[2003] WASC 96

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	**:**	HAYDEN -v- BOND [2003] WASC 96
CORAM	**:**	BARKER J
HEARD	**:**	30 APRIL 2003
DELIVERED	**:**	28 MAY 2003
FILE NO/S	**:**	CIV 1137 of 2002
BETWEEN	**:**	RONALD ARTHUR HAYDEN Plaintiff AND SUSAN BOND Defendant

Catchwords:

Probate - Application under s 64 *Administration Act 1903* (WA) to remove caveat - Circumstances in which a caveat may be removed - Whether claims concerning capacity of testatrix and undue influence at time of execution of will justify maintenance of caveat - Testatrix considered to be an alcoholic - Testatrix's husband considered to be dominant partner in relationship

Legislation:

Administration Act 1903 (WA), s 63, s 64(1)
Evidence Act 1906, s 79C
Non-Contentious Probate Rules 1967, r 33
Supreme Court Rules, O 37 r 6
Wills Act 1970 (WA), s 8

Result:

Caveat removed

Category: B

Representation:

Counsel:

Plaintiff	:	Mr A W Kaminickas
Defendant	:	Mr M J Hayter

Solicitors:

Plaintiff	:	Scott & Kaminickas
Defendant	:	M J Hayter & Co

Case(s) referred to in judgment(s):

Bailey v Bailey (1924) 34 CLR 558
Banks v Goodfellow (1870) LR 5 QB 549
In the Will of Key (Dec) (1892) 18 VLR 640
In the Will of Young (1968) 70 SR(NSW) 386
Re Estate of Dudley Herbert Crossland (Dec) [2001] WASC 21
Roebuck v Smoje [2000] WASC 312
Sylvester v Tarabini, unreported; SCt of WA; Library No 960062; 13 February 1996
West Australian Trustee Executor and Agency Co Ltd v Holmes [1961] WAR 144
West Australian Trustees Ltd v Poland, unreported; SCt of WA; Library No 7000; 6 January 1988
Worth v Clasohm (1952) 86 CLR 439

Case(s) also cited:

Clark v Henshaw, unreported; SCt of WA; Library No 5423; 29 June 1984
In re Finn [1942] VLR 125

Masi as Executrix of the Estate of the late Edwin Gauci v Briffa, unreported; SCt of WA; Library No 950032; 31 January 1995

BARKER J:

Introduction

1 By an originating summons dated 5 February 2002, the plaintiff (Mr Hayden) seeks an order that the caveat lodged by the defendant (Ms Bond) in respect of the plaintiff's application for a grant of probate of the will of Ute Thekla Haley, deceased, be removed. I will hereafter, mainly refer to the deceased as "Mrs Haley".

2 Mrs Haley executed the will the subject of the caveat on 24 February 1999. In it, she appointed her husband, Stanislaw Haley, to be the executor of her will and gave him her estate in the event that he should survive her by 30 days. In the event that her husband did not survive her by 30 days, Mrs Haley appointed Mr Hayden as executor to hold her estate upon trust as follows:

> "To divide the same between such one or more of my grandchildren namely Kyle Oliver Haley McCracken, Erron Boyed Haley McCracken and Curtis Shannon Haley McCracken as survive me and attain the age of 30 years and upon each of them attaining that age."

3 It appears that Mr Haley made a will in similar terms to Mrs Haley's on the same day, so that Mrs Haley and her husband made mutual wills. In the event, Mr Haley predeceased his wife.

4 Mr Hayden duly applied for a grant of probate in common form in respect of the will of Mrs Haley following her death. He instructed the solicitors who now act for him, and who had acted on the preparation of the mutual wills, to prepare and lodge the application for probate of the will. Mr Hayden, it appears, had worked with Mr Haley and had known him and, through him, Mrs Haley for some 20 years. After Mr Haley died on 6 June 2001, Mr Hayden maintained contact with Mrs Haley and saw her about once a week until the time of her death on 22 August 2001.

5 By cl 1 of the will of Mrs Haley made 24 February 1999, the deceased revoked all prior wills and other testamentary acts. She had, in fact, made an earlier will on 18 September 1976. By that will, she had appointed the West Australian Trustee Executor and Agency Co Ltd to be the executor and trustee of her will and had given her estate, both real and personal, to Mr Haley, should he survive her, and if he should not, then to her trustee upon trust:

> "For such of my child or children as shall survive me and attain the age of 21 years and if more than one in equal shares."

6 At the time of her death, Mrs Haley had two children, being Ms Bond and Ms Bond's sister, Ms Loditta Haley. If the will made 18 September 1976 were proved in probate, Ms Bond and her sister would be the joint beneficiaries of their mother's estate. However, if the will dated 24 February 1999 is proved, Ms Bond and her sister will have no interest in the estate.

The caveat

7 On or about 28 September 2001, Ms Bond instructed her solicitors to lodge a caveat in the Probate Division in this Court against the granting of probate of the will of Mrs Haley dated 24 February 1999. By the caveat, Ms Bond claimed an interest as one of the natural and lawful surviving children of the deceased and as a beneficiary under the will made by the deceased on 18 September 1976 who would benefit under that will if the present will of the deceased dated 24 February 1999 is neither admitted to probate nor the subject of a grant of probate.

8 In its terms, the caveat did not specify any other basis upon which the will dated 24 February 1999 should not be admitted to probate. However, in these proceedings in an affidavit made in opposition to the application of Mr Hayden for removal of the caveat, Ms Bond says that the reason she instructed her solicitors to lodge the caveat was that she believed that, at the time her mother made the will in 1999, she did not have the capacity to do so. In her affidavit, she states that:

> "To my knowledge my mother was an alcoholic and towards the end of her life she suffered from dementia. I believe that my mother made the decision to make the 1999 will as a consequence of an incident which involved my late father and which necessitated my sister and grandmother taking out a restraining order against him and my mother. At that time my mother was drinking heavily and I do not believe she would have changed her will if she had been of sound mind or if my late father had not influenced her decision."

9 In short, Ms Bond says, supported by the affidavit evidence of her sister, that her mother's will dated 24 February 1999 should not be admitted to probate by reason of questions surrounding the capacity of her mother to make her will of that date and also by reason of undue influence

exercised over her by her late husband at the time she made that will. The allegations of incapacity and undue influence are rejected by Mr Hayden.

Application to remove the caveat

10 The application of Mr Hayden is supported by his affidavits sworn 17 January 2002 and 14 February 2003 and by the affidavit of Arunas Walter Kaminickas (solicitor and counsel for the plaintiff) sworn 19 November 2002. In opposition to the application, Ms Bond relies upon her affidavit sworn 27 March 2002 and the affidavits of her sister, Ms Loditta Haley sworn 9 April 2002 and 23 January 2003. Each of these affidavits in opposition to the application contain annexures which, in a number of respects, appear to contain hearsay information. For example, the affidavit of Ms Bond sworn 23 March 2002 annexes notes and reports from the Fremantle Hospital concerning Mrs Haley, relating to various examinations or periods of hospitalisation in the late 1980s and through the 1990s. Apart from certain passages in the affidavits of the plaintiff objected to on behalf of the defendant, no objection has been taken in these proceedings by the parties to hearsay information in the affidavits or annexures thereto and neither party sought leave to cross-examine the deponents of the affidavits. Ordinarily, by reason of O 37 r 6(1) of the *Supreme Court Rules*, hearsay evidence will not be admitted into evidence to prove matters in issue. The exception provided for by r 6(2)(a) is in relation to interlocutory proceedings where an affidavit may contain statements of information and belief. I proceed, in this case, on the basis that the annexures to the affidavits to which objection is not taken are admitted by the parties to be evidence of the things they state, which may be regarded for the purposes of these proceedings. In any event, although no reference was made to it in the course of the hearing, it may be that the content of such things as the hospital records of Fremantle Hospital would be admissible pursuant to s 79C of the *Evidence Act 1906*.

11 In submissions made at the hearing of this application, counsel for Mr Hayden (who was also the solicitor who prepared the will of Mrs Haley and subscribed his signature as a witness to the signing of the will by her in conformity with the requirements of s 8 of the *Wills Act 1970* (WA)) explained that, on his advice, Mr Hayden had made and wished to pursue the application for removal of the caveat as a more expeditious and cost-effective way of obtaining probate of the will of the deceased dated 24 February 1999 than a probate action to have the will proved in solemn form. He recognised that the issues for determination by the Court, on an application for removal of a caveat lodged in respect of an application for grant of probate of a will, are different from those

which apply on a final hearing of a probate action to prove the will in solemn form.

12 By s 63 of the *Administration Act 1903* (WA), a person may lodge with the Principal Registrar a caveat against any application for probate at any time previous to such probate being granted. There is no particular requirement for the ground supporting the caveat to be stated. The form of caveat contained in Form 3 to the schedule of the *Non-Contentious Probate Rules 1967* and r 33 which refers to it, followed by the defendant in this instance, simply require that the interest claimed be set out and that "nothing be done therein without notice to me". In this case, the interest claimed by Ms Bond was pursuant to the earlier will. The interest stated plainly is sufficient to support the lodging of the caveat: ***Re Estate of Dudley Herbert Crossland (Dec)*** [2001] WASC 21 (2 February 2001).

13 Rule 33 of the *Non-Contentious Probate Rules 1967* also deals with caveats. It provides that a caveat shall remain in force for a period of six months and will then expire and be of no effect unless otherwise ordered. This seems to contemplate that the Registrar will make the order. Where the applicant for a grant does not obtain an order under s 64, according to r 33(5), he shall, within one month or such extended time as the Judge or the Registrar may allow after notice of entry of the caveat, commence contentious proceedings by issuing a writ against the caveator and proceeding in the ordinary manner.

14 Thus, where a caveat is lodged, it is open to the applicant for a grant of probate either to move under s 64 to remove the caveat or to proceed by way of probate action under O 73 of the *Rules of the Supreme Court* in order to obtain a grant of probate of the will in solemn form. In this case, the first option has been taken, namely, to apply for removal of the caveat.

Circumstances in which a caveat may be removed

15 By s 64(1) of the Act, the person applying for probate may apply to remove a caveat. However, nothing in s 64 specifies the particular criteria which the Court should regard in determining whether it should order the removal of a caveat.

16 In ***West Australian Trustees Ltd v Poland***, unreported; SCt of WA; Library No 7000; 6 January 1988, Kennedy J was required to determine an application for removal of a caveat lodged pursuant to s 64 of the *Administration Act*. His Honour had regard to ***In the Will of Young*** (1968) 70 SR(NSW) 386 at 392 in adopting the test by which such an

application should be determined. In ***In the Will of Young***, Walsh JA (as he then was) stated (at 392):

> "The learned judge stated in his reasons that 'the respondent must show that there is a substantial issue to be tried'. He stated also that the evidence did not indicate that there was 'any issue which I should be justified in having tried in a suit'. The appellants contend that these statements impose too high a test for determining whether the matter should proceed as a contested matter. They contend that they were entitled to have a contested suit unless it appeared that their opposition was merely 'vexatious'. Now it may be argued that the distinction is one of words rather than of substance. It may be suggested that, if the caveators do not produce sufficient evidence to show that there is a substantial issue to be tried, the necessary conclusion is that the opposition is vexatious. But I think that it is more than a mere matter of words. If (as the learned judge said) it is not necessary that the caveators should show a prima facie case for the rejecting of the will, ***I think that they may escape a decision that their opposition is merely vexatious if they provide some material to show that their opposition is based upon doubts genuinely entertained by them as to the validity of the will (as contrasted with an opposition appearing merely to be spiteful) and that there are circumstances which a probate court might regard as warranting some investigation***. This requirement might be satisfied, although the court was not satisfied that ultimately it would appear that the issues raised were 'substantial' ones." (Emphasis supplied)

17 It seems to me that the words emphasised supply the appropriate test for determining whether a caveat should be removed. That test ultimately is whether, on the material before the Court, the Court considers that there are circumstances that warrant some investigation before it should consider sealing a grant of probate in respect of the will.

18 In ***West Australian Trustees Ltd v Poland***, Kennedy J was "totally unpersuaded" that the evidence before the Court provided any support for a plea of incapacity. The medical evidence provided no support whatever for an assertion that the testator had no knowledge or understanding of what he was doing.

19 His Honour also rejected a submission that a relationship between the deceased and the second defendant (a woman the deceased and his

wife had known for some 50 years beforehand) suggested that she had exercised undue influence over the deceased.

The question of capacity

20 In support of the maintenance of her caveat, Ms Bond first claims that the deceased did not have capacity to make the later will on 24 February 1999.

21 ***In the Will of Key (Dec)*** (1892) 18 VLR 640, Holroyd J at 642 stated:

> "To satisfy the Court, (of the capacity of the testator) it will ordinarily be sufficient to prove the due execution of the will, as the presumption of sanity arises from the performance of an apparently rational act, and the absence of any evidence, or evidence strong enough, to throw doubt upon the competency of the testator."

22 What Cockburn J said in ***Banks v Goodfellow*** (1870) LR 5 QB 549 at 565 is often cited as the classic statement concerning the capacity that a testator must have to make a valid will. In order to exercise the power of disposition by the execution of a will, a testator must understand the nature of the act and its effects; understand the extent of the property of which he is disposing, 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. The mere fact that the testator was eccentric or was subject to one or more delusions is not, of itself, sufficient.

23 As Hasluck J observed in ***Roebuck v Smoje*** [2000] WASC 312 at [88], it is not necessary that the deceased should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple form. In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to. In other words, his capacity may be perfect to dispose of his property by will, and

yet very inadequate to the management of other business, as, for example, to make contracts for the purchase or sale of property.

24 In ***Bailey v Bailey*** (1924) 34 CLR 558, an aged testator suffering from pneumonia gave instructions to a solicitor to prepare a will for him. Three days later, he signed it with his mark, being unable through weakness to write his name. The High Court held that the propounders of the will had established a *prima facie* case of testamentary capacity which had not been displaced and, therefore, the will was held to be valid. Knox CJ and Starke J approved the reasoning in ***Banks v Goodfellow*** (*supra*) at 556. Isaacs J set out, at 570, a number of "working propositions" derived from decided cases.

25 Isaacs J noted that the onus of proving that an instrument is the will of the alleged testator lies on the party propounding it. This onus continues throughout the whole case and must be determined upon the balance of the whole evidence. His Honour was here speaking of a probate action to prove a will in solemn form. The proponent's duty is, in the first place, discharged by establishing a *prima facie* case, that is to say, one which satisfies the Court judicially that the will is the last will of a free and capable testator. A man may freely make his testament however old he may be, for it is not the integrity of the body but of the mind that is requisite in testaments. The quantum of evidence sufficient to establish a testamentary paper must always depend upon the circumstances of each case, because the degree of vigilance to be exercised by the court varies with the circumstances.

26 As instances of material circumstances, Isaacs J went on to cite: (a) the nature of the will itself regarded from the point of simplicity or complexity, or of its rational or irrational provisions, its exclusion or non-exclusion of beneficiaries; (b) the exclusion of persons naturally having a claim upon the testator; (c) extreme age, sickness, the fact of the drawer of the will or any person having motive and opportunity in exercising undue influence taking a substantial benefit. Once the proponent establishes a *prima facie* case, then the burden of proof lies upon the party impeaching the will to show that it ought not to be admitted to proof.

27 Isaacs J further said that, in order to displace a *prima facie* case of capacity and due execution, mere proof of serious illness is not sufficient; there must be clear evidence that undue influence was in fact exercised or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property.

28 As Hasluck J observed in ***Roebuck v Smoje*** (*supra*) at [93], the reasoning of the High Court in ***Bailey v Bailey*** (*supra*) suggests that, where there are no suspicious circumstances, the requisite knowledge and approval of the testator will be presumed by the Court from the due execution of the will. ***West Australian Trustee Executor and Agency Co Ltd v Holmes*** [1961] WAR 144 supports this view. In ***Roebuck v Smoje***, Hasluck J noted at [94] that the suspicion of the Court will always be aroused where the testator is blind, illiterate or mentally or physically enfeebled or the will had been prepared by a person who, or whose child, benefited under it.

29 In ***Worth v Clasohm*** (1952) 86 CLR 439, a widow died at the age of 86, having executed a will nine months earlier. The trial Judge found that the deceased was suffering from senile degeneration and was subject to a delusion that people were stealing her possessions and that her food was being poisoned by certain relatives. The will was drawn by the plaintiff, who was a solicitor and nephew of the deceased and a beneficiary named in the will. The trial Judge recognised that the circumstances were such as ought to excite the suspicion of the Court and that he ought not to pronounce in favour of the document unless a vigilant and zealous examination of the evidence satisfied him that it expressed the true will of the deceased. The trial Judge felt at the end of a hearing that there was sufficient doubt to refuse probate of the will and, in doing so, gave weight to the evidence of Dr Goode, a general practitioner, who had treated the deceased for various ailments and thought that her mental condition was poor because she kept on repeating herself and talking incoherently. The High Court allowed an appeal, noting that Dr Goode had no special qualifications in mental disorders and did not profess to have made any effort to test the deceased for her capacity to understand business matters or to weigh rationally considerations of the kind which are material in deciding upon testamentary dispositions.

30 However, the High Court acknowledged (at CLR 451) that the evidence of Dr Goode and another witness could properly be regarded as raising a doubt as to the validity of the will. Nonetheless, in the final analysis, the High Court considered that there were a number of features which in combination decisively outweighed the causes of the trial Judge's doubt. These features included the character of the dispositions made by the will and by three earlier wills, the impression of the testatrix depicted by various competent observers, including the fact that she seemed to take an intelligent interest in and to appreciate fully everything that was said to her. The evidence did not identify any deficiency of memory or failure to

appreciate the extent or nature of her property or the claims of her relatives.

31 The High Court went on to say that, where a doubt is raised as to the existence of testamentary capacity at the relevant time, there undoubtedly rested upon the plaintiff the burden of satisfying the conscience of the Court that the testatrix retained her mental powers to the requisite extent. But that is not to say that she was required to answer the doubt by proof to the point of complete demonstration, or by proof beyond a reasonable doubt. The criminal standard of proof has no place in the trial of an issue as to testamentary capacity in a probate action.

32 In ***Sylvester v Tarabini***, unreported; SCt of WA; Library No 960062; 13 February 1996, Anderson J also considered that the mere proof of serious illness will not necessarily lead to a conclusion of a want of testamentary capacity. There must be evidence that the illness affected the testator's mental faculties to a degree sufficient to deprive the testator of testamentary capacity.

33 These authorities, though dealing with probate actions to prove a will in solemn form, identify principles that may cause a Court which is required to determine an application to remove a caveat, to conclude that some investigation is required into a testator's capacity to make a will before probate is granted in respect of the will.

The evidence concerning capacity

34 The defendant adduced evidence concerning the physical and mental condition of Mrs Haley at various times as disclosed by the records of the Fremantle Hospital, and the nature of the relationship that Mrs Haley maintained with her late husband. After applying the above principles to the circumstances of this case, I do not consider that this evidence is sufficient to cause the Court to conclude that some investigation is required into Mrs Haley's capacity to understand the will she made on 24 February 1999 or to determine whether her late husband exercised a power to overbear her will, before granting probate of the will of the deceased. In my view, this is not a case where the caveat of the defendant should remain in place in order to oblige the plaintiff to satisfy the conscience of the Court in respect of the matters.

35 There is little evidence tendered on behalf of Mr Hayden concerning the particular circumstances which surrounded the actual execution of the will on 24 February 1999. As noted above, the will of Mrs Haley was

witnessed on that day by the solicitor who now appears as counsel for Mr Hayden on this application. The affidavit of Mr Kaminickas, which is filed and deposes as to more formal matters, does not deal with the question of the circumstances surrounding due execution. Mr Kaminickas expressed the view to the Court when making his submissions on behalf of Mr Hayden that, if he were to have deposed as to such matters, he may not have been able to appear as counsel on the application. Nevertheless, there is no particular evidence concerning the capacity of Mrs Haley to make the will on the day in question.

36 However, in his affidavits, Mr Hayden does address the capacity of Mrs Haley at times which may be considered relevant to the date upon which the will was executed on 24 February 1999. Some of his evidence is objected to in this regard by the defendant on the basis that his observations are not confined to facts that he is, of his own knowledge, able to prove, and so do not comply with O 37 r 6(1) of the *Supreme Court Rules*. Counsel for Ms Bond also claims that these passages are "scandalous, irrelevant or otherwise oppressive". The passages in question are pars 6 and 7 of the affidavit sworn 17 January 2002 and pars 9, 10 and 12 of the affidavit sworn 14 February 2003 . The relevant paragraphs of Mr Hayden's first affidavit state as follows, and should be read, in my view, in the context of the two paragraphs immediately preceding them:

> "4. The deceased was a friend of mine both at the time of making her last will in 1999 and at the time of her death in 2001.
>
> 5. I had known her and her husband for some 20 years having worked with her husband.
>
> 6. At no time did she ever display any symptoms of mental instability or infirmity.
>
> 7. Although she apparently had a problem with alcohol her behaviour was always normal and she articulated herself clearly and displayed no symptoms suggestive of mental incapacity."

37 The relevant passages from the second affidavit of Mr Hayden, including pars 2, 3, 4, 5 and 11, which provide the relevant context, are as follows:

> "2. I recall the period in February 1999 in connection with Stan and Ute Haley and their wills.
>
> 3. They both came to see me a day or so after their wills had been prepared and signed.
>
> 4. Mr and Mrs Haley both explained to me that they wanted me to be the executor of their will. They asked me to read their wills which I did.
>
> 5. They explained to me the reasons for not including their children as beneficiaries.
>
> ….
>
> 9. Mrs Haley discussed her will with me in a normal sensible fashion and there was no sense or irrationality or mental instability.
>
> 10. There was no indication to me that she had made this will under pressure from Mr Haley as she spoke quite openly expressing her views quite strongly.
>
> 11. Mr Haley died on 6 June 2001. I attended his funeral shortly after he died.
>
> 12. I continued to maintain contact with Mrs Haley once a week or thereabouts and up until her death I did not witness any sign of delusion, irrationality or mental infirmity."

38 In my view, the objections to the particular paragraphs should be rejected. It cannot be said that the passages are scandalous, irrelevant or otherwise oppressive. The other objection of Ms Bond is that, in making those statements, the deponent purports to give hearsay evidence. However, there is also a question of the entitlement of the deponent to express an opinion about matters on which he may not be qualified. He is a gardener, as described in his affidavit, and not a medical person. However, I do not view the statements made by him as statements of medical opinion. When read in context, I view the statements as the observations of a person who knew Mrs Haley well, as to whether or not she exhibited any signs which made him doubt her sanity or ability to understand the terms of her will at about the time she signed it on 24 February 1999, having regard to her usual behaviour as he had come to

understand it. In this respect, his evidence stands in much the same position as that of the general practitioner, Dr Goode, considered by the High Court in ***Worth v Clasholm*** (*supra*) referred to above.

39 The question, then, is whether there is any other evidence that throws doubt upon the competency of Mrs Haley to make her will on 24 February 1999. In this regard, it is necessary to consider the affidavit evidence of Ms Bond and her sister. First it is said that the deceased was an alcoholic. This does not appear to be denied by the plaintiff. However, the observation must be made that, without more, a statement that a person is an "alcoholic" does not deny their competence to make a will. Of course, if they were affected by alcohol on the day they purported to sign a document constituting their will, questions as to capacity might be raised. In this case, Ms Bond says, at par 6 of her affidavit, that, to her knowledge, her mother "was an alcoholic". She relies, in support of this view, on various papers from Fremantle Hospital. For example, a Fremantle Hospital inpatient summary, at page 13 of her affidavit, made on or about 20 April 1987 states that Mrs Haley was then a 47-year-old female "with a previous history of alcoholic hepatitis". The entry goes on to state that:

> "She had seen Dr Bridge in August 1986 and he had diagnosed alcoholic hepatitis and had advised complete abstinence from alcohol. Since then she had continued to drink the occasional glass of wine … SOCIAL HISTORY: lives with her husband, lifelong non-smoker, previous heavy alcohol consumption."

At most, this entry suggests that alcohol consumption was not a particular problem so far as the capacity of the deceased was concerned as of the middle of 1987.

40 Ms Bond further relies upon a Fremantle Hospital inpatient summary made about 10 January 1991 that appears at page 23 of her affidavit. In the history obtained from Mrs Haley from Dr P Atherton, Registrar, it appeared that Mrs Haley had taken certain tablets possibly with alcohol. It is noted: "It seems as though she did this because she had been arguing with her husband. She also had a long history of heavy alcohol consumption." A past medical history is then set out concerning an admission in September 1990 with a haematemasis, which was "not investigated because of her alcohol abuse". The examination disclosed, amongst other things, that:

> "She was however conscious and alert and responding to commands …

> She spent the night in ICU and was transferred to the general medical ward. Here she was seen by the psychiatrist who thought that she was not actively suicidal. They suggested that her overdose attempt was a reaction to her social situation. They advised her to stay off alcohol and adopt strategies to alter her lifestyle. She was well when discharged home on the 17.12.90."

These passages confirm a continuing problem with alcohol and also suggest difficulties in her relationship with her husband, but they do not suggest that Mrs Haley suffered from an ongoing incapacity to understand a written document such as a will.

41 Ms Bond further relies on a letter of Fremantle Hospital, apparently from Mr Roger Swift, Staff Specialist at the hospital, to Dr D O'Donovan, whom one may assume was Mrs Haley's general practitioner, dated 21 March 1996, which appears at pages 25 and 26 of her affidavit. In it, Dr Swift states that Mrs Haley was seen in the emergency department that evening and notes that she has a past history of excess alcohol, amongst other things. He noted, in particular, that: "She has been unwell for the past week related to an alcohol binge. She has been vomiting and unable to tolerate food. She denied haematemasis although her husband thought she had." Dr Swift summarised the condition of Mrs Haley as follows:

> "In summary she had signs of dehydration with impaired renal function. However there were no sign of acute GI bleed on this occasion. She was given IV hydration and felt well enough to go. Her husband was still very concerned and I wonder if she is not admitting to all her symptoms. However she appeared well enough to be discharged. I asked her husband to bring her back if there was any change in her condition and in particular if there is any sign of GI bleed. I've asked her to see you to have her renal function checked again. If she is not adequately hydrated and there is any deterioration in her renal function she may need further IV hydration.
>
> She is arranging to go to serenity lodge for rehabilitation."

42 Ms Bond also relies upon a Fremantle Hospital inpatient summary of about March 1997 that appears at page 19 of her affidavit. The diagnosis in respect of Mrs Haley is: "ALCOHOLISM WITH LIVER CIRRHOSIS". The note goes on to state: "Discussion about abstinence from alcohol was done several times during this admission but she declined any help."

43 These records disclose alcoholism, in fact, was a continuing problem for Mrs Haley as of about 1996/1997, but they do not, in my view, provide any basis for concluding that Mrs Haley was incapable of understanding the terms of her will when she made it in February 1999.

44 Ms Bond also makes reference to observations in the Fremantle Hospital records that her mother was suicidal and overdosed, and prone to self-harm. I have already referred to a passage to that effect in the Fremantle Hospital inpatient summary of about 10 January 1991 at page 23 of Ms Bond's affidavit. The statement then made was that "her overdose attempt was a reaction to her social situation". The psychiatrist did not think that Mrs Haley was "actively suicidal".

45 Ms Bond also refers to a Fremantle Hospital entry dated 13 December 1990 that appears at page 38 of her affidavit. It appears that Mrs Haley's daughter, Loditta, had been involved with the admission of Mrs Haley to the hospital on 11 December 1990. The assessment indicates that a Dr Tait (psychiatrist) had assessed Mrs Haley and advised her "to contact GP or MSW when she is 'ready to do some deciding about changing her lifestyle'". References are also made to Mrs Haley's drinking. Nothing on this page suggests that Mrs Haley lacked the capacity to perform a rational act.

46 At page 27 of Ms Bond's affidavit there is a Fremantle Hospital document described as "Behavioural Contract", signed by Mrs Haley and dated 6 November 1993. In it, she agrees to comply with the following request whilst an inpatient in Ward D4:

> "(1) Not to self-harm. If I feel like doing so I will talk to my allocated nurse.
>
> (2) I will not take alcohol or non-prescribed medications.
>
> (3) I will engage in appropriate counselling activities as requested.
>
> (4) I will not leave the ward without staff consent."

This appears to be a standard form of "contract", designed to help control the behaviour of an inpatient. In my view, little else can be drawn from it, apart from the fact that the representatives of the Hospital considered she was capable of understanding what she thereby agreed to.

47 Related nursing progress notes of Fremantle Hospital from November 1993, that appear at page 34 of Ms Bond's affidavit, make

reference to Mrs Haley (then an inpatient in Ward D4) being "very distressed and close to tears this morning". She had apparently been "ruminating about her life and suicide attempt. Says she experienced her first panic attack in 1969 but became problematic in the early 70s and after this starting drinking to control symptoms. Very ashamed of this behaviour and acknowledges the impact of it onto her husband." A further note at that time states:

> "It seems apparent her dominant more aged husband allows little space for her as an individual woman and their relationship is on very thin ice. Assertive and relaxation therapy would benefit Ute."

These entries made by nursing staff as to what they were told by Mrs Haley, or what they themselves surmised, concerning her personal relationship with her husband, relate both to past history as well as her present circumstances. In my view, neither of them support a view that, at that time, Mrs Haley was incapable of understanding the terms of a written document.

48 Ms Bond further says that the materials disclose a lack of marital harmony between Mrs Haley and her husband at material times and refers to the materials to which I have already made reference that appear at pages 23 and 29 of her affidavit. She says that the deceased felt that the relationship between herself and her late husband contributed to her drinking and other problems which she experienced. This is supported by what appears in the hospital notes at pages 23 and 31 of her affidavit. It is further said that Mrs Haley was physically abused by her late husband and that support for this may be found in the hospital notes at pages 32 and 39 of her affidavit. All of these things would appear to be so. However, in my view, none of them, either taken alone or together, can lead to the conclusion that Mrs Haley lacked the capacity to understand her will when she executed it on 24 February 1999.

49 Ms Bond also says that her mother suffered from anxiety and depression. That Mrs Haley suffered from anxiety and depression at certain times is confirmed by some of the Fremantle Hospital records to which reference has already been made.

50 The Fremantle Hospital nursing progress notes that appear at page 34 of the affidavit of Ms Bond, which are from the period November 1993, also suggest that the deceased's husband was a dominant partner in the relationship. However, the note made on 10 November 1993, to which reference was made above, is in terms that suggest it is the assessment

(although it may be one based upon things Mrs Haley said) of the registered nurse. Similarly, it would appear that, on 11 November 1993, as set out in the Fremantle Hospital record at page 35 of Ms Bond's affidavit, that a registered nurse considered Mrs Haley's husband to be "extremely ego-centric and dominant". There may be proper grounds for concluding that the relationship between Mrs Haley and her husband was an extremely difficult one and that he was the cause of much of the difficulty. However, in my view, none of that warrants the view that, at material times when she made her will on 24 February 1999, Mrs Haley lacked the capacity to understand its terms.

51 It appears that, at particular times, Mrs Haley suffered neurological problems, resulting in collapse and loss of consciousness. It appears the deceased suffered a grand mal seizure in December 1996, lasting approximately seven minutes. The Fremantle Hospital nursing progress notes from that period, that appear at page 50 of Ms Bond's affidavit, state that, on 13 December 1996, she "did have a seizure in the shower today, no warning signs noted. Seizure generalised and grand mal, lasting approximately seven minutes … "

52 The Fremantle Hospital emergency department clinical record of 30 September 1999, that appears at pages 45 to 47 of the affidavit of Ms Bond, made after she was seen at 1550 hours, suggests that she fell at 1300 hours and hit the back of her head. She had apparently been experiencing dizziness, light headedness, palpitations and chest pain prior to the fall and some light headedness and a sore head after the fall. A similar episode had apparently been experienced earlier in the year. The clinical record also noted, amongst other things, that Mrs Haley had been sleeping poorly, not eating properly, although she felt better towards evening when her appetite increased, felt very tired, although better in the evenings, that she was worrying about her husband's poor health, and that there was some family conflict - "no contact with 2 x daughters and 3 x grandchildren". In my view, this recorded incident and information contained on it, certainly without more, does not provide any warrant for the view that, when she made her will on 24 February 1999, Mrs Haley lacked the capacity to understand its terms.

53 In addition, Ms Bond says that her mother suffered mental and behavioural disorders. She refers in her affidavit specifically to a Fremantle Hospital and Health Service case summary sheet from 25 September 2001 that appears at page 58 of her affidavit. Mrs Haley's principal diagnosis on that visit to the hospital is "alcoholic hepatic failure". Amongst a number of additional diagnoses, it is noted "F101 -

Mental and behavioural disorders due to alcohol, harmful use". The same additional diagnosis is made in a related document of the same date at page 59 of the affidavit. A similar entry is made on another summary sheet of the hospital dated 22 January 2001 that appears at page 61 of the affidavit. The same entry in respect of additional diagnoses appears in another summary sheet of the hospital dated 19 December 2000. These summary sheets, which are merely that - summary sheets - appear to codify much of the prior medical conditions referred to in the Fremantle Hospital records, a number of which have been referred to above. None of these entries on their own suggest some particular mental or behavioural disorder, and certainly no particular mental or behavioural disorder not associated with the alcohol problems of the deceased previously noted. There is nothing in these particular records of the hospital to suggest that, at the material time when the will dated 24 February 1999 was executed, Mrs Haley lacked the competence to perform a rational act.

54 Ms Bond in her affidavit finally says that the deceased was acting irrationally and was delusional. In this regard, she relies on Fremantle Hospital records at pages 52, 53 and 54 of her affidavit. At page 52, there is a nursing progress note from 15 December 1996 as follows:

> "Mrs Haley returned to ward at 0240 hours after sitting outside waiting for husband for around 45 minutes. Patient refused to go back to her bed - acting irrational and delusional. Refusing all medication. For review in morning."

55 At page 53 is a further entry made by a different nurse on 15 December 1996 which, in part, provides as follows:

> "Staff phoned patient's daughter Loditta McCracken after this phone call, and explained to daughter that her mother had left the hospital without legally discharging herself, was unreasonable and irrational. Patient's daughter agreed her mother was 'often irrational and unreasonable and lied', she agreed to contact her mother to encourage her to return to Fremantle Hospital."

56 At page 54 is a nursing progress note with entries of both 15 December 1996 and 16 December 1996. It contains a further entry from 15 December 1996 (in a different nurse's handwriting) in which it is said that the patient believes "picture of two penguins on wall in her room is actually two men in penguin suits". There is no particular reference on

this page to the patient being irrational or delusional, although the reference to the penguin painting might possibly suggest that. Taken together, these Fremantle Hospital notes indicate that, as of about 15 December 1996, Mrs Haley was not well and was acting irrationally on that day. Whether she was also delusional on that day is not altogether clear, although it was the opinion of one nurse at that time that she was. It appears that Mrs Haley did return to the hospital, having discharged herself earlier on. There is nothing in this incident, having regard to later evidence, to suggest that, as at 24 February 1999, Mrs Haley was lacking the competence to understand her will.

57 As noted in the medical records of Fremantle Hospital, Ms Loditta Haley appears to have assisted her mother at different times with her illness. At all these material times, Ms Bond lived in New South Wales. In her affidavit dated 23 January 2003, Ms Haley says that her mother suffered physical abuse from her late husband, was dominated by him and in fear of him, and that she (Loditta Haley) received threats of violence from her late father and, to a lesser extent, from her late mother. At the time of making this affidavit, Ms Haley says she is 44 years of age. She lived with her mother and father from birth until 19 years of age. She says that, while living with her parents, she witnessed her mother receiving "verbal and physical abuse from my late father on numerous occasions and after leaving home I also witnessed the same type of conduct on several occasions when visiting my late parents and on several occasions observed my mother having bruises and black eyes". There is no reason to doubt this evidence, particularly having regard to the various notes made in the Fremantle Hospital records. However, in my view, none of those matters bear upon the competence of Mrs Haley to understand her will and perform the rational act of signing it on 24 February 1999.

Conclusion on the question of capacity

58 The defendant's opposition to the application of Mr Hayden for an order removing the caveat is very much dependent on the records of the Fremantle Hospital to which I have referred. They document an unhappy family relationship, at least at particular times, between the deceased and her husband. They also confirm that the deceased suffered from alcohol abuse and received medical assistance for her condition and related problems over a number of years. It appears that her problems with alcohol had not abated in the years leading up to her death. While alcohol and related problems seem, at times, to have affected what might be called the mental health of Mrs Haley, so that, at particular times, she suffered

from depression and (for example, in December 1996) acted irrationally and possibly in a delusional manner, the evidence, taken as a whole, does not provide any basis for concluding that this was Mrs Haley's usual or constant state. There is nothing to support the view that this was her state when she executed her will on 24 February 1999. In short, the evidence does not throw sufficient doubt on the competency of Mrs Haley to understand and make her will on 24 February 1999 to justify a requirement, in effect, that Mr Hayden should be obliged to prove the will of the deceased in solemn form.

59 The evidence discloses a sad and sorry story about the deceased and her relationship with her husband, and with her children, and it also shows that Mrs Haley's health was seriously affected by her problems with alcohol, but, in my view, it does not warrant any investigation by way of a probate action into whether she had the mental capacity to understand and make her will on 24 February 1999.

The question of undue influence

60 The defendant also claims that the caveat should be maintained on the ground that there is sufficient before the Court to raise the issue whether the will of the deceased was made under the undue influence of her late husband.

61 In ***West Australian Trustees Ltd v Poland*** (*supra*), Kennedy J stated:

> "The submission made on his [the caveator's] behalf assumed that undue influence, as understood in equity, was the same as that applying in probate. This is fallacious. There is, in probate, no presumption of undue influence arising from particular relationships between individuals - see *Parfitt v Lawless* (1872) LR2P&D 462 at pp 468-471.
>
> The burden of proving undue influence rests upon the person asserting it (see Williams Mortimer and Sunnucks: Executors, Administrators and Probate, 16th ed at pp 168 and following and *Craig v Lamoureux* [1920] AC 349). That burden cannot be discharged simply by showing that the second defendant had power enabling her to overbear the will of the testator. It would have to be shown both that she exercised that power, and that execution of the will was obtained thereby. A careful review of the evidence before me provides, in my opinion, no support for the claim of undue influence."

Evidence concerning undue influence

62 Undoubtedly, the relationship between Mrs Haley and her late husband was a difficult one, as I have accepted. The evidence suggests that Mr Haley was considered to be a dominant person in the relationship and capable of being overbearing in his relationship with his wife. Mr Haley, to use the words of Kennedy J in ***West Australian Trustees Ltd v Poland*** (*supra*), may well have had the power to enable him to overbear the will of the testator. However, in my view, there is insufficient evidence to warrant an investigation into whether Mr Haley exercised undue influence over his wife at the time she made her will. As Kennedy J noted in ***Poland***, the burden of proving undue influence rests upon the person asserting it. The burden cannot be discharged simply by showing that one person has the power to overbear the will of a testator. It needs to be shown not only that a person had that power, but also that the person exercised the power, and that execution of the will was obtained thereby.

Conclusion on the question of undue influence

63 In my opinion, there is nothing to show that Mrs Haley's late husband exercised a power to overbear her will in relation to the making of her will, or that she made her will on 24 February 1999 as a result of such undue influence. Any suggestion that she was overborne on that occasion is, in all the circumstances, speculative. Speculation that something may have happened is not a sufficient ground to maintain a caveat in circumstances such as these.

64 In this particular case, the difference between the will made by Mrs Haley on 24 February 1999 and her earlier will made 18 September 1976 is that she did not leave any portion of her estate to her children in her later will. In some circumstances, the failure of a testatrix to make some provision for a particular person naturally having a claim upon her may, as Isaacs J suggested in ***Bailey v Bailey*** (*supra*), constitute a material circumstance suggesting either lack of capacity or undue influence. However, in this case, the circumstances in which the change of heart appears to have occurred in Mrs Haley is explained in not dissimilar ways on behalf of the plaintiff and the defendant. Ms Loditta Haley in her affidavit attributes the change of heart to the fact that she (Ms Loditta Haley) obtained a violence restraining order against both her mother and father in about February 1999, as a result of "her aggressive and irrational behaviour towards me". Mr Hayden in his affidavit sworn 14 February 2003, says that Mr and Mrs Haley both explained to him two days after

they made their wills in February 1999 that the reason for excluding their children as beneficiaries was based on a rift that had developed between them and had culminated in restraining orders being made against them by Loditta.

65 In light of this likely explanation for the change of heart of Mrs Haley in making her will on 24 February 1999, there is no particular reason to suggest that the exclusion of her children as beneficiaries under her later will is to be explained by any unsoundness of mind on her part or the exercise of undue influence over her by her late husband.

66 Whether or not Ms Bond and Ms Haley may be entitled to maintain an action against the estate of their deceased mother pursuant to the *Inheritance (Family and Dependants Provision) Act 1972* (WA), the mere fact of their exclusion from the will made by their mother dated 24 February 1999 does not persuade me, in all the circumstances, that there are proper grounds to oblige the plaintiff to commence a probate action to prove the will in solemn form.

Conclusion and order

67 In conclusion, I take the view:

(1) That the will made by the deceased dated 24 February 1999 was executed in conformity with the requirements of the *Wills Act.*

(2) There is a presumption that the will so made was made by the deceased with competent understanding.

(3) There is no sufficient evidence to warrant an inquiry into whether the deceased was of sound mind when she made the will.

(4) There is no sufficient evidence to warrant an inquiry into whether the deceased made her will as a result of undue influence exercised over her by her late husband.

68 In these circumstances, the plaintiff has established his entitlement to an order for the removal of the caveat and I would so order.