the Testator's de facto partner.<sup>5</sup>

The Defendant met the Testator at a cafe, took instructions for the 2013 will and sent the Testator's draft will to the Testator's de facto partner, who brought it to the Testator's nursing home.<sup>6</sup> A week later, the Defendant met the Testator in his nursing home. There was no record of the Testator having offered an explanation for the change to his will.<sup>7</sup>

### **Issue**

The only issue the Court had to deal with was whether the Testator had testamentary capacity so as to be a free and capable testator at the time of making the 2013 will. If he did not, the 2011 will would be admitted to probate.<sup>8</sup>

### **Issue Discussed**

The Court found that, although it readily accepted that the Defendant was careful in taking her instructions, the Defendant's evidence did not decisively outweigh the evidence that the Testator did not have the capacity to make the 2013 will.<sup>9</sup>

No explanation for the Testator's changes was included in the Defendant's affidavit evidence or file notes. Acknowledging that the Defendant had been careful in making her notes, the Court held that the Defendant would have made a note of any explanation if the Testator had provided one.<sup>10</sup>

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<sup>1</sup> *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007, 6.

<sup>2</sup> *Ibid* 98.

<sup>3</sup> *Ibid* 60.

<sup>4</sup> *Ibid* 28-32.

<sup>5</sup> *Ibid* 2-4.

<sup>6</sup> *Ibid* 47-50.

<sup>7</sup> *Ibid* 70.

<sup>8</sup> *Ibid* 2.

<sup>9</sup> *Ibid* 6.

<sup>10</sup> *Ibid* 79.

The Court held a substantial, rather than a merely residual, doubt that the Testator had capacity at the time of making the 2013 will. The reasons for this substantial doubt included the manner in which the Defendant had taken instructions from the Testator by:

- only reading the draft 2013 will back to the Testator rather than seeking confirmation of his instructions by non-leading direct questions;
- not asking why the Testator was changing his will in such a way and the lack of explanation with regard to the change;
- not asking appropriate questions that might have elicited information about the Testator's capacity in view of previous medical reports and hostel notes about the Testator's mental state;
- approaching her task without knowledge of or attention to the kinds of matters identified in the Law Society of New South Wales guidelines in relation to being satisfied of a client's testamentary capacity particularly with regard to a client residing in a nursing home;
- accepting that the Testator understood the change by "nodding his head" despite the Testator "appearing more sombre, frail and being slower on his walker".<sup>11</sup>

The Court deemed that "a good understanding of the issues surrounding mental capacity is an essential skill for any solicitor who holds himself or herself out as competent to provide legal services to natural persons."<sup>12</sup>

The Court also suggested some "basic rules of thumb", including:

- interviewing the client alone – if an interpreter is required, ideally the interpreter should not be a family member or proposed beneficiary;
- always considering the issue of capacity and the possibility of undue influence, if only to dismiss it in most cases;
- seeking instructions by non-leading questions and carefully recording both questions and answers in a file note, and if there is any doubt about a client's capacity - repeating this process when presenting the draft will rather than simply reading the provisions of the will to the client and seeking his or her assent;
- if the client is over 70, being cared for or residing in a nursing home – asking the client and their carer whether there is any reason to be concerned about capacity, and keeping detailed file notes.<sup>13</sup>

According to the Court, the evidence of a testator's solicitor will be critical in cases which come before the Court so "full, contemporaneous file notes" are essential and should be retained indefinitely.<sup>14</sup>

## **Harrison Lee**

*As approved by Grace van Baarle, Manager, Ethics Solicitor, QLS Ethics Centre*

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<sup>11</sup> Ibid 98.

<sup>12</sup> Ibid 105.

<sup>13</sup> Ibid 107.

<sup>14</sup> Ibid 108.