
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

TITLE OF COURT : THE COURT OF APPEAL (WA)

CITATION : SAUNDERS -v- THE PUBLIC TRUSTEE
[2015] WASCA 203

CORAM : BUSS JA
BEECH J
MITCHELL J

HEARD : 14 AUGUST 2015

DELIVERED : 6 OCTOBER 2015

FILE NO/S : CACV 16 of 2014

BETWEEN : VALERIE SAUNDERS
Appellant

AND

THE PUBLIC TRUSTEE
First Respondent

DAVID HOFFMAN
Second Respondent

JUDITH MARGARET HOFFMAN
Third Respondent

ON APPEAL FROM:

Jurisdiction : SUPREME COURT OF WESTERN AUSTRALIA
Coram : EM HEENAN J
Citation : THE PUBLIC TRUSTEE -v- ROYAL PERTH
HOSPITAL MEDICAL RESEARCH FOUNDATION
INC [2014] WASC 17
File No : CIV 1154 of 2010

Catchwords:

Appeal - Contentious probate jurisdiction - Grant of probate in solemn form - Testamentary capacity

Legislation:

Supreme Court (Court of Appeal) Rules 2005 (WA), r 47(3)(d)

Result:

Appeal dismissed

Category: B

Representation:*Counsel:*

Appellant : In person
First Respondent : Ms C F Holyoak-Roberts
Second Respondent : Mr R J Nash
Third Respondent : In person

Solicitors:

Appellant : In person
First Respondent : Public Trustee (WA)
Second Respondent : Public Trustee (WA)
Third Respondent : In person

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

Aon Risk Services Australia Ltd v Australian National University [2009] HCA 27; (2009) 239 CLR 175
Banks v Goodfellow (1870) LR 5 QB 549
Clark v Ryan (1960) 103 CLR 486
Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission [2000] HCA 47; (2000) 203 CLR 203
Devereaux-Warnes v Hall [2006] WASCA 268
Doyle (WA) Pty Ltd v ING Real Estate Joondalup BV [2014] WASCA 215
Easter v Griffith (1995) 217 ALR 284
Ebner v Official Trustee in Bankruptcy [2000] HCA 63; (2000) 205 CLR 337
Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22; (2007) 230 CLR 89
Goninan & Co Pty Ltd v Direct Engineering Services Pty Ltd [2007] WASCA 10; (2007) 33 WAR 182
H v P [2011] WASCA 78
Jones v Darkan Hotel [2014] WASCA 133
Lackovic v Insurance Commission (WA) [2006] WASCA 38; (2006) 31 WAR 460
Lafranchi v Transport Accident Commission [2006] VSCA 81; (2006) 14 VR 359
Lunt v New Resource Holdings Pty Ltd [No 3] [2011] WASCA 45
Mallard v The Queen [2003] WASCA 296; (2003) 28 WAR 1
Miller & Associates Insurance Broking Pty Ltd [2010] HCA 31; (2010) 241 CLR 357
Minister for Immigration v Hamsher (1992) 35 FCR 359
Moore v Minister for Immigration [2007] FCAFC 134; (2007) 161 FCR 236
Public Trustee v Stretch [2002] WASC 147
R v Bonython (1984) 38 SASR 45
R v GP (1997) 18 WAR 196
Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd [2007] WASCA 175; (2007) 34 WAR 403
Riley v The State of Western Australia [2005] WASCA 190; (2005) 30 WAR 525
S v D [2014] WASCA 224
Sami v Minister for Immigration [2013] FCAFC 128
Shire of Gingin v Coombe [2009] WASCA 92; (2009) 169 LGERA 236
Trajkoski v Director of Public Prosecutions (WA) [2013] WASCA 222
Vairy v Wyong Shire Council [2005] HCA 62; (2005) 223 CLR 422
Williams v Minister Aboriginal Land Rights Act 1983 [2000] NSWCA 255

Winmar v The State of Western Australia [2007] WASCA 244; (2007) 35
WAR 159

Worth v Clasohm (1952) 86 CLR 439

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BUSS JA
BEECH J
MITCHELL J

1 **BUSS JA:** I agree with Mitchell J.

2 **BEECH J:** I agree with Mitchell J.

MITCHELL J:

Summary

3 On 29 January 2014, the trial judge ordered that a grant of probate in solemn form of the Will of Alexa Hoffman dated 5 August 2001 be made to the Public Trustee. The 2001 Will generally distributed the deceased's estate (principally comprising a house in Wembley) among her son, grandchildren and a great-grandchild. It did not make any provision for her daughters, who opposed the grant of probate on grounds of testamentary incapacity.

4 The appellant, one of the daughters, appeals against the grant of probate. She contends that her mother lacked testamentary capacity when making the 2001 Will. The appellant alleges that the trial judge made various errors in concluding that testamentary capacity was established.

5 The critical issue at trial and on appeal is whether, at the time she made the 2001 Will, the deceased had the capacity to comprehend and appreciate the claims on her estate to which she ought give effect. I agree with the trial judge that the evidence adduced at trial established the deceased to have had that capacity. In my view, the trial judge did not err in so finding, and conducted the trial in a manner which was procedurally fair. The appeal must therefore be dismissed.

6 My reasons for reaching this conclusion follow.

The Hoffman family

7 It is convenient to begin by identifying the members of the Hoffman family, most of whom were parties to the proceedings below. As many family members share common surnames, I will refer to them by their first names only. This is to avoid confusion, and is not intended as a sign of any disrespect.

8 Alexa was born in 1912, and married Thomas in 1941. The couple had three children, Valerie (born in 1946), Judith (born in 1951) and David (born in 1956). Thomas died in 1976, and Alexa did not remarry or have any other children.

- 9 At the time of Alexa's death in August 2008, she had six grandchildren. Two were the sons of Valerie: Malcolm (born in 1973) and Michael (born in 1978). Four were the children of Judith: Deborah (born in 1969), Tracey (born in 1979), Chantelle and Tenielle (born in 1982). Alexa also had one great-grandchild, Yasmin, born to Deborah in 1999.

Alexa's Wills and estate

- 10 The grant of probate was for Alexa's last Will, prepared with the assistance of the Public Trust Office and executed in regular form on 5 August 2001. Alexa left legacies of \$1,000 to each of the Royal Perth Hospital Medical Research Foundation (Inc), the Uniting Church in Australia (Property Trust) WA and the Epilepsy Association of WA (Inc). \$500 was left to the Asthma Foundation of WA (Inc), and \$200 to Deborah on trust for Yasmin. The Public Trustee was appointed the executor of Alexa's estate.
- 11 The 2001 Will left the residue of Alexa's estate to such of her son David and her grandchildren Malcolm, Michael, Tracey, Chantelle and Tenielle as survived her. Alexa's daughters, Valerie and Judith, were not mentioned in the 2001 Will.
- 12 The principal asset in Alexa's estate was her home in Wembley. The estate also comprised the furnishings of the house and Alexa's other personal effects, together with some bank deposits and cash accounts. In 2009, when the Public Trustee first applied for probate, the value of the estate was estimated at \$900,000.

The critical issue

- 13 At trial, the critical contentious issue was whether Alexa had testamentary capacity when she made the 2001 Will. There was no real dispute that, at that time, Alexa understood the nature of a Will and the extent of the property of which she was disposing. What was in issue was Alexa's capacity at that time to comprehend and appreciate the claims on her estate to which she ought give effect.
- 14 At trial, the Public Trustee and David propounded a 1977 Will in the alternative, in the event that the 2001 Will was found to be invalid. No party to the appeal contended that the 1977 Will should be admitted to probate. I have concluded Alexa had capacity when she made the 2001 Will. It is, therefore, unnecessary to determine the validity of the 1977 Will in these reasons. However, the content and circumstances of making

the 1977 Will remain relevant when considering some of the arguments advanced in relation to the 2001 Will.

- 15 There was also an issue at trial as to who should be appointed administrator of Alexa's estate in the event of intestacy. Again, it has not proved necessary to deal with that issue in this appeal, as I have concluded that probate of the 2001 Will was appropriately granted.

Parties' position at trial

- 16 At trial Valerie and Judith opposed the grant of probate for the 2001 Will on the basis that Alexa lacked testamentary capacity. They contended that Alexa died intestate and that the distribution of her estate should be determined by s 14 of the *Administration Act 1903* (WA). The effect of that provision would be to distribute Alexa's estate equally among Valerie, Judith and David.

- 17 Valerie's defence to the probate action pleaded that all Alexa's testamentary writings were invalid because she lacked testamentary capacity due to some mental health problems. She pleaded that Alexa had no understanding of the effect of her actions on others; that she did not understand the moral or legal claims of her three children on the estate; and that she suffered from some disorder of the mind that affected her ability to make rational decisions regarding the disposal of her property. The defence further alleged that this disorder of mind was a lifelong condition present at least from early adulthood.

- 18 Valerie's opening submissions at trial were summarised in the following terms by the trial judge:

[Valerie] contended that the nature of her case is that her mother lacked testamentary capacity because she was not able to understand her relationship with her two daughters, which was an abusive one from the day they were born, as distinct from the relationship which she had with her son. [Valerie] submitted that the deceased was not able to give full weight to her moral and legal responsibilities towards herself and her sister as a result of some sort of mental disorder. This was, in due course, developed to include the existence of a long-term history of imbalance and hostility by the deceased towards [Valerie and Judith] and the contention that the deceased had an unreasoning and chronic lack of perspective together with hostility towards both her daughters, suggestive of an imbalance of some kind or another in her ability to make judgments and form attachments [71].

19 Judith's defence was in the form of an affidavit. A number of arguments were advanced in the affidavit. Her ultimate position was that Alexa lacked testamentary capacity due to multiple unidentified psychological conditions.

20 The primary position of the Public Trustee and David (through counsel engaged by the Public Trustee) was that Alexa had testamentary capacity when she made the 2001 Will.

Evidence at trial

21 At trial the Public Trustee adduced affidavit and oral evidence from Alexa's grandchildren Michael, Tracey, Tenielle, her GP Dr Melling and the Public Trust officers (Mr McKenzie and Mr McCarthy) who had taken her will instructions. They gave evidence about their interactions with Alexa. Dr Melling expressed his opinion that Alexa had testamentary capacity in 2001.

22 Valerie and Judith both gave evidence by affidavit and oral testimony. Portions of their affidavit evidence were struck out by the trial judge.

23 Valerie also tendered affidavits of Dr Hugh Series and Professor Steven Hirsch, psychiatrists from the United Kingdom who she had engaged to give expert evidence at trial. Dr Series was made available for cross-examination and Professor Hirsch's affidavit was received even though he was not made available for cross-examination.

Facts found by the trial judge

24 The trial judge's reasons for decision contain an extensive summary of the evidence led at trial and a number of factual findings made by reference to that evidence. I will attempt a brief and general summary of the basic facts relating to the critical issue in this appeal. In some cases, I have inferred that the trial judge made findings by reference to uncontested evidence which he recites. I shall generally summarise the findings in chronological order, rather than the order in which the trial judge made the findings. The following paragraph references are to paragraphs of the trial judge's reasons.¹

¹ *The Public Trustee v Royal Perth Hospital Medical Research Foundation Inc* [2014] WASC 17.

Alexa's marriage and children

25 A few days after marrying Alexa, Thomas left for service in the army in Singapore. He was wounded and imprisoned in Changi until the end of the war, returning home in November 1945. Thomas remained in the army until his retirement in 1958 [127].

26 Until 1949, Alexa, Thomas and Valerie (born in December 1946) lived in Alexa's parents' house. In April 1949, the family moved to the Wembley house in which Alexa lived at the date of her death [128]. Judith was born in June 1951 (when Valerie was 4 years old), and David was born in December 1956 (when Valerie was 10 years old and Judith was 5 years old). David was born with a number of chronic disabilities, including epilepsy. His current need for care is such that the Public Trustee has been appointed plenary administrator of David's estate.

27 Valerie and Judith had very unhappy childhoods and there were constant arguments within the family between Alexa and Thomas. At one stage, when the children were very young, Alexa appeared to have trouble and difficulty managing them. The local general medical practitioner and some social workers he called in became concerned about the welfare of the children and whether or not there might be a need for them to be removed. That did not eventuate, but Alexa was severe with the girls, was very prone to criticise and punish them, and they grew up feeling unloved [123].

28 The many problems in the family were caused by animosity between Alexa and Thomas, the hardship suffered by Thomas as a prisoner of war, poverty and certain attitudes and outlooks of Alexa. To an extent, these were alleviated by the intervention of Alexa's mother and other members of the extended family, but the family situation was very difficult. Alexa was severe, critical, uncompromising and demeaning in her attitude towards her two daughters. This was a pattern which lasted throughout their infancy, childhood and adolescence [159].

Valerie's and Judith's early adult relationship with Alexa

29 Valerie graduated from Claremont Teachers College and obtained a postgraduate qualification from the University of Western Australia. She married her former husband, Neville Saunders, in November 1971. Malcolm was born in May 1973. The difficult relationship between Valerie and Alexa continued. Alexa refused to visit Valerie in hospital when her children were born. She refused to attend Malcolm's

Christening and berated Valerie when her second child was born premature and died in 1974 [138] - [139].

30 Judith ran away from home several times at about the age of 14 and 15, going to stay with her paternal uncle. Eventually, it was decided that she should go and live with her uncle. Judith became pregnant,² resulting in Deborah's birth and Judith's marriage to the boyfriend. Alexa refused permission for the marriage. It was necessary for Judith to apply to the court for permission to marry. This was obtained and they married at the age of 17, went to stay with the boyfriend's parents in the country, but were divorced two years later. Judith went back to stay with her uncle until her second marriage to Ken Clarke in 1975 [137].

31 Since they left Alexa's home Valerie and Judith have, with only minor exceptions, remained alienated from their mother [160].

Death of Thomas in February 1976

32 At the time of Thomas' death in 1976, Valerie was in England living with Neville and Malcolm. She wished to attend the funeral but says Alexa refused to postpone the funeral until she could return to Perth. This was, however, eventually done after the intervention of others. Valerie arrived in Perth and went to the Wembley home with Judith. Alexa refused to let her in or speak to her and closed the door in her face. The two sisters went around to the back and sat on the lawn to wait. Some relatives arrived and went into the house to speak to Alexa to repair the situation. A screaming match resulted and Valerie was told that her mother did not want to have anything to do with her and that she had to leave. At the funeral itself Valerie was not let into the house and Alexa ignored her [140].

1976 Will

33 On 18 February 1976, Alexa attended at the office of the Public Trustee and saw a trust officer, Mr McCarthy. A pro forma instruction sheet containing details required for the preparation of a will was completed. David was identified as the sole beneficiary. Valerie and Judith were identified as children not included in the proposed Will. The stated reason for their exclusion was:

Son is an invalid pensioner and would be more in need of estate than two daughters who are married and quite comfortable [30].

² I note that the recited evidence refers to Judith becoming pregnant at age 16, but this cannot be correct as Judith was 18 years old when Deborah was born.

34 The will was then prepared in manuscript on a Public Trustee form, and executed by Alexa on the same day [31].

1977 Will

35 Alexa executed the 1977 Will on 14 June 1977 [37].

36 The 1977 Will was in the same terms as the handwritten 1976 Will, leaving all of Alexa's estate to David.

Continuing relationship between Alexa and her daughters to 2001

37 When Michael was born in May 1978, Alexa did not visit Valerie in hospital. Valerie later completed an arts degree at the University of Western Australia and was invited to apply for admission to Oxford University in England. Valerie, Neville, Malcolm and Michael moved to Oxford in September 1983. Valerie and Neville separated in 1985 [141].

38 In about 1986 or 1987, Alexa began writing letters to Valerie indicating that she wished to re-establish contact. Alexa and David visited Valerie in Oxford in 1988 [142].

39 Both Valerie and Judith have a deep, almost overwhelming, hostility towards Alexa stretching back 30 - 40 years or more [158].

40 Both Valerie and Judith left home essentially to get away from their mother and, with only minor exceptions, have remained alienated ever since. Subsequent episodes such as weddings, christenings and funerals, in which there was some contact between the daughters and their mother, mostly ended in acrimony. There had been very little contact between Valerie and Alexa from 1976 onwards, except for the visit to Oxford in 1988. The visit to Oxford produced arguments and resentments. In Judith's case there had been very little, if any, contact since about 1997 [160].

Consultations with Dr Melling from 1981

41 Dr Philip Melling, now retired, was the attending general medical practitioner for Alexa over the period from 1981 until June 2008. Alexa and David were patients of Dr Melling at his general medical practice in Floreat until his retirement [73].

42 Dr Melling's prior experience and medical qualifications included a three year period in the English army working in psychiatry. He completed his Diploma in Psychological Medicine (DPM), which was

then the major post-graduate qualification in psychiatry in the United Kingdom [74]. Dr Melling had also worked in an Albany practice which was looking for a doctor with interest in psychiatry to work sessional clinics in the prison system. He continued in Albany until 1979, when he moved to Perth to take up the general practice in Floreat. In Floreat, he worked as a general practitioner with an interest in psychiatry and surgery [75].

- 43 From 1981 Alexa visited Dr Melling's practice about every six or eight weeks for either her or David's medical needs [76].

Contact between Alexa and Michael to 2001

- 44 Michael did not have any specific memories of Alexa before he was four years of age. Between the ages of four and eight, Michael lived with his family in the United Kingdom. In 1986, when he was eight, Michael returned to live in Perth with Malcolm and their father. Michael's father had separated from Valerie, who remained in the United Kingdom. Michael's relationship with Alexa was re-established by his father upon their return [52].

- 45 Michael's childhood experience of Alexa was that she treated him well and was a loving, doting grandmother. He, his brother and father would often go to visit her and have dinner at her house. She would visit their house and would give them gifts, soft drinks and chocolate. Alexa looked after Michael and Malcolm from time to time and was always interested in what they were doing. While living at home, Michael and the family would see Alexa once every couple of weeks. Michael has fond memories of those experiences [53].

- 46 In mid-1990, at 12 years of age, Michael began to see more of Alexa as he started surfing and she would often take him to the beach [53].

- 47 During his adult years, Michael's contact with his grandmother diminished slightly but he did make time to catch up with her, apart from a period of about two years in his mid-20s when he was away working. Even then he would see her about every three months or so. The relationship was happy and she would enquire from him whether he had heard from Valerie or Judith [53].

- 48 Michael recalled that Alexa was extremely loving and helpful to David and did everything she could do to make sure that he was well looked after. David looked well cared for and was neatly presented. Alexa's house was always clean and well-ordered [54].

Contact between Alexa and Tracey to 2001

49 Tracey had little contact with Alexa during her early childhood and did not see her from about the age of 12 years onwards for some time [57].

50 When Tracey was aged about 17 or 18 years (which would have been 1997 to 1998), she re-established contact with Alexa but did not see her very often. By 2001 Tracey was visiting Alexa, who was then still living independently. David was with Alexa sometimes on the weekends and over Christmas [58].

Contact between Alexa and Tenielle to 2001

51 Tenielle did not remember having much of a relationship with Alexa as a child. After she obtained a motor car at the age of about 17 or 18 (which would have been in 1999 or 2000) she visited occasionally, without her mother knowing and created her own relationship with the deceased. Until Tenielle's 19th birthday, when she obtained her own car, contact with her grandmother was difficult because she was still living with her mother. She only saw her grandmother occasionally before the 2001 Will was made [63].

52 Tenielle described her grandmother as being independent, without need of assistance, and capable of doing things for herself, such as her own shopping and cleaning. At their meetings, Tenielle described her grandmother as talking about how expensive things were and asking about what was going on in her own life and what was happening in the news [64].

2001 Will

53 The instructions for the 2001 Will were taken at Alexa's home by Mr McKenzie, who was then employed as a wills officer at the Public Trust Office. He has no independent recollection of the event, but from records he was able to depose as to receiving instructions which he recorded on a form used to prepare the 2001 Will [39] - [40].

54 The recorded instructions identified the beneficiaries of the 2001 Will. The form also recorded the location where Alexa's security documents were kept. It confirmed that there were persons omitted from the proposed dispositions who might have a claim under the *Family Provision Act 1972* (WA) (Inheritance Act). The notes indicated, in substance, that Alexa has two daughters but had no contact with them for years. The notes recorded that Deborah 'is OK financially', that David is

an invalid pensioner and has asthma and epilepsy, and that Alexa believes that his sixth share would be sufficient [41].

55 On 3 August 2001, Alexa saw Dr Melling to advise that she had completed a will and asked that he provide a letter as to her testamentary capacity at the time. Alexa indicated to him that she thought that someone would challenge her will [81].

56 On 3 August 2001, Dr Melling wrote a letter to the Public Trustee in the following terms [80]:

Dear Sir/Madam

Re Mrs Alexa Hoffman, 80 Simper Street, Wembley, 6018 DOB 17.11.12

Mrs Hoffman has been a patient of mine since 1981 and I have seen her on a regular basis.

She informed me that recently she has changed her will and that she suspected that following her death that the will will be challenged by some of her relatives.

When I saw her on 28th July 2001, she asked if I would write to you confirming that she was in a competent state of mind to determine how her estate should be managed.

There is certainly no question at all that she was competent to make decisions about the disposal of her assets and properties, and she did not exhibit the slightest signs of any intellectual or mental incapacity whatsoever.

Yours faithfully

Dr P Melling

57 The 2001 Will was executed on 5 August 2001 [42].

2006 Will Instructions

58 On 10 August 2006 Mr McKenzie again visited Alexa at her home and took instructions from her for the preparation of another will [43]. The instructions were similar to the 2001 Will, but some of the legacies were increased. There was a new specific legacy for Deborah, and two further small legacies to additional charities [45].

59 Mr McKenzie drafted a Will based on these instructions, and wrote to Alexa on 23 August 2006. He advised that a draft will had been prepared and asked for confirmation of a beneficiary's address before

sending the draft will for execution. Alexa did not respond to Mr McKenzie's letter. There was no other contact between Alexa and Mr McKenzie prior to her death in August 2008 [44].

Trust officers' assessments

60 Over the period from February 1976 until 10 August 2006, Alexa was seen by two experienced trust officers of the Public Trustee's Office to whom she gave instructions for the preparation of four wills. On each occasion when instructions were given, the trust officer concerned considered whether or not Alexa evidently displayed testamentary capacity and had no doubt that she did. On none of these occasions did the trust officer consider that there was any need or indication to pursue that matter or to seek medical or other evidence of capacity. Alexa identified the person or persons whom she desired to benefit under each will she was then proposing. She identified, to the satisfaction of the trust officer, the persons who might be regarded as having some form of claim on her estate. She gave reasons which, leaving aside the question of whether or not they were justified, were entirely plausible as to why her two daughters were being omitted from any benefit under the will [46].

Relationship between Alexa and her grandchildren between 2001 and her death

61 Michael had a good relationship with Alexa up until her death and visited her about once a month, usually at her home. On some occasions when he visited, Alexa's friends from the local community group would call in. Michael last saw Alexa about two months before she died. He thought Alexa appeared tired but everything else about her was the same and that she was her usual, alert, attentive self [54].

62 Tracey described her relationship with Alexa up until the date of her death as good. Over the last years she would visit Alexa once a week and would give occasional help with the housework on these visits, something that Alexa did not much like because of her fierce independence. This ceased when Tracey was pregnant with her own daughter in 2007, when she was unable to visit or help as often as she wished. However, she continued to visit and to converse with Alexa on a number of things and speak about food, the garden, politics and money [58].

63 Tenielle's visits became more frequent and regular. Tenielle observed that Alexa doted on David. These visits, which appear to have been made more or less weekly, continued until Alexa died. Tenielle observed Alexa living independently at this time [64].

Trial judge's reasons

64 The trial judge summarised the evidence of the above witnesses in detail, and reviewed a number of judicial authorities dealing with the test of testamentary capacity. He said:

In this present case the application of this test comes down to whether or not the plaintiff has proved that the deceased was able to comprehend and appreciate the claims to which she ought to give effect and, in that regard, whether no disorder of the mind existed which poisoned her affections, perverted her sense of right or prevented the exercise of her natural faculties; that no insane delusion influenced her will in disposing of her property and brought about a disposal of it which, if her mind had been sound, would not have been made [179].

65 After referring to the decision of the New South Wales Court of Appeal in *Easter v Griffith*,³ the trial judge said that establishing testamentary capacity involved showing that:

the deceased, because of want of proper understanding however caused, whether because of a mental condition, including a deluded mind, that is, an unreasoning attitude towards the individual, has failed to appreciate and give due consideration to claims which that person may deserve when the testator is determining the distribution of his property [18].

66 The trial judge recognised the critical distinction as being between:

1. harsh and unreasonable judgment, which is nevertheless the product of a sound mind; and
2. a judgment so affected by unreason and prejudice indicating a lack of mental capacity to comprehend and appreciate the claims of a person who may deserve benefit.

The trial judge said that this line can be hard to draw. He said that the onus of proof of capacity rests upon the propounder of the testament, but:

once a full examination of the evidence is made a residual doubt is not enough to defeat a claim for probate unless it is felt by the court to be substantial enough to preclude a belief that the document propounded is the will of the deceased, who possessed sound mind, memory and understanding at the time of its execution [219].

67 The trial judge concluded that the plans of disposition of Alexa's estate since 1976 were framed in terms which were logically coherent, having regard to the family circumstances [220] - [221].

³ *Easter v Griffith* (1995) 217 ALR 284.

68 The trial judge accepted that Alexa had 'fixed and unforgiving beliefs and a long-standing disapproval of her two daughters'. However, he was not persuaded that this connoted 'delusive thinking, a failure to recognise her daughters as persons deserving of participation in the distribution of her estate after death, or any unsoundness of mind'. He saw reasons why Alexa could have chosen to exclude her daughters having regard to the long-standing mutual hostility which existed between them [222].

69 The trial judge noted that the evidence of Alexa's harsh behaviour related to events which took place 25 years or more before the 2001 Will was made, and that there had been no diagnosis of unsoundness of mind at that time despite suspicions of some family members [223] - [224]. He noted that the evidence of those who had dealings with Alexa at the time her wills were made:

is emphatic that she appeared to be a person well able to make decisions and conscious of the significance and importance of a will and able to identify the persons whom she might be expected to consider when disposing of her property [224].

70 The trial judge concluded that the fact that Alexa appeared to have a personality of a vexatious kind, and the family history was replete with unpleasant episodes, did not prevent a finding that she had testamentary capacity when she made the Wills [225] - [226]. He said that the Public Trustee's onus of proof was discharged by:

the manner and form of the wills themselves and their execution, the evidence of the trust officers who obtained instructions for the preparation of the wills, the evidence of Dr Melling and of the grandchildren who were meeting with Mrs Alexa Hoffman over the 10 years or so before her death [226].

71 The trial judge therefore was satisfied that the 2001 Will was validly made, and granted probate of that Will to the Public Trustee.

Appeal to this court

72 Valerie appeals to this court against the grant of probate of the 2001 Will, on the following grounds:

1. Errors of fact in judgement.
2. The Trial judge refused to permit arguments by Valerie Saunders regarding appropriate procedures by GP's to be undertaken before assessing a person's TC, in breach of s 72 of *Evidence Act*.

3. The trial judge overlooked the findings of *Easter v Griffiths* (1995) regarding people with personality disorders also potentially lacking testamentary capacity.
4. The trial judge contravened s 24 of *Supreme Court Act* by making unjustified comments about the two main defendants in his judgement.
5. The findings of facts was against the weight of evidence.

Application in an appeal

73 On 22 October 2014, Judith, as third respondent to the appeal, relevantly applied to adduce additional evidence in the appeal. At the hearing of the appeal on 14 August 2015, the court refused leave to adduce additional evidence. What follows are my reasons for joining in the making of that order.

The October Affidavit

74 The additional evidence sought to be adduced is an affidavit sworn by Judith on 14 October 2014 (October Affidavit).

75 Paragraphs 1 - 12 of the October Affidavit are in the nature of submissions, rather than evidence. Those paragraphs do not refer to any material which does not form part of the trial record. At the hearing of the appeal on 14 August 2015, the court indicated that it would receive these paragraphs by way of submissions in the appeal.

76 That part of the October Affidavit asserts that some statements made by the trial judge did not appear in the transcript of the trial. The parties were provided with an audio copy of the transcript by the court, and given an opportunity to identify any alleged errors. The court made orders that included:

By 4.00 pm on 31 August 2015, the third respondent is to file and serve a document which:

- (a) states precisely each alleged omission or other error in the transcript;
- (b) states the text of each alleged omission;
- (c) gives particulars of each other alleged error;
- (d) specifies the place in the transcript (including the page numbers), where each alleged omission or other error occurred; and

- (e) sets out any submissions as to the significance or impact of the alleged omissions or other errors on the grounds of appeal or the manner in which the appeal should be decided.

77 On 31 August 2015, Judith filed a document headed 'Submissions in the appeal relating to the affidavits in the yellow appeal book in response to orders of 14th August 2015'. The document acknowledges receipt of the audio recordings and does not allege any significant omission or other error in the transcript. Submissions are also advanced as to a number of matters outside the scope of the supplementary submissions permitted by the court's order of 14 August 2015. I have not had regard to the supplementary submissions or submissions respondent to them, so far as they deal with these other matters.⁴

78 Paragraph 13 of the October Affidavit identifies and annexes transcripts of diaries that Judith kept from 1994 to 1996.

79 Paragraphs 14-20 suggest that evidence may be available from experts on autism that Alexa suffered from this disorder, and attached pages from the 5th edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) relating to autism spectrum disorder.

80 Paragraph 22 of the October Affidavit states:

I did not present all my evidence at trial, I am presenting here that which was omitted, as well as evidence that is significant, but was rejected by His Honour either at trial, or in his findings of 29 January 2014.

81 Paragraphs 23 to 132 of the October Affidavit give an account of various interactions between Alexa and Valerie.

82 At the hearing of the appeal on 14 August 2014, the court made an order striking out par 13 to par 132 inclusive of the October Affidavit, including annexures A and B.

Principles governing receipt of additional evidence on appeal

83 Section 58(1)(b) of the *Supreme Court Act 1935* (WA) gives this court jurisdiction to hear and determine appeals from a judge. Section 58(2) requires this court to hear and determine an appeal brought before the court, and questions incidental thereto.

⁴ *Miller & Associates Insurance Broking Pty Ltd* [2010] HCA 31; (2010) 241 CLR 357 [111].

84 Rule 25 of the *Supreme Court (Court of Appeal) Rules 2005* (WA) (Rules) provides for the appeal to be by way of rehearing. Provision for the appeal to be by way of rehearing connotes that:

1. The court can receive further evidence and its powers are not restricted to making the decision which should have been made at first instance.
2. The appeal is usually conducted by reference to the evidence given at first instance.
3. Ordinarily, and absent further evidence or a relevant change in the law, this court can exercise its appellate powers only if satisfied that there was error on the part of the primary court.⁵

85 Rule 47(3)(d) of the Rules provides that a single judge has jurisdiction to make an order relating to the admission of additional evidence, either before or at the hearing of the appeal, by the Court of Appeal. This rule has been construed as conferring a statutory discretion on the Court of Appeal (whether or not constituted by a single judge) to make an order admitting new evidence.⁶ While the rule does not contain any words limiting or governing the exercise of that discretion, the discretion to admit fresh evidence must be exercised judicially.⁷

86 It may be that the source of the statutory discretion is better understood as being inherent in the provision by r 25 for an appeal to be by way of rehearing. On that view, r 47(3)(d) would empower a single judge to make case management directions in relation to the admission of evidence, for the purposes of s 61(1) of the *Supreme Court Act*. However, whatever the source of the power, the existence of the court's power to admit additional evidence is well established.⁸

87 In deciding whether to allow an applicant to adduce additional evidence on an appeal against a final decision made after trial, the strong public interest in the finality of litigation will be an important consideration. That public policy provides a powerful reason for strictly confining the circumstances in which a party on appeal will be allowed to

⁵ *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 203 [13] - [14].

⁶ *Lunt v New Resource Holdings Pty Ltd [No 3]* [2011] WASCA 45 [35]; *Goninan & Co Pty Ltd v Direct Engineering Services Pty Ltd* [2007] WASCA 10; (2007) 33 WAR 182 [9].

⁷ *Lunt* [35].

⁸ *Trajkoski v Director of Public Prosecutions (WA)* [2013] WASCA 222 [39].

augment the evidence led at trial. Except in the most exceptional circumstances, a party is bound by the conduct of his or her case at trial.⁹

88 Another important consideration will be whether the additional evidence is properly characterised as fresh evidence which either did not exist at the time of the trial or which could not have been discovered with reasonable diligence at that time.¹⁰ Generally, the discretion will be exercised against admitting evidence which is not fresh in this sense, particularly where the evidence has been deliberately withheld at trial.¹¹

89 It will also be relevant to consider the strength of the evidence, whether it is contested and whether there is a significant possibility that the evidence would lead to a different result if admitted.¹² If evidence is contested and would require a new trial to resolve factual disputes if it were admitted, then that will be a factor counting against its admission in the appeal.

90 Ultimately the question is whether it is in the interests of justice to admit the additional evidence, having regard to the above considerations.¹³

Why leave should be refused in the present case

91 The evidence which Judith seeks to admit is not fresh evidence. It was discoverable by the exercise of reasonable diligence and the material was mostly known to her already. It also appears that Judith made a conscious decision to 'cut [her] evidence short', as deposed in par 9 of the October Affidavit.

92 Judith had a reasonable opportunity to present the evidence at trial. On 25 February 2013, more than 5 months prior to trial, the trial judge made orders for the trial to proceed by affidavit. He ordered that no party may adduce evidence from any witness whose affidavit had not been filed and served in accordance with those orders.

93 Judith filed three affidavits on which she relied at trial. Judith could have included the material contained in the October Affidavit in an affidavit filed for the purposes of trial. Had she sought to adduce the

⁹ *Devereaux-Warnes v Hall* [2006] WASCA 268 [2], [26].

¹⁰ *Lunt* [36].

¹¹ *Goninan* [12]. See by analogy *Sami v Minister for Immigration* [2013] FCAFC 128 [7], citing *Moore v Minister for Immigration* [2007] FCAFC 134; (2007) 161 FCR 236 [4] - [7].

¹² *Lunt* [36]; *Goninan* [11]; *Sami* [7].

¹³ *Goninan* [11]. See, by analogy, *Lackovic v Insurance Commission (WA)* [2006] WASCA 38; (2006) 31 WAR 460 [112], [114].

evidence at trial, the filing of an affidavit was the appropriate manner of proceeding, as the trial directions required evidence-in-chief to be by way of affidavit.

94 Further, having reviewed the transcript, is it not apparent to me that the trial judge tried to 'close down the evidence under the guise of lack of time'. I will deal with the course of the trial in more detail when dealing with the fourth ground of appeal.

95 The October Affidavit, if admitted, would not be likely to produce a different outcome. The evidence relates to events preceding the making of the 2001 Will by a considerable period. The critical findings of the trial judge were based on evidence of capacity in 2001. The main point sought to be made through the evidence is that Alexa displayed what Judith considers to be the signs and symptoms of autism. However, the evidence could only lead to that conclusion if there were medical evidence diagnosing such a condition. There is no such evidence.

96 Further, having reviewed Judith's pleadings and oral submissions at trial, it appears to me that she seeks to use the new evidence to run a case which she did not seek to make out at trial. At trial Judith contended that Alexa suffered from multiple unidentified psychological conditions. She now seeks to establish a specific condition, not advanced in the evidence led at trial. There was only one suggestion in cross-examination of Dr Melling that Alexa displayed one of the indicators of 'Asperger's'. He rejected the proposition¹⁴ and no other admissible evidence of an autism spectrum disorder was advanced.

97 Finally, the evidence which Judith seeks to adduce is not uncontroversial. The matters raised would need to be put to other witnesses who gave evidence at trial. The trial judge was not prepared to accept Judith's evidence except where it was independently confirmed or corroborated [157]. Assessing the veracity of the new evidence, and its impact on other evidence in the case, would effectively require a retrial.

98 All of the above considerations count strongly against the exercise of discretion to admit the new evidence contained in the October Affidavit. In my view, it is not in the interests of justice to admit that evidence in this appeal.

¹⁴ Trial ts 135.

Ground 1: alleged errors of fact

99 Valerie's submissions identify a number of paragraphs of the trial judge's reasons which are said to contain specific factual errors, to which this ground of appeal relates.

Upkeep of Wembley property

100 The first complaint is that:

In his judgement in para 164 and 165, the trial judge claimed that the family are responsible for the upkeep of the property at 80 Simper Street, and that the Public Trustee is not responsible for property maintenance.

101 This submission misunderstands what the trial judge said at [164] and [165]. The trial judge did not say that the family were responsible for the upkeep of the property. Rather, the trial judge was dealing with a submission that the Public Trustee should not be appointed administrator in the event of intestacy, because the Public Trustee had allowed the house to deteriorate. The trial judge rejected that criticism because:

... the Public Trustee has had no authority to do anything or to expend money in relation to the estate and that, having regard to the acrimony which existed between the parties, no consensual agreements for the preservation of the property have been possible while these proceedings have been pending [164].

102 In any event, this part of the reasons goes only to the issue of who should administer the estate if the grant of probate of the 2001 Will is overturned.

Completion of form in 1976

103 The second complaint concerns a finding the trial judge made at [30] in relation to the completion of the will instruction sheet on 18 February 1976. After referring to Alexa attending the Public Trust office on that date, the trial judge observed:

She there completed a pro forma instruction sheet containing requisite details for the preparation of a will. This was done in her own handwriting [30].

104 The form was headed 'to be completed in the testator's own handwriting'. However, the evidence was not clear as to whether Alexa wrote out the form herself or whether Mr McCarthy completed the form based on what Alexa told him.

105 If this was an error, it would not have been material to the decision to grant probate for the 2001 Will. There is nothing in the trial judge's reasons to suggest that he relied on the finding that Alexa completed the form in 1976 for this or any other purpose.

Behaviour at Oxford in 1988

106 Valerie's third complaint concerns the following finding of the trial judge in relation to Alexa's visit to Oxford in 1988:

The evidence from [Valerie] about her mother's visit with David to her in Oxford in 1988 indicates that the relationship between mother and daughter may not have been very warm and how there were then a number of irritations which prompted resentment about [Alexa's] behaviour in the past. There is nothing to suggest that she was then irrational or prone to delusive thought or behaviour [193].

107 The trial judge had previously referred to Valerie's evidence about the visit to Oxford, noting that:

She describes certain other incidents by her mother during that Oxford visit which she alleges were abnormal or bizarre [142].

108 Valerie's evidence about the visit was at pars 60 - 64 of her affidavit of 11 October 2011. In summary she describes:

- A visit to a common room where David was not reading and referred to hearing voices, to which Alexa responded by looking at Valerie and shrugging her shoulders.
- An argument between Valerie and Alexa about a subject which Valerie could not recall. This resulted in Alexa locking herself and David in a bedroom and refusing to come out or interact with Valerie for about a week.
- Alexa placing pills which were David's regular medication in his mouth.
- Alexa using Valerie's telephone to call her sister in Perth without asking permission.
- Alexa and David leaving without saying anything to Valerie or leaving a note.

109 The trial judge was clearly cognisant of this evidence and the fact that Valerie regarded Alexa's behaviour on this occasion as abnormal or

bizarre. The trial judge was not compelled to characterise the reported behaviour in that manner. He might have taken the view that Alexa's approach to the care of her severely disabled son, and her withdrawing from contact with Valerie after the argument, were not necessarily irrational.

- 110 When dealing with the contention that the finding as to testamentary capacity was against the weight of the evidence, I will consider the substance of this evidence rather than the label which may be applied to Alexa's conduct. For present purposes it is sufficient to note that the trial judge did not make any material error in relation to the visit to Oxford which itself justifies overturning his ultimate conclusion.

Dr Melling's training

- 111 Valerie's fourth complaint concerns the reference to Dr Melling having 'specialist psychiatric training'. The phrase appears in the following passage of the trial judge's reasons:

In the course of the trial there was evidence given from Dr Melling, who treated Mrs Alexa Hoffman as her attending general medical practitioner at regular intervals over the years before her death. His evidence will be examined more closely later but the basic effect of Dr Melling's evidence, who himself had specialist psychiatric training and qualifications and who had worked as a psychiatrist in the United Kingdom in the British Army before he came to Australia, was that she suffered from no mental disease or infirmity and that there was no reason to suggest that she lacked testamentary capacity at any material time [25].

- 112 This passage needs to be read with the later parts of the trial judge's reasons adverted to in the above passage. The trial judge described Dr Melling's qualifications in greater detail in the following passage:

He completed his undergraduate medical qualifications at Durham University in England between 1962 and 1967 and first became registered in England in 1967. He completed a 12-month internship at a hospital doing six months in general medicine and six months in surgery, and then entered the British Army for a period of five years. For the first two of those years he was regimental medical officer and then senior medical officer for the British zone for the United Nations in Cyprus. For the remaining three years of his period in the army he worked in psychiatry. During the first and second years of that three-year period he completed his Diploma in Psychological Medicine (DPM) and then became a psychiatric specialist from the third year primarily treating acute psychiatric problems. At that time the DPM was the major post-graduate qualification in psychiatry in the United Kingdom [74].

113 The trial judge also referred to the following evidence of Dr Series:

Dr Series refers first to Dr Melling's qualifications in psychiatry, referring to his DPM degree. Dr Series mentions that that is a recognised qualification but is not now regarded by the Royal College of Psychiatrists as certifying post graduate training in psychiatry to the level required to practise as a psychiatrist in England or Wales. As a consequence, Dr Series says that Dr Melling's qualifications are those of a general practitioner with an interest in psychiatry but not as a qualified psychiatrist. I accept that to be the case, although when Dr Melling obtained his DPM in England during his five years in the army in 1967, the DPM was an accepted post graduate qualification in psychiatry before the Royal College of Psychiatrists established and conferred its own fellowships [101].

114 The trial judge's summary of the above evidence is accurate. The trial judge did not misunderstand the nature of Dr Melling's qualifications. He recognised that the current specialist training in psychiatry is different from that which was recognised when Dr Melling undertook his training. Changes in specialist training since the 1960s and 1970s did not make it incorrect to refer to Dr Melling having, in the past, undertaken specialist psychiatric training.

Paranoid personality disorder

115 Valerie's fifth complaint is that the trial judge contradicted himself in the following passage:

Dr Melling regarded her [Alexa] having a paranoid personality disorder resulting in the display of hostility and aggression to others because of her mistaken appreciation of them but said that she was not delusional. According to him, she was a person of very fixed beliefs but these were not necessarily paranoid [25].

116 The trial judge was not making a finding of fact at this point. Rather, he was summarising the evidence given by Dr Melling.

117 I do not regard the trial judge's summary of Dr Melling's evidence to be inaccurate. At par 14 of his affidavit of 30 July 2012, Dr Melling said:

I would diagnose her as having a personality disorder but she was not psychotic.

118 Dr Melling described the personality disorder in the following manner in his oral evidence:

Well, there was certainly no evidence of any psychotic delusional behaviours, but she was always in contact with reality. She was a very

difficult - somewhat aggressive or might - talk about a paranoid personality in the sense of a lot of hostility towards people, you know, but she always appeared to me to be in contact with reality (ts 131).

119 The trial judge did not make any material error of fact in his summary of Dr Melling's evidence.

Assertions put to Dr Melling in cross-examination

120 Valerie's sixth complaint concerns the following paragraph of the trial judge's reasons, which follows a summary of Judith's cross-examination of Dr Melling:

It is important here to stress that allegations of behaviour attributed to [Alexa] were assertions put by the cross-examiner and that they had not independently been proved [93].

121 The allegations, which had been summarised in the previous paragraph, were that Alexa:

on occasions said that she hated all men, that sex was dirty and that she was good simply because she had been to church and that she had this belief that her husband was bad and that her daughters were bad, and that these were fixed and incorrigible beliefs [92].

122 The trial judge had also noted that Dr Melling's response to this was to accept that Mrs Hoffman may well have had such beliefs but that that did not necessarily reflect any mental illness.

123 In the passage complained of, the trial judge was simply making the point that questions put in cross-examination are not evidence. Valerie says that the claims also formed part of her affidavits. The trial judge had elsewhere referred to Valerie's evidence, and so did not overlook it. Valerie's affidavits did not address at least many of the specific matters which Judith had put to Dr Melling in cross-examination, and were not necessarily to be characterised as independent proof.

124 I am not satisfied that the trial judge made any material error of fact in the relevant passage.

Trial judge's observations about other family relationships

125 Valerie's seventh complaint concerns the following passage of the trial judge's reasons:

Unfortunately, it is also the case that there is virtually no cordial relationship between [Valerie and Judith] on the one hand and those of

their children who gave evidence at this trial, namely, [Michael, Tracey and Tenielle]. So far as one can tell, this sad breakdown in maternal relations is attributable to the attitudes which both [Valerie and Judith] have adopted towards [Alexa] over many years and which they sought to impose, unsuccessfully, on those children [161].

126 In my view, it was unnecessary for the trial judge to have made this observation. The reasons for the breakdown in relations between Valerie, Judith and their children were not relevant to any matter in issue at trial. The issue at trial was whether Alexa had testamentary capacity at the date she made her Wills. The relationship between Alexa and her children and grandchildren was relevant to that question. The reasons for the breakdown in relations between Valerie, Judith and their children could not have informed the inquiry as to Alexa's testamentary capacity at any relevant date. It is not an issue which the parties could reasonably have expected the trial judge to determine, on which they might have adduced evidence to rebut the conclusion. Therefore, I agree that the trial judge should not have made these observations.

127 However, the observations could not have affected the trial judge's assessment of Alexa's testamentary capacity in 2001. It does not appear from the reasons that the passage was treated by the trial judge as other than an observation made in passing and which was not an element in his ultimate reasoning. No material error which would itself justify setting aside the trial judge's decision as to Alexa's testamentary capacity has been demonstrated.

When estrangement began

128 Valerie's eighth complaint relates to the following passage which appears in the course of the trial judge's discussion of the decision in *Easter*:

The period of estrangement in the *Griffith* case, while lasting about 10 years, was towards the end of the testatrix's life, whereas in the present case the estrangement between [Valerie and Judith], on the one hand, and their mother began in mid-childhood and appears to have been virtually complete when each left home and was, accordingly, of a much longer duration [213].

129 Valerie submits that:

This is a misrepresentation of facts. Problems in relationships began from birth due to the deceased abusing her two daughters emotionally and physically to the extent that both daughters left home as soon as possible.

130 However, the trial judge was not, in the passage quoted above, identifying when the abusive behaviour began. Rather he was describing when the children turned away or became alienated from their mother. I am not persuaded that the conclusion which the trial judge reached in this regard was in error.

Harsh behaviour towards daughters

131 Valerie's ninth and tenth complaints relate to the following passage of the trial judge's reasons:

The long history of harsh behaviour by [Alexa] towards her two daughters as described in the evidence of [Valerie] relates to events which took place before about 1966, that is, in the distant past. Whatever [Valerie and Judith] may attribute to the cause of their mother's behaviour during that time, there is no evidence of any diagnosis of unsoundness of mind, or mental disease or infirmity [223].

132 Referring to this passage, Valerie submits that the trial judge overlooked her account of what happened when her father died in 1976 and Alexa visited Oxford in 1988. I do not accept that the trial judge overlooked that aspect of Valerie's evidence. He specifically referred to the evidence at [140] - [142] of his reasons.

133 Valerie also says that Dr Melling, Dr Series and Prof Hirsch all agreed that Alexa suffered from a personality disorder. Again, the trial judge referred to that evidence elsewhere in his reasons. As discussed below, the fact that a person is diagnosed with a personality disorder does not necessarily mean that he or she lacks testamentary capacity. In any event, I consider that the trial judge is here referring to a contemporary diagnosis. That is, the trial judge was saying that while Valerie and Judith had views about the causes of Alexa's harsh behaviour before 1966, there was no evidence that a medical diagnosis was made prior to that time.

134 For these reasons I do not accept that Valerie's ninth or tenth complaints require the finding of the trial judge to be set aside.

Evidence of irrationality

135 Valerie's final complaint of specific factual error concerns the following passage of the trial judge's reasons:

Although [Alexa] appears to have had a personality of a vexatious kind, making her prone to quarrel with others and to be a person of fixed opinions, there is no evidence of irrationality on her behalf or inability to cope with the demands of living an independent life, running her finances

and a home. The criticisms made of the deceased by her daughters are not shared by the three grandchildren who gave evidence, although I realise that none of them had been born at the time during which [Valerie and Judith] contend that their mother's unjustified attitudes towards them were formed and demonstrated [225].

136 Valerie complains that the evidence of abusive behaviour by Alexa towards Valerie and Judith when they were children, and other behaviour described in Valerie's affidavit, is 'evidence of irrationality'. In its context, the reference in this passage would seem to be to irrationality demonstrated at about the time Alexa made her 2001 Will. It was at this time that Alexa's grandchildren had contact with her. This was also the time to which the evidence of independent living, given by Dr Melling, Michael, Tracey and Tenielle, related. It was also the time at which testamentary capacity had to be assessed; a time when Valerie did not have any significant contact with Alexa.

137 When the trial judge's reference to there being 'no evidence of irrationality' is understood in this sense, no specific factual error is demonstrated.

Conclusion as to ground 1

138 For the above reasons I am not satisfied that Valerie's specific complaints demonstrate that the trial judge made any material error of fact which would justify setting aside the decision.

139 It remains to consider whether the evidence as a whole supported the trial judge's ultimate conclusion that Alexa had testamentary capacity when she made the 2001 Will. I will undertake that task in dealing with ground 5.

Ground 2: evidentiary ruling

140 Valerie's submissions indicate that the substance of this ground is a complaint that the trial judge wrongly struck out parts of her affidavit of 22 August 2012. The title of the affidavit indicated that it was responsive to the affidavit of Dr Melling dated 9 July 2012.

141 The trial judge made his ruling at pages 194 - 196 of the transcript, and noted the ruling at [120] of his reasons.

142 I agree with the trial judge's ruling that the paragraphs of the affidavit which were struck out did not contain any admissible evidence.

143 Many of the paragraphs which were struck out contained medical
opinion evidence. I agree with the trial judge's view that the evidence did
not establish that Valerie had the medical training or experience necessary
to qualify her to express opinion evidence of that kind.

144 Opinion evidence of this kind is admissible only if given by a
witness of specialised knowledge, derived from study or experience, on a
subject for which unqualified persons require that assistance to form a
sound judgment.¹⁵

145 In this case the relevant area of specialised knowledge is the medical
field of psychiatry. Before the trial judge could receive her opinion
evidence on questions of psychiatry, he would have to be satisfied that
Valerie had acquired, by study or experience, sufficient knowledge of the
subject to render her opinion of value in resolving the issues before the
court.¹⁶

146 The trial judge was not so satisfied. He said:

[Valerie] has no medical training or experience, is not a psychiatrist, and
although she has said that she has some knowledge of psychology, she is
not a person whom I consider should be allowed to give opinion evidence
on matters of medical assessment or competence in these proceedings
(ts 195).

147 In my view the trial judge was clearly correct to so conclude.

148 Other paragraphs which were struck from Valerie's affidavit of 22
August 2012 were in the nature of submissions or argument about other
evidence. Those paragraphs did not contain evidence of any primary fact,
and were properly excluded on that basis.

149 Valerie referred to s 72 of the *Evidence Act 1906* (WA), which
provides:

All courts and persons acting judicially may, in matters of public history,
literature, science, or art, refer, for the purposes of evidence, to such
published books, maps, or charts as such courts or persons consider to be
of authority on the subjects to which they respectively relate.

150 This provision could only be relevant to the extracts of publications
annexed to the October affidavit.

¹⁵ *Clark v Ryan* (1960) 103 CLR 486, 491.

¹⁶ *R v Bonython* (1984) 38 SASR 45, 46 - 47, adopted in *Mallard v The Queen* [2003] WASCA 296; (2003) 28
WAR 1 [253].

151 Scientific publications in the field of psychology have been referred to under this provision or its equivalents.¹⁷ However, the dangers of the court relying on its own interpretation of scientific material in relation to contentious facts have been recognised.¹⁸

152 The first publication was a paper apparently published on the internet titled 'How to assess capacity to make a will' jointly authored by a psychiatrist and a solicitor. This is not an authoritative book which may be referred to under s 72 of the *Evidence Act*. It deals principally with legal matters which the court must determine. The second publication was a one page extract of a 1996 publication *Oxford Textbook of Psychiatry* dealing with the clinical features of abnormal personalities. It contained a general reference to many patients hiding delusions skilfully. Reference to that extract could not have assisted the court's resolution of the critical issues in the case, and its current authority was not established. The trial judge did not err in refusing to admit the extracts.

Ground 3: *Easter v Griffith*

153 Ground 3 alleges that the trial judge 'overlooked the findings in *Easter* ... regarding people with personality disorders also potentially lacking testamentary capacity'.

The decision in *Easter*

154 In *Easter*, the primary judge had refused to grant probate of the Will of Ethel Griffith who died in 1993 at age 84. Her last will, made in April 1989, made no provision for her only son. The son had left the home which he shared with his mother in 1983 and they had not spoken since. There was evidence of bizarre behaviour by the mother prior to 1983. The incident which caused the son to leave involved the mother threatening the son with a knife, screaming that she hated him and telling him to leave. The only subsequent encounter between mother and son was in 1985, when the son returned to the house to get a textbook. He knocked on the door and saw his mother through a window. She stared at him through the glass and walked away. He left the house. On a couple of occasions between 1984 and 1989 the son received strange letters from his mother. The mother left some odd diary notes about her son.

¹⁷ See the cases cited in *R v GP* (1997) 18 WAR 196, 212.

¹⁸ See *Winmar v The State of Western Australia* [2007] WASCA 244; (2007) 35 WAR 159 [29]; *Riley v The State of Western Australia* [2005] WASCA 190; (2005) 30 WAR 525 [71] - [73].

155 The primary judge in *Easter* was faced with conflicting medical evidence. One psychiatrist reviewed available material and concluded that Ethel Griffith:

was suffering from a paranoid personality disorder which manifested itself in delusions about her son and, in particular, in the delusion that he did not care for her, that he was a threat to her, and that he suffered from serious character defects (289).

156 Another psychiatrist was of the view that there was no ground for concluding that Ethel Griffith suffered from any paranoid personality disorder or any form of delusion.

157 The primary judge in *Easter* did not wholly accept the evidence of either psychiatrist. He was not prepared to find that Ethel Griffith suffered a severe form of paranoid personality disorder. The primary judge concluded:

I conclude that, while it may not be established positively that [Ethel Griffith] suffered from a paranoid personality disorder; nonetheless there is enough substance in that history for there to be a plausible case, not rebutted, that, by her behaviour; she rejected him for no rational ground and was unable to consider and give effect to claims upon her bounty, in this case, of her only child (292).

The majority judgment in the Court of Appeal was delivered by Gleeson CJ, with whom Handley JA agreed.

158 Gleeson CJ described the onus and standard of proof of testamentary capacity in the following terms:

Where the evidence in a suit for probate raises a doubt as to testamentary capacity, there rests upon the plaintiff the burden of satisfying the conscience of the court that the testatrix had such capacity at the relevant time. If, following a vigilant examination of the whole of the evidence, the doubt is felt to be substantial enough to preclude a belief that the testatrix was of sound mind, memory and understanding at the time of execution of the will, probate will not be granted (289). (citation omitted)

159 Gleeson CJ also referred to the traditionally accepted formula for determining testamentary capacity, stated by Cockburn CJ in *Banks v Goodfellow* in the following terms:¹⁹

It is essential to the exercise of [testamentary] 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

¹⁹ *Banks v Goodfellow* (1870) LR 5 QB 549, 565, quoted in *Easter* (290).

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 delusions 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.

160 Gleeson CJ went on to observe that mental infirmity of a kind which denies testamentary capacity does not necessarily involve 'insane delusions'.²⁰ He said:

The critical question, in a case such as the present, concerns mental capacity to comprehend and appreciate the claims upon one's bounty (291).

161 Gleeson CJ had previously noted the critical distinction as being between:

a 'harsh, unreasonable judgment of character' which is not, on that account alone, inconsistent with a sound disposing mind, and a 'morbid aberration' which so affects a testatrix's judgment of a person with a natural claim on her bounty as to warrant the conclusion that she lacked the capacity to make a valid will (289)[;]

and between:

mere antipathy, albeit unreasonable, towards one who has a claim, and a judgment which is affected by a disorder of the mind (290).

162 Gleeson CJ found that there was ample evidence to support the primary judge's conclusion. In the absence of any error of principle in the primary judge's approach or successful challenge to his assessment of the evidence and his findings of fact, the appeal was dismissed.

163 Kirby P dissented, and would have allowed the appeal.

Trial judge's approach

164 It cannot fairly be said that the trial judge overlooked the findings in *Easter*. The trial judge discussed the decision in detail at [205] - [219] of his reasons. The trial judge drew the same distinction as Gleeson CJ had identified when he referred to:

the line between harsh and unreasonable judgment, which is nevertheless the product of a sound mind on the one hand, and a judgment so affected by unreason and prejudice indicating a lack of mental capacity to

²⁰ *Easter* (290 - 291).

comprehend and appreciate the claims of a person who may deserve benefit [219].

165 The trial judge did not fall into the mistake of regarding delusions as a necessary requirement for testamentary incapacity. The trial judge adopted the approach taken by the majority in *Easter*. He identified the critical question as being whether Alexa:

because of want of proper understanding *however caused*, whether because of a mental condition, *including* a deluded mind, that is, an unreasoning attitude towards the individual, has failed to appreciate and give due consideration to claims which that person may deserve when the testator is determining the distribution of his property [218]. (emphasis added)

166 The emphasised words in the above quote make it clear that the trial judge did not consider that delusions were a necessary element of testamentary incapacity.

167 The trial judge was ultimately not persuaded that Alexa's beliefs and disapproval of her daughters:

cannot[e] delusive thinking, a failure to recognise her daughters as persons deserving of participation in the distribution of her estate after death, *or any unsoundness of mind* [222]. (emphasis added)

168 This passage again recognises that a person may lack testamentary capacity even if he or she does not suffer from delusions.

169 While there are other passages of the trial judge's reasons which refer to delusions, those passages are merely concerned with decisions or evidence on that topic.²¹ When discussing evidence, the trial judge's references were often to delusions or other forms of mental incapacity. For example, in those passages the trial judge observed:

The medical evidence did not go as far as identifying any particular delusion or delusions, *nor of attributing this alleged behaviour to any form of mental incapacity* [191]. (emphasis added)

170 Again, the emphasised passage indicates that the trial judge was not confining his inquiry to evidence of delusions.

171 I am not persuaded that the trial judge failed to identify or apply the relevant principle articulated in *Easter*.

²¹ For example, [187], [191], [193], [196] - [197].

Precedent

172 Some of the submissions of various parties treated *Easter* as a precedent for the factual findings made in that case. *Easter* is authority for the proper principle to be applied in determining whether a person had testamentary capacity when making a will. It is an authority which this court is required to apply in the absence of any suggestion that the decision is plainly wrong.²² However, it is not an authority for the outcome of the factual inquiry in the present case. The proper use of precedent is to identify the legal principles to apply to facts as found.²³ Previous decisions stand as authority for the principles which they establish, not the facts which are found in those cases. Contrary to some of the submissions advanced in this case, it is unnecessary for this court to consider the correctness of the factual finding in *Easter*, or to distinguish the facts of the present case from those found in the earlier case.

Ground 4: fair procedure

173 Valerie's fourth ground of appeal in substance alleges that the trial judge failed to conduct the trial in a manner which was procedurally fair. Although the source of the obligation is misidentified as s 24 of the *Supreme Court Act 1935* (WA), it is clear that the substantive obligation exists. The obligation to afford procedural fairness has two aspects which are centrally relevant to the complaints made by Valerie and Judith under this ground of appeal. The first aspect is that the court was obliged to provide the parties with a sufficient opportunity to present their cases.²⁴ Secondly, the court is required to act impartially, both in fact and by conducting proceedings in a manner that avoids a reasonable apprehension of bias arising. For this purpose a reasonable apprehension of bias will arise where a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge was required to decide.²⁵

Opportunity to present case

174 The substance of Valerie's and Judith's first complaint about the conduct of the trial is that they were prevented from being able to present evidence which would fully tell '[their] side of the story'. I do not accept

²² *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89 [135].

²³ *Vairy v Wyong Shire Council* [2005] HCA 62; (2005) 223 CLR 422 [3]; see also [28] - [30], [146] and *Shire of Gingin v Coombe* [2009] WASCA 92; (2009) 169 LGERA 236 [39] - [42], [139]; *Lafranchi v Transport Accident Commission* [2006] VSCA 81; (2006) 14 VR 359 [39].

²⁴ *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27; (2009) 239 CLR 175 [98], [102], [112].

²⁵ *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337 [33].

that either Valerie or Judith were denied a sufficient opportunity to present admissible evidence in support of their cases.

Programming orders

175 As I have noted above, programming orders were made for the substance of any evidence to be produced in the form of an affidavit. The parties had an opportunity to produce such affidavits as they wished.

176 At the commencement of the trial, the trial judge outlined the trial process for Valerie and Judith, including the process of giving evidence. The explanation was given in clear terms. Valerie indicated that she understood the explanation, and Judith was afforded the opportunity to seek further information.²⁶ At the commencement of their respective cases, the trial judge explained to both Valerie and Judith that they had the option of adducing evidence, and outlined some of the consequences of doing and not doing so.²⁷

Valerie's evidence at trial

177 At the trial Valerie was sworn in and sought to tender two affidavits which she had prepared. The trial judge received those affidavits as exhibits, subject to striking out inadmissible parts. Having made his ruling on the admissibility of the affidavits, the trial judge asked Valerie whether there was any further evidence she sought to lead.²⁸ Valerie replied 'only that of my two experts. Not personally, no'.

178 Valerie was then cross-examined by counsel for the Public Trustee and David. Judith was also permitted to ask questions of Valerie by way of cross-examination. Judith's cross-examination continued for a time without significant interruption. As Judith was asking Valerie about Alexa's conflicts with their school teachers, the following exchange occurred:²⁹

HEENAN J: Ms Hoffman, this is entirely a matter for you but I'm not sure if it's really necessary to go to this length to make the point, that at least in your estimation and that of your sister, your mother was, to use the words that have been spoken in evidence, very hostile, cruel and unreasonable, forceful, dominating and controlling. Now, even if all that is true, common decency produces some limit at which it's unnecessary to go further to disparage her.

²⁶ Trial ts 54 - 59.

²⁷ Trial ts 187 - 189, 219.

²⁸ Trial ts 196.

²⁹ Trial ts 215 - 216.

The real question is not was she a difficult, argumentative, hostile, dominating or controlling person, but whether or not she had testamentary capacity when her will in 2001 and 1976 was made.

HOFFMAN, MS: I believe that all of this goes to indicate that she did not have very good judgment, either in relationships or with anybody, and I also believe it goes way beyond just a personality disorder.

HEENAN J: Well, that submission can be made, but how - how much more of this family misery do we have to go through?

HOFFMAN, MS: Well, I'm not sure how to demonstrate it. I know how it works out for us but I'm not sure how the court sees it.

HEENAN J: Well, it must have been terrible for everybody.

HOFFMAN, MS: It was. It was dreadful.

HEENAN J: I'm not suggesting anything to the contrary. I mean, it's a hideous story.

HOFFMAN, MS: Okay.

HEENAN J: It is just that the point seems to have been made.

HOFFMAN, MS: All right. Okay.

179 Judith then asked a question of Valerie about an incident when, as children, they had to wait on a street corner for about an hour for Alexa. The trial judge then asked what that had to do with the question of Alexa's testamentary capacity in 1976 or 2001. Judith offered an explanation for the questions she was putting, and asked Valerie if there was anything she wanted to add. Valerie said that there wasn't. Judith then said 'all right. Well, perhaps I can leave it there then'.³⁰

180 This passage of transcript does not reveal that Judith was unfairly denied an opportunity to adduce evidence from her sister by way of cross-examination. The trial judge did not prevent Judith from asking any question. He made the point that there was a considerable body of evidence that Valerie regarded her mother's treatment of the sisters in their childhood and beyond as abusive. He put it to Judith that the point had been made. Valerie made the choice not to further pursue the line of cross-examination. While the choice was understandable in light of the comments which the judge had made, it remained Judith's choice. It was not a choice that in any event denied Judith (who, it must be recalled, is not an appellant) an opportunity to adduce such evidence-in-chief as she

³⁰ Trial ts 217.

wished. Nor is it apparent how further evidence of Valerie's recollections of bad treatment at the hands of Alexa in childhood could have affected the trial judge's process of reasoning, which accepted that Valerie had those recollections.

181 Valerie was then given an opportunity to give evidence in relation to matters raised in cross-examination. The trial judge did not constrain the evidence which Valerie gave at this time.

182 On the third day of the trial, the trial judge allowed the Public Trustee to amend its pleadings to counterclaim for an order appointing him administrator of Alexa's estate in the event of intestacy. There is no complaint about that decision in this appeal. The trial judge then gave Valerie an additional opportunity to give oral evidence about that matter, which she took.

Judith's evidence at trial

183 Judith adduced the evidence-in-chief she wished to rely on, contained in three affidavits. The trial judge received the affidavits, ruled on objections and, subject to those rulings, admitted the affidavits as exhibits. The trial judge asked Judith if there was anything more she wished to say about her evidence. Judith said that there was not.³¹

184 Judith was not substantively cross-examined until the following day. She was provided and accepted an opportunity to give evidence about who should be appointed administrator.³² Judith was then cross-examined by counsel for the Public Trustee and David, as well as by Valerie.

185 At one point, when Valerie was asking Judith about a childhood car accident involving David, the trial judge interrupted and posed some questions about the accident. Valerie indicated a wish to move on to another topic.³³

186 A short time later, counsel for the Public Trustee observed that 'the court has, I'm assuming, sufficient evidence about the poor prior relationship'. The trial judge observed:³⁴

Well, it is in a way relevant and it's for [Valerie] to decide whether or not it's to be pursued.

³¹ Trial ts 225.

³² Trial ts 270 - 272.

³³ Trial ts 280 - 281.

³⁴ Trial ts 282.

187 Valerie completed her cross-examination of Judith without interruption.

Dr Series' evidence at trial

188 Valerie also took the opportunity to adduce affidavit evidence from Dr Hugh Series. She tendered his affidavit without objection and, when asked, said she did not want to ask any further questions of Dr Series.³⁵ Dr Series was then cross-examined by the other parties, following which the trial judge raised a number of matters with him. Valerie was then given the opportunity to re-examine Dr Series, which she did without any substantial interruption. Other parties were then given an opportunity to ask questions arising from the trial judge's questions. Judith was only constrained from putting an allegation of undue influence, which had not been pleaded.

Professor Hirsch's evidence at trial

189 Valerie also sought to tender an affidavit of Professor Hirsch, and was allowed to do so. Valerie had not complied with programming orders requiring Professor Hirsch to be made available for cross-examination, and his attendance at trial could not be arranged. The trial judge, correctly in my view, considered that the interests of justice did not make an adjournment appropriate. However, the tender of Professor Hirsch's affidavit was allowed over the Public Trustee's objection. The trial judge said that he would take account of the fact that the evidence had not been tested by cross-examination in considering its weight and impact [97].

Fairness of hearing

190 Having regard to all of the above, Valerie and Judith were not deprived of a fair opportunity to present their cases. Each had and took the opportunity to adduce evidence-in-chief by way of affidavit. They did not seek to adduce additional oral evidence in chief from any witness. Nor was Valerie materially constrained in her own evidence in response to cross-examination, or her cross-examination of other witnesses. She was allowed to tender the affidavit of a witness who was not made available for cross-examination. She was given the opportunity to make oral submissions.

³⁵ Trial ts 227 - 228.

Reasonable apprehension of bias

191 Valerie complains that the trial judge made unjustified comments about Valerie and Judith. I have already explained why the requirement for the trial judge to give reasons did not require him to make the comments at [161], attributing blame to Valerie and Judith for the breakdown in their relationship with some of their children.

192 Another comment which seems to me to have been unnecessary was the observation that:

The spectacle of a mother, and then an aunt, cross-examining her son and nephew and attempting to suggest in various ways that he was untruthful was sad and unedifying [56].

193 It is, no doubt, regrettable that the relationships between Valerie, Judith, some of their children and each other appear to have broken down. However, the trial judge was not required to make a judgment on the state of interpersonal relationships between the various members of the Hoffman family. Nor was he required to make any finding as to the causes for the breakdown of those relationships. The issue was Alexa's testamentary capacity at the date she made her wills. The comment quoted above did not go to the resolution of that issue. While it may have been open for the judge to form the view reflected in observations of this kind, there was no imperative for the trial judge to have expressed that view in his written reasons in this case.

194 However, the fact that an observation of this kind may be unnecessary does not mean that the decision below must be set aside.

195 The comments might lead to the decision below being set aside if they revealed error in the decision as to testamentary capacity or if they gave rise to a reasonable apprehension of bias. In this case the observations were unnecessary because they could not inform the decision about testamentary capacity. There is nothing to suggest the trial judge reached his ultimate conclusion by reference to those observations.

196 Further, the observations were not such as to gives rise to a reasonable apprehension of bias. I see nothing in the comments made by the trial judge to indicate that he determined the question of Alexa's testamentary capacity other than on its merits. Valerie has not articulated, and I am not satisfied of, any logical connection between these comments and any deviation from the proper course of deciding the case on its

merits. As such, there is no basis for contending that any reasonable apprehension of bias arose.³⁶

197 There is no other basis for contending that the observations made the trial unfair, or should lead to setting aside the trial judge's decision.

Ground 5: findings of fact against the weight of the evidence

198 Valerie's final ground of appeal alleges that the trial judge's finding that Alexa had testamentary capacity when she made the 2001 Will is against the weight of the evidence. In considering this ground I will firstly examine the evidence indicating that Alexa had testamentary capacity at that time. I will then turn to evidence on which Valerie and Judith rely as suggesting the contrary.

199 In considering the evidence, it is important to bear a number of general principles in mind. The question is whether Alexa had the capacity of sound judgment rather than whether she in fact made the judgment about the disposition of her estate soundly and for reasons which might appear to the observer to be good.³⁷ That question is an inquiry into Alexa's capacity at the time she made the 2001 Will,³⁸ not years or decades earlier.

200 Further, the critical question in this case concerns Alexa's capacity to comprehend and appreciate the claims on her estate to which she ought give effect. This is a legal, rather than a medical, question. A conclusion that a person had a condition which may fit current diagnostic criteria used by psychiatrists to identify mental disorder may inform consideration of the legal question, but does not itself deny testamentary capacity. The decision in *Banks v Goodfellow* illustrates this point. The testator in that case had suffered from 'insane delusions' for a significant part of his life, and clearly suffered from a mental disorder. Yet he was found to possess testamentary capacity. Cockburn CJ said:

If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result,

³⁶ *Ebner* [8]; *Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd* [2007] WASCA 175; (2007) 34 WAR 403 [272] - [275].

³⁷ *Public Trustee v Stretch* [2002] WASC 147 [8].

³⁸ *Worth v Claohm* (1952) 86 CLR 439, 453.

ought not to take away the power of making a will, or place a person so circumstanced in a less advantageous position than others with regard to this right (561).

201 Cockburn CJ saw the same test as applicable whether unsoundness of mind arose from congenital defect, supervening infirmity or mental disease. The test looks to 'the capacity on the part of the testator to comprehend the extent of the property to be disposed of, and the nature of the claims of those he is excluding'.³⁹ That is, the question turns on the extent of the testator's capacity rather than the reason for any lack of capacity.

202 There will be many persons who may meet the diagnostic criteria for a currently recognised psychiatric condition but who retain testamentary capacity. A person may suffer from a depressive condition which, even untreated, does not affect relevant capacity. The impact of other diseases or disorders on capacity may vary over the course of the condition and its treatment. The critical question is whether Alexa understood the nature of the claims of those she was excluding from her 2001 Will, not whether she met the current criteria which a psychiatrist may employ to diagnose a mental disorder.

Evidence pointing to testamentary capacity

203 It is appropriate to begin by considering the terms of the 2001 Will, in light of the background of the relationships between Alexa, her children and grandchildren.

204 There is nothing in the form of the 2001 Will which indicates that Alexa lacked capacity to understand the nature of the claims of persons on her estate. The testamentary gifts for which the 2001 Will provides are directed to relatives - David, her grandchildren and great-grandchild - who have a natural claim to benefit by reason of their relationship to her. The exceptions are modest bequests to charitable organisations with which Alexa had associated, and a \$500 gift to a person in England. In this respect the terms of the 2001 Will demonstrate Alexa's capacity to identify those with a natural claim to share in her estate and appreciate the nature of those claims.

205 That Valerie and Judith were excluded from the 2001 Will is explainable by their hostile relationship with Alexa, that there had been little contact between mother and daughters for over 30 years prior to the date on which the 2001 Will was made and that there seemed little

³⁹ *Banks* (569 - 570).

prospect of reconciliation. The evidence at trial established that Valerie and Judith were both hostile to their mother, and that long-standing hostility provided a rational ground for Alexa to exclude them from her 2001 Will. This was so regardless of who was to blame for the state of their relationship. Further, the 2001 Will recognises their line by including Valerie's and Judith's children (other than Deborah) in the equal distribution of Alexa's residual estate.

206 The nature of the changes Alexa made in 2001 to the testamentary dispositions made by the 1977 Will do not suggest any lack of capacity to appreciate the claims on her estate. She introduced bequests to grandchildren and a great-grandchild who had such claims, but who were not previously included. The reduced provision for David may be explained by the fact that he was then 44 years old. David was 20 years old when the 1977 Will was made.

207 Alexa's instructions to Mr McKenzie for the 2001 Will also indicate a capacity to understand the nature of the claims of those she was excluding. The note made by Mr McKenzie indicated that Alexa had omitted persons who may claim under the Inheritance Act, and read:⁴⁰

Inheritance Act explained. Testatrix has 2 daughters - no contact for years. [Deborah] is a granddaughter but is ok financially. [David] is an invalid pensioner & has asthma, epileptic. Testator believes 1/6th will suffice. I advised testator to write statement.

208 This note indicates that Alexa had the capacity to understand the nature of the claims of her children and grandchildren on her estate. She provided rational reasons for excluding Valerie, Judith and Deborah from the Will. Whether or not the reasons for excluding them were regarded as good, the evidence concerning the instructions for the 2001 Will shows that Alexa had the capacity to understand the nature of their claims on her estate.

209 I note that, in completing the instruction form for the 2001 Will, Mr McKenzie indicated a 'yes' answer to the question '[f]urther enquiries regarding testamentary capacity required'. Mr McKenzie indicated in his oral evidence that this was his mistake.⁴¹ That it was a mistake is also indicated by the fact that following questions related to testamentary capacity were not answered. Further, Mr McKenzie indicated that his standard practice was to assess a person's testamentary capacity as best he could. He would refuse to make a Will for a person he considered did not

⁴⁰ See attachment PMW4 to exhibit 2 and trial ts 139 - 40.

⁴¹ Trial ts 147.

exhibit a sound mind, memory or understanding. He would require the client to produce a certificate from a medical practitioner confirming capacity if he was in doubt.⁴²

210 It is also relevant to note that Alexa's will instructions, provided to the Public Trustee in 1976 and 2006, recognised her daughters and provided a rational reason for their exclusion.

211 The evidence of Dr Melling at trial was a strong indicator of testamentary capacity. He may not have undertaken as full an examination as Dr Series and Professor Hirsch required to enable them to form an opinion about capacity. However, Dr Melling had seen Alexa regularly since 1981, and continued to see her until 2008. He was a medical practitioner with psychiatric training and experience, even if he was not qualified as a psychiatrist in 2001. He did not conduct and record an examination which would enable a psychiatrist who had never seen Alexa to form an opinion about Alexa's testamentary capacity. That did not mean that Dr Melling's evidence, based on his history of contact with Alexa, was unreliable.

212 The circumstances in which Dr Melling's letter was written in 2001 are significant. Alexa presented wanting a letter as to testamentary capacity because she thought someone would challenge her Will. The present proceedings would suggest that this was not irrational paranoid ideation. Dr Melling assessed Alexa's testamentary capacity at the time the 2001 Will was made. He was satisfied that Alexa had that capacity. His oral evidence confirmed that he had no doubt about Alexa's testamentary capacity,⁴³ although he regarded her as having a paranoid personality disorder.⁴⁴ His assessment in 2001 was that:⁴⁵

There is certainly no question at all that she was competent to make decisions about the disposal of her assets and properties, and she did not exhibit the slightest signs of any intellectual or mental incapacity whatsoever.

213 Dr Melling also gave evidence that Alexa lived independently and was able to manage her affairs throughout the time he saw her as a patient.⁴⁶

⁴² Exhibit 9, par 8.

⁴³ Trial ts 112, 118, 119; exhibit 8 pars 22 - 26.

⁴⁴ Trial ts 133, exhibit 8 par 14.

⁴⁵ Attachment PM1 to exhibit 8.

⁴⁶ Trial ts 127, 128, 129, 130.

214 Finally, there was the evidence of Michael, Tracey and Tenielle about their contact with Alexa before and after the 2001 Will was made. This evidence indicates that Alexa was living independently and had a good relationship with them and David.

Evidence relied on by Valerie and Judith

215 A focus of Valerie's and Judith's evidence and submissions was the abusive behaviour which they recall Alexa subjecting them to as children. It is unnecessary to detail that evidence here. It does give rise to concern about Alexa's mental state at that time. However, this conduct occurred decades before the 2001 Will was made. Alexa's circumstances when Valerie and Judith were children were very different to those which presented in 2001. During Valerie's and Judith's childhood, Alexa faced poverty, a husband returned from what must have been a traumatic experience during the Second World War and the demands of raising a severely disabled son. Those external stressors were not present in 2001. The evidence was that, by 2001, Alexa demonstrated her capacity to care for her disabled child David in a loving and caring manner.

216 Contact which Judith and Valerie describe with Alexa as adults indicates an ongoing hostile relationship between them. However, even that limited contact had ceased well before the 2001 Will was made. Evidence of Alexa's harsh and irrational behaviour at the 1977 funeral must be understood in the context that her husband had just died and she was left to care for a severely disabled son. She could not be expected to be entirely rational at that time. The fact that Alexa withdrew from contact with Valerie during the visit to Oxford in 1988 may be explainable by the argument she had with Valerie.

217 The significance of Valerie and Judith's evidence about their mother's behaviour was reduced by the fact that it related to a time well before the 2001 Will was made, and that they did not have contact with Alexa anywhere near the time when the 2001 Will was made.

218 Dr Series' evidence was relied on by Valerie as indicating testamentary incapacity. However, his evidence was qualified by the fact that he had never seen Alexa. The conclusion which he reached in his report of 4 September 2012 was that:

In my opinion, Dr Melling's affidavit raises unanswered questions about Alexa Hoffman's mental state. I cannot conclude confidently from the evidence he provides that she did have testamentary capacity, but what he says raises a clear possibility that her thinking was sufficiently abnormal for this abnormality to have an effect on her testamentary capacity. I do

not think that he has presented sufficient evidence to dispel this possibility [24].

219 Dr Series' report identifies a number of possibilities, but does not state a positive conclusion that Alexa had or lacked testamentary capacity. Dr Series considered that Dr Melling's affidavit did not provide sufficient information to enable him to exclude the possibility that Alexa lacked that capacity. That statement does not preclude the court from forming a view, based on all the evidence before the court, that Alexa had the relevant capacity.

220 In cross-examination, Dr Series was taken to the passage of his report quoted above, and confirmed that he was referring to a possibility only. He accepted that he was unable to really form an opinion as to whether Alexa did or did not have testamentary capacity based on Dr Melling's affidavit alone. Dr Series accepted that he would need more information to form an opinion as to Alexa's testamentary capacity.⁴⁷

221 Professor Hirsch, who as I have noted was not made available for cross-examination, concluded his second report with the following observations:⁴⁸

15. I would accept that there is no evidence that [Alexa's] state of mind was cognitively affected or affected by delusions when she made her Will, but I would still maintain that the Deceased probably had a vexatious attitude toward her daughters which did effect [sic] her decisions. It is for the Court to decide what the extent of the abnormality of this attitude was, and whether it unfairly distorted her view and the natural obligations she would have as a mother, when making her will. The Court will consider to what extent she considered her obligations to her daughters, with whom she had not had contact for many years, and considered this in the light of her duty toward her son, who is disabled.
16. In my view Dr Mellings [sic] had not determined the deceased's state of mind in relation to making her will, and whether she had abnormal ideas about her daughters which prevented her from considering her obligations to them. I would accept his view that it is unlikely that she was psychotic or delusional, as that is likely to have shown itself to a psychiatrist over the years.
17. Having said this I think there is a basis for the Court to consider that she did have a vexatious attitude toward her daughters and that this was a factor in influencing her decision making when she made her will.

⁴⁷ Trial ts 232; see also re-examination at trial ts 236.

⁴⁸ GB 181 - 182.

222 Ultimately, Professor Hirsch does no more than indicate that Alexa had a vexatious attitude towards her daughters. He does not contend that she lacked capacity to understand the nature of her daughters' claims. As already explained, there is a distinction between unreasonable antipathy and a judgment affected by a disorder of the mind. Professor Hirsch did not express an opinion on the question of which side of the line this case fell.

Conclusion as to testamentary capacity

223 When regard is had to the above evidence as a whole, it was open to the trial judge to be satisfied that Alexa had the capacity to appreciate the claims on her estate when she made the 2001 Will. Having reviewed the evidence, I agree with the trial judge's conclusion that the evidence as a whole established testamentary capacity. The evidence of Valerie and Judith related to a time well before the 2001 Will was made. The medical evidence which they adduced was equivocal at best.

224 The evidence on which Valerie and Judith relied was sufficient to require the court to undertake a 'vigilant examination of the whole of the evidence which the parties place before the court'. However, as the High Court noted in *Worth v Clasohm*:

that examination having been made, a residual doubt is not enough to defeat the plaintiff's claim for probate unless it is felt by the court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding at the time of its execution (453).

225 In my view, the other evidence to which I have referred pointed strongly to Alexa having testamentary capacity. In my view, it is significant that Dr Melling considered the issue in 2001 and did not have any concerns. That and the other evidence about Alexa behaviour and state of mind in 2001 supports the conclusion that she had the capacity to make the 2001 Will.

226 In *Minister for Immigration, Local Government and Ethnic Affairs v Hamsher*,⁴⁹ Beaumont and Lee JJ made the following observations, in relation to challenges to fact finding in appeals:

[T]he court is not obliged to proceed to make new findings of fact on all relevant issues and discharge the judgment appealed from if those findings differ from those of the trial judge and do not support the judgment. The court must be satisfied that the judgment of the trial judge is erroneous and

⁴⁹ *Minister for Immigration v Hamsher* (1992) 35 FCR 359, 369.

it may be so satisfied if it reaches the conclusion that the trial judge failed to draw inferences that should have been drawn from the facts established by the evidence. The court is unlikely to be satisfied if all that is shown is that the trial judge made a choice between competing inferences, being a choice the court may not have been inclined to make but not a choice the trial judge should not have made. Where the majority judgment in *Warren v Coombes* [(1979) 142 CLR 531] (at 552 - 553) states that an appellate court must not shrink from giving effect to its own conclusion, it is speaking of a conclusion that the decision of the trial judge is wrong and that it should be corrected.

227 That observation has been adopted by this and other courts.⁵⁰

228 I am not satisfied that the trial judge erred in concluding that the evidence established that Alexa had capacity to make the 2001 Will. To the contrary, I agree with his conclusion. Ground 5 is not made out

Orders

229 For the above reasons, none of the grounds of appeal are established. The appropriate order is that the appeal be dismissed.

⁵⁰ See *Williams v Minister Aboriginal Land Rights Act 1983* [2000] NSWCA 255 [60]; *H v P* [2011] WASCA 78 [42]; *S v D* [2014] WASCA 224; *Jones v Darkan Hotel* [2014] WASCA 133 [31]; *Doyle (WA) Pty Ltd v ING Real Estate Joondalup BV* [2014] WASCA 215 [22] - [23].