IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
TRUSTS, EQUITY AND PROBATE LIST

Not Restricted

S PRB 2017 03904

IN THE MATTER of the Will of GEORGE WHITE deceased

JOHN MONTGOMERY — First Plaintiff

-and-

JANE MONTGOMERY — Second Plaintiff

v

MARY TAYLOR — Defendant

JUDGE:	McMillan J
WHERE HELD:	Melbourne
DATE OF HEARING:	13 November 2017
DATE OF JUDGMENT:	9 February 2018
CASE MAY BE CITED AS:	Re White; Montgomery & Anor v Taylor[1]
MEDIUM NEUTRAL CITATION:	[2018] VSC 16

SUCCESSION, WILLS AND PROBATE — Informal computer will — Where testator took own life — Whether testator intended informal document to be his final will — Whether testator had testamentary capacity — *Wills Act 1997,* ss 7 and 9.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr R Boaden	William Murray Solicitors
For the Defendant	Mr R Phillips	Kenna Teasdale Lawyers

[1] This judgment has been anonymised by the adoption of pseudonyms where relevant.

HER HONOUR:

Introduction

1 George White died on 18 April 2015 ('the deceased'). He was survived by his domestic partner ('the defendant'), his three children with the defendant, Andrew, David and Sarah, and his child from a previous relationship, Martin.

2 The plaintiffs are the deceased's sister ('the second plaintiff') and her husband ('the first plaintiff').

3 By originating motion filed 16 March 2017, the plaintiffs seek a grant of probate of an informal computer will made on 18 April 2015 ('the informal will'), pursuant to s 9 of the *Wills Act 1997* ('the Act'), with leave reserved to the defendant. The informal will bears the date 17 April 2015 and was discovered in a computer file in the deceased's computer. The informal will is said to have been typed by the deceased prior to him taking his own life in the early hours of 18 April 2015.

4 The defendant objects to the application on two grounds: at the time that it was written, the deceased lacked testamentary capacity; and the deceased did not intend for the informal will to be his will.

5 Failing proof of the informal will bearing the date 17 April 2015, the deceased's estate would be distributed in accordance with the relevant intestacy provisions.[2]

6 At the time of the deceased's death, the assets of his estate included a pharmacy in a country town, a car, an interest in pharmacies in another state of Australia and funds in certain loan accounts. The most recent estimate of the value of the deceased's estate is approximately $1,555,116.

Evidence

7 The facts are not in dispute, save for some minor objections.[3] The parties rely upon five affidavits sworn by the plaintiffs, an affidavit and letter from the deceased's general

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2 *Administration and Probate Act 1958*, ss 51, 52.

3 The last sentence of [12] and the entirety of [17] are struck out in the affidavit of the first plaintiff sworn 15 March 2017.

practitioner, Dr Minh Dzung Ho, who also gave evidence at the trial, two affidavits sworn by the deceased's lawyer, Mr Roger Blythman, an affidavit sworn by Dr John Gall and a confidential affidavit sworn by the defendant.

8 At the date of his death, the deceased was aged 48 years. Prior to his death, he had been a successful pharmacist and controlled substantial assets. According to the defendant, the deceased would have been regarded as 'a perfectionist in many aspects of his life'. When things did not go as the deceased planned, at times he would withdraw, sleep through the day and sometimes not turn up to work.

9 Dr Ho was the deceased's general practitioner from 2003 until the deceased's death. He deposed that the deceased had no history of mental illness, or signs of anxiety or depression. Dr Ho described the deceased as 'healthy and active', and was unaware that on two occasions in the mid 1990's the deceased had attempted suicide.

10 The deceased was married between 1996 and 1999. Martin, now aged 21 years, is the child of that relationship. After the marriage ended, Martin initially spent time living with the deceased, however, it appears that the deceased and Martin had little contact from approximately 2008 until 2014.

11 In 1999, the deceased commenced living with the defendant. The defendant has described their relationship as 'honest and open'. Their children are now aged 17, 15 and 13 years respectively. The deceased also had close relationships with the plaintiffs and their children.

12 In late 2014, the deceased reconnected with Martin and sought to foster this relationship.

13 Mr Blythman had been the deceased's lawyer since 1987. On 27 October 2014, the deceased had a discussion with him regarding the preparation of his will. The deceased indicated that he wanted the defendant as his primary executrix and the plaintiffs as co-executors and the beneficiaries were to be the defendant and the deceased's children. Mr Blythman's notes from the time indicate that they discussed a number of assets controlled by the deceased, including the XX Group Trust, superannuation fund, car, life insurance, pharmacy interests, personal chattels and family home. The deceased, however, was unable to identify with

certainty the assets he owned and the discussion concluded on the basis that the deceased would provide Mr Blythman with such information at a later date. That information was never provided to Mr Blythman.

14 Mr Blythman was not aware of the deceased having previously made a will. This is consistent with a comment that the deceased made in the presence of the second plaintiff in January 2015, stating that he did not have a will.

15 The deceased had a family history of heart disease, and due to concerns surrounding his own health, he underwent a number of medical tests in early 2015. The results of these came back negative. They were discussed with the deceased at his last appointment with Dr Ho on 27 March 2015. At that time, Dr Ho viewed the deceased as 'well and healthy', such that he would have had full testamentary capacity up to 18 April 2015. While Dr Ho maintained this opinion during cross-examination, he was uncertain as to whether the specific elements of testamentary capacity were satisfied, in contrast to the position as deposed in his affidavit. Dr Ho conceded that he could not exclude the possibility that the deceased may have had some degree of mental illness at the time that he took his life, noting that it is a 'difficult problem', as patients may not discuss such issues with him or show any evidence of mental illness.

16 In the months leading up to his death, the deceased was balancing work at the country pharmacy with family commitments in Melbourne, including developing his relationship with Martin. According to the defendant, the deceased found it difficult to balance these commitments and felt that he was perhaps losing touch with the family. In this regard, the defendant described the deceased as having a 'number of struggles and demons in his life'.

Circumstances surrounding the deceased's death

17 On Friday 17 April 2015, the deceased went to the gym with Martin. He then drove Andrew and the plaintiffs' son to Richmond before returning home at about 4.00 pm. It appears that the deceased and defendant both left home again before returning at about 5.00 pm. Sometime thereafter they had an argument that the defendant has described as 'trivial', although it did involve the deceased taking hold of the defendant physically. After then

taking David to football training, the deceased returned home and packed a bag and his notebook computer ('the notebook'). The notebook was used for his business affairs and email purposes. When the deceased was at home it was kept in his study. The deceased was the only person who used the notebook.

18 After packing his bag and the notebook, the deceased apologised to the defendant and left for the country town at about 7.00 pm, leaving his house keys behind. The deceased and the defendant rented a property in the country town and the deceased was scheduled to work there on Sunday, 19 April 2015. Normally he would drive there on Saturday night or Sunday morning.

19 As identified in the report of Mr Thompson, a forensic analyst, dated 24 October 2016, the informal will is a Microsoft Word document with the file name 'George_White-Final_Will_and_Testament', and was 'created or commenced' on the notebook at approximately 8.44 pm. Mr Thompson's report also refers to Microsoft Windows metadata, which indicates that the file was 'first created or saved' at 9.42 pm. The difference between these two times is not otherwise explained in the report. While it perhaps could be inferred that the file was first 'created' at 8.44 pm and first 'saved' at 9.42 pm, the likely inference is that the informal will was created sometime between 8.44 pm and 9.42 pm on 17 April 2015.

20 At 9.30 pm Sarah sent a text message to the deceased.

21 The last time that the informal will was saved was eight minutes past midnight on 18 April 2015. At around this time a shortcut to the file was also created on the notebook's desktop.

22 At 12.30 am on 18 April 2015, the deceased sent a text message to the defendant asking if she was awake and could call him.

23 Between midnight and 2.11 am, eight other Microsoft Word files were created and accessed on the notebook. The files consisted of seven short personal letters, including one to Mr Blythman, and one file giving directions regarding tenants and invoices related to certain property ('the invoice directions'). The letter to Mr Blythman stated, inter alia:

> I am of sound mind when I am writing this letter. I didn't get a chance to speak to you about myself but I trust my instructions last year and what I have attempted to be my

> Last Will & Testament will be sufficient enough to follow my wishes. I hope everyone involved respects my final wishes.

24 The other letters indicate that the deceased was planning to take his own life. One of them referenced the medical tests that the deceased had had in the previous months, while another stated that the '[t]he human brain is an amazing thing but we do not understand all of its secrets'. A letter addressed to the defendant refers to the actions of the deceased the previous day as 'disgusting and shameful'.

25 Desktop shortcuts were created for seven of the eight additional files. The last shortcut was created at 2.12 am on 18 April 2015.

26 At approximately 9.10 am on Saturday, 18 April 2015, the first plaintiff discovered an email that had been sent from the deceased's iPhone at 2.26 am that morning to the defendant and second plaintiff. The email included the words: 'I have left my notebook at the country house in the WIR. I have tried to leave instructions for everything'. The first plaintiff alerted the defendant to the email, and the defendant attempted to contact the police. She then travelled to the rental property in the country town, arriving at approximately midday.

27 Upon arrival, the defendant discovered the deceased on a bed in the upstairs bedroom and telephoned the emergency services. Unlabelled empty vials, a bottle of scotch and some personal items were located on the kitchen bench. Despite the actions of both the defendant and paramedics, the deceased died later that day.

28 The notebook was found by the defendant in the deceased's backpack, which was located in the wardrobe of the bedroom. A police officer switched on the notebook and copied files to a USB stick before returning the notebook to the defendant.

29 Toxicology investigations detected a number of drugs and compounds in the deceased's body, consistent with excessive and potentially fatal use, and a pathologist's report dated 22 April 2015 concluded that the cause of death was mixed drug toxicity.

30 On 21 May 2015, as a consequence of issues surrounding the pharmacy interests, the second plaintiff sought and was granted a limited grant of representation *ad colligendum bona* in the estate, which was extended on 16 March 2016.

31 In a finding without inquest dated 22 October 2015, the Coroner stated that 'it was likely that [the deceased] was suffering from undiagnosed depression' and determined that the deceased took his own life by way of intentional overdose.

32 The report of Mr Thompson does not indicate that the informal will was modified or accessed after eight minutes past midnight on 18 April 2015.

The informal will

33 A print out of the informal will is annexed to the affidavit of the second plaintiff. It bears the date 17 April 2015 and commences with the defendant's name, address and date of birth and then states as follows:

> This document is to form part of my last will and testament. Roger Blythman has taken instructions to prepare a Will sometime ago but it has not been completed. Therefore, I have prepared this document so I can express my final wishes as to how my assets and belongings should be distributed.

34 Under the heading 'ASSETS' the informal will then sets out in a list numbered one to nine the following items: the country pharmacy; the other pharmacies, in which the deceased was a '1/6' partner; life insurance; the family home; XX Group Trust (eight shops at a shopping centre and a Bendigo Bank account); a superannuation fund; bank accounts and names associated with those accounts; two Mercedes cars; and personal items, 'two watches, two pairs of cufflinks, an I-phone and a ring'. Brief details are provided in relation to each asset listed, for example, regarding item two, the other pharmacies, information is provided as to who has the partnership agreement.

35 A second list titled 'MY WISHES' sets out what appear to be a number of directions and gifts labelled one to nine that correspond with each of the 'Assets' identified in the preceding list. For example, in relation to item five of the first list, the XX Group Trust, details are provided as to new directors of the corporate trustee, sale of the properties held by the trust, including the time of such sales, use of the proceeds of sale to pay out lines of credit, and deposit of any excess funds into an interest bearing account for the benefit of named individuals. A number of the listed directions refer to associated proceeds becoming 'part of the Estate'.

36 Finally, under a third heading 'THE ESTATE', the informal will then provides that all of the assets of the estate of the deceased should be transferred to a 'Testamentary Trust'. Three specific gifts of $100,000 are bequeathed to named individuals, before '[t]he remainder of the Estate is to be invested in a property and shares portfolio for wealth creation'. This appears to be associated with the creation of a named trust, and the defendant is said to be able to access her share, 10 per cent, after three years, while the remainder is divided equally between the children.

37 The informal will appoints the plaintiffs and defendant as executors before ending with the deceased's name.

Dr Gall's report

38 Dr Gall is a medical practitioner who has practiced in the field of clinical forensic medicine for over 20 years. He has previously worked at the Department of Forensic Medicine, Victoria Police, as well as the Victorian Institute of Forensic Medicine.

39 In drafting his report, Dr Gall relied upon the affidavits filed in the proceeding, including the toxicology report annexed to the defendant's affidavit. Consistent with the toxicology report, Dr Gall noted that the drugs detected within the deceased 'had potentially adverse effects upon the respiratory and cardiovascular systems'. He then went on to express a number of opinions, including:

(a) it would not be unreasonable to assume that the cocktail of drugs/compounds was taken at or about the same time ... one exception to this may have been alcohol that may have been consumed over a longer period of time;

(b) the effects of the consumed drugs/compounds would have been evident in about 20–30 minutes following oral administration. These effects would have included light-headedness, dizziness and sedation;

(c) a reading of the Will File … and the letters to the various individuals … shows a precision and purpose of thought and accuracy of typing that would not be expected had the deceased, at the time of writing, been under the influence of the cocktail of

drugs/compounds and alcohol found within his system at the time of his death; and

(d) there would appear to be no toxicological reason for [the deceased] not possessing full testamentary capacity until the effects of the drugs/compounds and alcohol became evident ... [the deceased] was of sound mind from a toxicological perspective at the time of writing of the letters and the Will File.

40 The conclusions drawn in Dr Gall's report were not challenged by the defendant.

Submissions

41 The plaintiffs submit that in accordance with the requirements of s 9 of the Act,[4] the informal will, although a computer file, is a document[5] and that the intentions of the deceased as expressed in the document are clearly testamentary.[6] In this regard, specific reference is made to the language 'final wishes as to how my assets and belongings should be distributed', 'the Estate' and 'Testamentary Trust'.

42 Insofar as it is asserted that the deceased did not have testamentary capacity, the plaintiffs contend that the evidence of Dr Ho confirms that as a general proposition, the deceased did have testamentary capacity. Moreover, Dr Gall's report 'puts to rest' any doubt regarding impairment of the deceased's capacity due to the drugs that he consumed. The informal will and the accompanying letters are said to indicate that they were written by someone who was still capable of expressing 'lucid and detailed' instructions about a complex estate.

43 The defendant does not take issue with the informal will satisfying the requirements of a document or that the intentions of the deceased were testamentary. Rather, she contends that the Court cannot be satisfied of the deceased's testamentary capacity and that the deceased could not have intended the informal will to be his will.

44 On the first point, it is suggested that as there is no reason for the deceased to have taken his own life, on the balance of probabilities, the Court should conclude that the deceased suffered

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4 *Re Masters* (1994) 33 NSWLR 446; *Re Sanders* [2016] VSC 694 (18 November 2016) [15]; *Re Lynch* [2016] VSC 758 (9 December 2016) [13].

5 See *Re Trethewey* (2002) 4 VR 406; *Yazbek v Yazbek* [2012] NSWSC 594 (1 June 2012); *Re Currie* [2015] NSWSC 1098 (5 August 2015); *Re Michael (deceased)* [2016] SASC 164 (2 November 2016).

6 *Russell v Scott* (1936) 55 CLR 440, 454.

from an undiagnosed mental illness or disturbance. That is, although on the evidence of Dr Gall the effects of medication and alcohol can be excluded, Dr Gall's report cannot address any undiagnosed mental illness or disturbance. Said to be of note in this regard is the cryptic phrase adopted in one of the seven letters: '[t]he human brain is an amazing thing but we do not understand all of its secrets'.

45 As to the second point, it is submitted that only the final page of the informal will is testamentary. Reliance is placed on the sentence 'this document is to form *part of* my last will', yet no other document is put forward as comprising another part of the deceased's last will and testament. Similarly, the defendant asserts that use of the word 'attempt' in the letter to Mr Blythman is not indicative of a person who has made a document intending to be his will.

46 According to the defendant, the content of the informal will also indicates that the deceased was either ignorant of the assets that he held individually, which was unlikely given his success as a pharmacist or businessman, or confused and not thinking clearly. For example, the family home was owned jointly with the defendant and unable to be disposed of, the XX Group Trust was not the deceased's asset, nor was the superannuation fund or life insurance. Additionally, the Bendigo Bank accounts were joint accounts.

47 A final point made in support of the proposition that the deceased could not have intended the informal will to be his will is that leaving 10 per cent of the testamentary trust to the defendant, as the deceased's partner of 16 years and mother of three of his children, seems 'improvident, harsh, and capricious'.

48 In reply, the plaintiffs suggest that the defendant's first point is not only wrong on the evidence, as there may have been a reason for the deceased taking his own life that is unknown to the Court, but inconsistent with authorities determining that the existence of depression, without more, is insufficient to conclude that the person lacked testamentary capacity.[7] Additionally, the informal will is not intended to be analysed in minute detail. The courts do not require a testator to know precisely the value of his or her assets, or even

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7 *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698; *NSW Trustee and Guardian v Pittman; Re Koltai* [2010] NSWSC 501 (18 May 2010).

certain classes of assets, particularly where the estate is large and complex.[8]

Applicable Law

49 Section 9 of the Act allows the Court to dispense with the requirements for execution as established by s 7 of the Act. The word 'document' in the provision is to be interpreted broadly, in accordance with s 38 of the *Interpretation of Legislation Act 1984*.[9] Although s 9 is remedial and, as such, should be afforded a generous construction, such an approach should not undermine the intention of the legislature in establishing formalities for execution in s 7.[10]

50 Three requirements must be satisfied for the Court to admit an informal will to probate under s 9 of the Act:

(a) there must be a 'document';

(b) the document must express or record the testamentary intentions of the deceased; and

(c) that document must have been intended by the deceased to be his or her will.

51 The Court must be satisfied of these on the balance of probabilities, assessing the evidence with care in accordance with the principles expressed in *Briginshaw v Briginshaw*[11] and s 140 of the *Evidence Act 2008*.[12]

52 The first two requirements are satisfied. The informal will, although a computer file, is a 'document' that expresses the deceased's testamentary intentions.[13] It states the deceased's 'wishes or intentions as to how, voluntarily, his property is to pass or be disposed of after his death'[14] as evidenced from the deceased's references to 'how my assets and belongings

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8 *Frizzo v Frizzo* [2011] QSC 107 (12 May 2011) [22], quoting *Re Estate of Griffith; Easter v Griffith* (1995) 217 ALR 284, 295 (Kirby P) (New South Wales Court of Appeal); affirmed on appeal in *Frizzo v Frizzo* [2011] QCA 308 (1 November 2011) [4], [6], [67]–[68].

9 *Wills Act 1997*, s 9(6).

10 See *Re Lynch* [2016] VSC 758 (9 December 2016) [12]; *Re Brock* [2007] VSC 415 (24 October 2007) [19]–[20].

11 (1938) 60 CLR 336.

12 See, eg, *Fast v Rockman* [2013] VSC 18 (7 February 2013) [48].

13 *Interpretation of Legislation Act 1984*, s 38; *Re Trethewey (*2002) 4 VR 406, 409 [14]; *Re Michael (deceased)* [2016] SASC 164 (2 November 2016); *Yazbek v Yazbek* [2012] NSWSC 594 (1 June 2012) [79]–[80]; *Re Currie* [2015] NSWSC 1098 (5 August 2015).

14 *Re Masters (deceased)* (1994) 33 NSWLR 446, 455 (Mahoney JA). See also *Re Trethewey (*2002) 4 VR 406,

should be distributed', 'my Estate' and a 'Testamentary Trust' in the informal will.

53 The third requirement is that the deceased intended 'that particular document to be his or her final will and did not want to make changes to it'.[15] As stated by Whelan J (as his Honour then was) in *Equity Trustees Ltd v Levin*, 'it cannot be a document intended as a personal memorandum or a note of intended instructions, it cannot be a draft or a "trial run"'.[16] The relevant intention must be possessed 'either, at the time of the subject document being brought into being, or, at some later time'.[17]

54 Satisfying the third requirement depends upon the facts and circumstances of each case. The Court may consider evidence regarding the making of the will, as well as direct evidence of testamentary intent.[18] Ultimately, the inquiry remains:

> whether the document itself, the circumstances regarding its contents … and other relevant circumstances … lead to the conclusion that the relevant deceased intended the subject document to constitute his will;
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> that, while each case must depend upon its own facts, the greater the departure from compliance with the requirements of s 7 of the Act, the more difficult will it be for the court to be satisfied that the relevant deceased intended the subject document to be his will.[19]

55 A relevant consideration under the third requirement is the deceased's testamentary capacity. Where a deceased lacked the capacity to make a will, then the Court cannot be satisfied that he or she intended the document to be his or her will.[20] In the context of an informal will, the usual presumptions as to testamentary capacity do not apply.[21] While the Court considers the evidence as a whole, the onus of proving testamentary capacity rests upon the party seeking to propound the informal will.[22]

56 The principles as to testamentary capacity, as espoused in *Banks v Goodfellow*,[23] are well-established:

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409 [16]; *Russell v Scott* (1936) 55 CLR 440, 454.

15 *Re Rosaro* [2013] VSC 531 (4 October 2013) [36].

16 [2004] VSC 203 (26 May 2004) [15].

17 *Hatsatouris v Hatsatouris* [2001] NSWCA 408 (30 November 2001) [56].

18 *Fast v Rockman* [2013] VSC 18 (7 February 2013) [66]; *Application of Becroft* [2009] VSC 481 (15 October 2009) [10] (Harper J); *Wills Act 1997*, s 9(3).

19 *Re Springfield* (1991) 23 NSWLR 535, 539 (citations removed).

20 *Jageurs v Downing* [2015] VSC 432 (21 August 2015) [19].

21 Ibid [111].

22 *Robinson v Jones* [2015] VSC 222 (1 June 2015) [10]; *Frizzo v Frizzo* [2011] QSC 107 (12 May 2011) [23].

23 (1870) LR 5 QB 549.

> 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.[24]

57 As Applegarth J has previously stated, '[t]he *Banks v Goodfellow* test does not require perfect mental balance and clarity; rather, it is a question of degree'.[25] Additionally, it is not necessary for the testator to know precisely the value of his or her assets or even certain classes of assets, particularly where an estate is on the larger side and complex in nature,[26] that is, precision is not required as to 'the nature and worth of each and every asset in his or her portfolio'.[27]

58 The suicide of a testator is a factor to be taken into account in all of the circumstances of the case.[28] There is no general proposition that:

> attempted suicide, or suicide, gives rise to a presumption of mental illness, at least not to the extent that would amount to testamentary incapacity. A testator's suicide, following shortly upon the making of a will, does not raise a presumption of testamentary incapacity.[29]

59 As an example, in the *Estate of Brown*[30] although the terms of the relevant document indicated that the testator was 'sad and in a state of despair, there [was] no evidence that he was incapable of thinking rationally'.[31] In contrast, in circumstances where the testator was depressed and contemplating suicide, oral evidence indicated that when the testator's mood was down she was irrational and could not be reasoned with and where the testator had consumed a bottle of whiskey and it was probable that she had taken drugs that interfered with her cognition, White J determined that she did not have the requisite capacity at the time that the document was created.[32] Similarly, the requisite testamentary capacity was lacking

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24 Ibid 565. See also *Bailey v Bailey* (1924) 34 CLR 558.

25 *Frizzo v Frizzo* [2011] QSC 107, [21]–[22], quoting *Re Estate of Griffith; Easter v Griffith* (1995) 217 ALR 284, 295 (Kirby P) (New South Wales Court of Appeal); affirmed on appeal in *Frizzo v Frizzo* [2011] QCA 308 (1 November 2011) [24].

26 *Re Kelsall* [2016] VSC 724 (30 November 2016) [34].

27 *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197 (10 July 2009) [94].

28 *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698; *Estate of Brown* [2016] SASC 199 (22 December 2016).

29 *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 237 [46], quoted in *APK v JDS* [2012] NTSC 96 (1 July 2012) [17].

30 [2016] SASC 199 (22 December 2016).

31 Ibid [24].

in circumstances where the deceased was erratic and mentally unstable at a time when he verbally approved a draft will.[33]

Consideration

60 The inference to be drawn from the evidence is that upon arriving at the country town, the deceased typed the text of the informal will. Mr Thompson's report indicates that this occurred between either 8.44 pm or 9.42 pm and approximately midnight, when the associated shortcut to the file was created. Thereafter, the deceased wrote personal letters to family members, before writing the letter to Mr Blythman and creating the invoice document. The pattern of creation and modification of these documents suggests that the deceased may have gone back and reviewed them after their initial creation, between 1.34 am and 1.59 am. The invoice document was then created at 2.11 am before the deceased packed away the notebook in the wardrobe and sent the email to the defendant and second plaintiff from his iPhone at 2.26 am.

61 The Court has no reason to doubt the opinions of Dr Gall, which were not contested by the defendant. Aside from alcohol, the drugs and compounds consumed by the deceased would have started to have an effect within 20 to 30 minutes of being taken. The Court accepts that on balance, these drugs were consumed at the same time either shortly prior to, or after, the deceased completed the documents and sent the email at 2.26 am. Either way, the 'precision and purpose of thought and accuracy of typing' in the informal will and letters indicates that the drugs had not taken effect while the deceased was typing the documents. Although the consumption of alcohol may have been over a longer preceding period, the Court accepts that such analysis remains applicable. Ultimately, there is no toxicological reason for the deceased to have lacked testamentary capacity at the time of writing the informal will or letters.

Did the deceased have testamentary capacity?

62 Dr Ho's opinion as to the deceased's testamentary capacity on 17 April 2015 has limited weight. It is based upon a consultation with the deceased on 27 March 2015 and he did not

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32 *NSW Trustee and Guardian v Pittman; Re Koltai* [2010] NSWSC 501 (18 May 2010).
33 *Robinson v Jones* [2015] VSC 222 (1 June 2015) [132]–[133].

appreciate the elements of testamentary capacity.

63 Notwithstanding the defendant's submissions, suicide does not give rise to a presumption of mental illness or lack of testamentary capacity.[34] Certain evidence, such as the defendant's tendency to withdraw, his concern over the results of the medical tests, the difficulties that he encountered over the last months of his life and his disgust and shame over what the defendant has described as a 'trivial' incident, perhaps raise a degree of doubt as to whether he was affected by an undiagnosed mental illness. As Dr Ho discussed, at times diagnosing mental illness can be difficult, particularly where a patient may be reluctant to disclose his or her symptoms. However, even if a mental illness or disturbance could be identified in the circumstances before the Court, 'there must be evidence that the testator's state of mind was so affected as to make him or her unequal to the task of disposing of his or her property'.[35] The weight of evidence, regarding both the structure and content of the informal will and the circumstances in which it was created, suggests that the deceased's mind was not 'so effected'.

64 It is clear that the deceased appreciated the effect of the informal will, with references to 'my Estate', and how 'assets' are to be 'distributed' that indicate the document was to have a testamentary effect. In addition, the document file name is 'George_White-Final_Will_and_Testament'.

65 The content of the informal will is thorough, encompassing many of the assets that the deceased briefly discussed with Mr Blythman in their meeting of 27 October 2014, as well as specified liabilities. The use of the two lists, followed by the testamentary trust, is methodical, with detail provided as to the specific assets. While the content of the lists is legally inaccurate, in the sense that they deal with certain property that did not fall within the deceased's estate, this does not amount to the type of confusion for which the defendant contends. A lack of precision in relation to the difference between a joint tenancy and tenancy in common, for example, does not mean that the deceased was not aware of the 'general nature and value' of what was a relatively complex estate. Additionally, perhaps in

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34 *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215.

35 *Ryan v Kazacos* [2001] NSWSC 140 (13 March 2001) [61].

light of his conversation with Mr Blythman, in some regards the deceased attempted to distinguish between ownership and control, such as the purported appointment of new directors to the corporate trustee of the XX Group Trust.

66 The content of the informal will also indicates that the deceased was aware of the claims to which he ought give effect, and capable of weighing up these claims. Again, detail is provided as to a weekly allowance for Martin, the ability of the defendant to continue to live in the family home, consideration of the living expenses of the defendant and children, the quantity of specific bequests, the establishment of a wealth creation vehicle to which specified shares are allocated, and the time at which those shares could be accessed. The informal will is precise in relation to figures and shares. Again, the approach appears methodical and considered, comprehending the competing claims upon the estate. In this context, insofar as the defendant contends that in allocating her a 10 per cent share of the testamentary trust the deceased must have been acting irrationally, such a submission cannot be accepted. Upon its face the informal will appears rational, and while the defendant may question the value of her share, 'testamentary capacity is not reserved for people who are wise, or fair, or reasonable, or whose values conform to generally accepted community standards'.[36]

67 Additionally, the conduct of the deceased at the time that the informal will was created does not suggest someone with impaired testamentary capacity. The informal will was created at either 8.44 pm or 9.42 pm, and last saved just over 2–3 hours later. After it was last saved, the deceased sent a text message with a clear request, wrote the personal letters and invoice document, and created shortcuts for the majority of documents, before packing away the notebook and sending an email from his iPhone. Such methodical behaviour is not consistent with a level of irrationality or disturbance that would compromise the deceased's testamentary capacity. Although each case is determined upon its own facts, it is of some note that in *Schlesinger v Bowman*,[37] Tennent J similarly recognised a testator 'logically and carefully' working through a number of steps before committing suicide.[38]

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36 See *Re Estate of Griffith; Easter v Griffith* (1995) 217 ALR 284, 291 (Gleeson CJ) (New South Wales Court of Appeal), quoted in *Ryan v Kazacos* [2001] NSWSC 140 (13 March 2001) [68] and *Perpetual Trustee Company Ltd v Baker* [1999] NSWCA 244 (16 July 1999) [2].

37 [2007] TASSC 57 (9 August 2007).

68 Accordingly, the Court is satisfied that at the time the informal will was typed, the deceased had testamentary capacity.

Did the deceased intend the informal will to be his will?

69 It is also necessary to consider whether the deceased intended the informal will to be his last will. Some doubt exists in this regard with the reference to the informal will being '*part of* my last will and testament' suggesting that the informal will is to be read in addition to the instructions provided to Mr Blythman, or some other document. However, when read in the context of the introductory paragraph of the informal will and the letter to Mr Blythman, the doubt is removed as the introductory paragraph acknowledges the incomplete instructions to Mr Blythman and then indicates that 'therefore', 'this document' has been prepared 'so that I can express my final wishes as to how my assets and belongings should be distributed'. The references to 'this document' and 'final wishes' suggest that it is the informal will alone that is intended to be the deceased's last will.

70 Similarly, while the phrase 'I trust that my instructions last year and what I have attempted to be my Last Will & Testament will be enough to follow my wishes' may be read as an 'attempt' being inconsistent with an intention that the informal will was a final document, or as the instructions forming part of the will, this phrase must again be weighed in context. The defendant knew that although he had briefly discussed the matter with Mr Blythman, he did not have a formally executed will. The informal will is titled 'George_White-Final_Will_and_Testament', its stated purpose is to express the deceased's 'final wishes' as to how his estate should be distributed, it was created hours before the deceased took his own life, and via the email of 2.26 am, the deceased directed the defendant and plaintiffs to the notebook, on which he had created a shortcut to the informal will. These factors weigh heavily in favour of a finding that the defendant intended the informal will to be his will.[39] The overall impression from the language of the informal will, the letter to Mr Blythman and the conduct of the deceased is that summarised in the plaintiffs' submissions: 'The

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38 Ibid [22].

39 See, eg, *Costa v Public Trustee (NSW)* [2008] NSWCA 223 (17 September 2008); *Public Trustee v Alexander* [2008] NSWSC 1272 (20 November 2008); *APK v JDS* [2012] NTSC 96 (1 July 2012)*; Fielder v Burgess* [2014] SASC 98 (7 August 2014).

[d]eceased was aware that the computer file was unlikely to be 'as good as' a Will prepared by a solicitor … nonetheless, the [d]eceased did want the computer file *to be* his Will.'

71 The informal will is more than a mere note of wishes to be added to the instructions previously provided to Mr Blythman. The evidence discloses that the intention was for it to be the deceased's will. Although in some instances, knowledge of the formalities of execution of a will and their subsequent absence from a document can weigh against a finding that the testator intended that document to be their last will,[40] that principle is perhaps tempered by circumstances of imminent suicide. In *Fielder v Burgess*, for example, Kourakis CJ, attached little weight to the fact that the deceased, who was a law graduate, was likely to be familiar with the requirements for the execution of a will, as 'the deceased was probably reluctant to reveal his contemplation of suicide to others'.[41] Here, in contemplation of suicide, the deceased sought to draft his testamentary dispositions as best he could in the form of the informal will and left directions as to where it could be found. It is incomprehensible that he did not intend it to be his will on the basis that he was aware that it was not formally executed.

72 Finally, the defendant's submission that only the last page of the informal will is testamentary and dipositive is rejected. The 'wishes' that are identified by the deceased specify certain proceeds that 'are to become' part of 'the Estate'. The 'Estate' then forms the content of the last page of the informal will. Moreover, page three of the informal will gifts specified personal chattels. While not all of the language in the informal will is dispositive, in such circumstances, it is inappropriate to view only the last page as testamentary and dispositive.

Conclusions

73 The issue before the Court was whether the deceased, at the time of typing the informal will, had testamentary capacity and whether he intended the informal will to be his will. The evidence establishes that the deceased rationally and methodically considered the disposition of his estate and created the informal will in order to achieve this end. This is reflected by the

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40 See, eg, *Robinson v Jones* [2015] VSC 222 (1 June 2015) [112]–[114], citing *Fast v Rockman* [2013] VSC 18 (20 March 2012) [112]–[113].

41 *Fielder v Burgess* [2014] SASC 98 (7 August 2014) [38].

content of the informal will as well as the circumstances surrounding its creation. The evidence supports the conclusion that when the deceased typed the informal will, he had the requisite testamentary capacity and intended the informal will to take effect as his last will.

74 Accordingly, pursuant to s 9 of the Act, the Court will order that subject to any requirements of the Registrar of Probates, probate of the deceased's informal computer will made on 18 April 2015 be granted to the plaintiffs, with leave reserved to the defendant.
