SUPREME COURT OF QUEENSLAND

CITATION:	*Reed v Smith* [2022] QSC 173
PARTIES:	**TIMOTHY OWEN REED** (First Plaintiff) AND **MARIAN ELLEN REED** (Second Plaintiff) **v** **JANET MARY SMITH (AS EXECUTOR OF THE ESTATE OF THE LATE GORDON BEST WRIGHT)** (Defendant)
FILE NO/S:	BS 8355 of 2019
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 August 2022
DELIVERED AT:	Brisbane
HEARING DATE:	18-20 October 2021, 21-22 March 2022.
JUDGE:	Kelly J
ORDER:	**1. The claim for a declaration as contained in paragraph 1 of the prayer for relief to the Further Amended Statement of Claim is dismissed.** **2. I will hear the parties as to costs and further orders.**
CATCHWORDS:	SUCCESSION – MAKING OF A WILL – TESTAMENTARY INSTRUMENTS – JOINT AND MUTUAL WILLS – where the testator died in 2019 – where the testator's wife predeceased him in 2018 – where the testator and his late wife made wills in 1995, 1999, and 2001 – where the testator made their last will in 2016 – where the testator's 2016 will appointed the defendant as his sole executor and trustee – where the 2001 wills provided the plaintiffs with more generous bequests than the testator's 2016 will – whether the testator and his late wife made a testamentary agreement to (a) not revoke their respective wills without the knowledge or consent of the other, and (b) to enjoy fully the ownership of the assets and property of each of them,

whether held jointly or severally, during each of their lifetimes subject to the limitation that neither of them would make *inter vivos* substantial gifts from those assets so as to defeat the non-revocation agreement

SUCCESSION – TESTAMENTARY CAPACITY – GENERALLY – where the plaintiffs sought declaratory relief – where the defendants submitted that declaratory relief should be refused because the evidence did not establish that the testator's wife lacked testamentary capacity when the 2016 will was executed – whether the testator's wife lost testamentary capacity before the testator's 2016 will

Aslan v Kopf [1995] NSWCA 26, cited
Baird v Smee [2000] NSWCA 253, considered
Bigg v Queensland Trustees Ltd [1990] 2 Qd R 11, cited
Birmingham v Renfrew (1937) 57 CLR 666, cited
Charles v Fraser [2010] EWHC 2154, cited
Croft v Sanders [2019] NSWCA 303, cited
Drivas v Jakopovic (2019) 100 NSWLR 505, cited
Estate of Masters (1994) 33 NSWLR 446, cited
Hussey v Bauer [2011] QCA 91, cited
Jones v Dunkel (1959) 101 CLR 298, cited
Osborne v Osborne [2001] VSCA 228, cited
Peter v Shipway (1908) 7 CLR 232, 240, cited
Plunkett v Bull (1915) 19 CLR 544, 548-9, cited
Pridham v Pridham [2010] SASC 204, cited
Public Trustee of Queensland v Smith [2009] 1 Qd R 26, cited
Re Goodchild (deceased) [1997] 3 All ER 63, cited
Re McPherson [1968] VR 368, cited
Re Oldham [1925] 1 Ch 75, cited
Re Walker [1905] 1 Ch 160, cited
Re White [1951] NZLR 393, cited
Re Will of Wilson (1897) 23 VLR 197, cited
Robertson v Barker [2021] NSWSC 1682, cited
Timbury v Coffee (1941) 66 CLR 277, cited
Webb v Ryan [2012] VSC 377, cited
Wesley v Wesley (1998) 71 SASR 1, cited

COUNSEL: M Amerena with J Fenton for the plaintiffs on 20 October 2021
J Fenton for the plaintiffs on 18-19 October 2021, and 21-22 March 2022
M Brady QC with M Williams for the defendant

SOLICITORS: O'Connor Ruddy & Garrett Solicitors for the plaintiffs
Wallace Davies Solicitors for the defendant

Matters of Introduction and Background

[1] Gordon and Dawn Wright were married for 52 years. Dawn[1] died on 10 July 2018, aged 90 years old. Gordon died on 30 January 2019, aged 92 years old. They had no children.

[2] The plaintiffs, Tim and Marian Reed, are Dawn's nephew and niece. Tim is 63 years old. Marian is 57 years old. Their brother William was born in 1960. Owen and Catherine Reed were the parents of Tim, Marian and William. Owen was Dawn's brother. James Reed was the father of Owen and Dawn.

[3] The defendant, Janet Smith, is Gordon's niece. Janet is 59 years old. She had a brother Richard who died in 2019. Her mother, Margaret, is Gordon's sister and is 90 years old.

[4] Gordon and Dawn made wills dated 3 April 2001 ("the 2001 wills"). The plaintiffs were beneficiaries under the 2001 wills. Dawn did not make another will before her death. The last will Gordon made prior to his death was a will dated 21 January 2016 ("the 2016 will") which appointed Janet as his sole executor and trustee. Under the 2016 will, the plaintiffs were the recipients of less generous bequests than those conferred upon them by the 2001 wills.

[5] At the heart of this proceeding lies the plaintiffs' essential contention that the 2001 wills were mutual wills which Gordon and Dawn had agreed not to revoke. This essential contention placed a burden upon the plaintiffs to prove, in this case by way of inference,[2] that Gordon and Dawn had made a testamentary agreement in respect of the 2001 wills. The pleaded testamentary agreement was to the effect that Gordon and Dawn had made two promises to each other. The first promise was "not to revoke their own will without the knowledge [or] consent of the other".[3] The second promise was "to enjoy the full ownership of the assets and property of each of them, whether held jointly or severally, during each of their lifetimes subject to the limitation that neither of them were to make *inter vivos* substantial gifts or settlements from these assets and property so as to defeat [the first promise]".[4]

[6] The trial commenced on 18 October 2021. At that time, Tim was the sole plaintiff. He closed his case on 19 October 2021. On 20 October 2021, Tim's counsel foreshadowed an application to make substantial amendments to his existing pleading. The trial was adjourned and the application to amend was filed on 12 November 2021. The application to amend was heard on 16 December 2021. I delivered reasons and made directions in respect of that application on 17 December 2021. The presently material directions allowed for the joinder of Marian as a second plaintiff and the hearing of the trial to proceed in relation to a separate question, namely, whether there should be a declaration that Janet, as executor under the 2016 will, holds the net assets of Gordon's estate on trust for the beneficiaries under the

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1 It has been convenient in these Reasons to refer to relevant persons by their first names

2 Further Amended Statement of Claim [5].

3 Ibid

4 Ibid

2001 wills.[5] The trial resumed on 21 March 2002 and final submissions were made on 22 March 2022.

The issues for separate determination

[7] The ultimate issues which arise for separate determination are these:

(a) Were the 2001 wills mutual wills in the sense that they were subject to the testamentary agreement alleged by the plaintiffs? This issue directs attention to whether it can be inferred that Gordon and Dawn agreed:

(i) not to revoke their 2001 wills without the knowledge or consent of the other; and

(ii) that they would enjoy the full ownership of the assets and property of each of them, whether held jointly or severally, during each of their lifetimes subject to a limitation that neither of them could make a substantial *inter vivos* gift or settlement so as to defeat their promise not to revoke their 2001 wills without the knowledge or consent of the other.

(b) If the 2001 wills were subject to the testamentary agreement contended for by the plaintiffs, is it appropriate to make the declaration sought by the plaintiffs?

[8] As to the first ultimate issue, the plaintiffs' pleading sought to infer the testamentary agreement from certain historical wills, the 2001 wills and alleged conversations.[6] Dawn and Gordon had made wills in 1995 ("the 1995 wills") and on 11 March 1999 ("the 1999 wills").

[9] The alleged conversations were:

(a) a 1994 conversation involving Tim, Dawn and Gordon at Tim's parents' home in Toronto, Canada ("the 1994 conversation");

(b) a 2001 telephone conversation involving Tim, Dawn and Gordon ("the 2001 conversation"); and

(c) a 2012 conversation involving Tim and Gordon at Gordon's home in Deception Bay ("the 2012 conversation").

[10] The plaintiffs' pleaded allegations about the 1994 conversation were to the effect that:[7]

(a) The 1994 conversation occurred in 1994 in Toronto at Tim's parents' house and involved Gordon, Dawn and Tim;

(b) Gordon and Dawn said that they were planning to prepare wills which would have the effect of ensuring that their respective estates were left to Tim's parents in the event that they both died;

(c) Gordon and Dawn told Tim that they had each agreed to prepare wills in terms that would ensure that their respective estates passed to Owen in recognition of the fact that he had gifted his half interest in a house named "Glenelg" in

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5 Further Amended Statement of Claim, Prayer for Relief [1]; Further Amended Claim [1].
6 Further Amended Statement of Claim [5] Particulars (aa)-(m).
7 Further Amended Statement of Claim [5] Particulars (a)-(d).

Auckland to Dawn and had otherwise made financial contributions to Dawn and Gordon over time;

(d) Gordon said, in Dawn's presence, words to the effect that he and Dawn had agreed that "the last one on this earth will give all their assets to your father upon meeting their maker".

[11] The plaintiffs' pleaded allegations about the 2001 conversation were to the effect that:[8]

(a) The 2001 conversation took place during telephone calls in May 2001 involving Gordon, Dawn and Tim;

(b) Gordon and Dawn said that they had updated their earlier wills as they were now residing in Australia and as a consequence of the fact that Owen had died;

(c) Gordon said that they had decided to change their earlier wills so that the entirety of their estates would be left to "the next generation of Reeds";

(d) Gordon said that the wills appointed Tim and Marian as executors and that upon the death of the survivor, their estates would pass to Tim and Marian but that they had made provision for a portion to be left to charity;

(e) Gordon and Dawn said words to the effect "it did not matter who was the last one left because either way, most of the estate would pass to Timothy and his sister Marian"; and

(f) both Gordon and Dawn said words to the effect that they had "no intention of altering the effect of their new wills as they were both in their 70s" at that time.

[12] The plaintiffs' pleaded allegations about the 2012 conversation were to the effect that:

(a) The 2012 conversation occurred in February 2012 at Gordon's home and involved Gordon and Tim;

(b) Gordon said that he and Dawn still had their 2001 wills in place by which they had left the majority of their estate to Tim and Marian in line with their agreement for their estate to be returned to the Reed family after Owen's death.[9]

[13] The second ultimate issue arises in the event that the alleged testamentary agreement is found to have been made. The declaratory relief sought by the plaintiffs is discretionary. The plaintiffs alleged that Dawn lost testamentary capacity between mid-2010 and 21 January 2016.[10] Ultimately, they sought a finding that Dawn had lost testamentary capacity from no later than 2012.[11] They submitted that, in circumstances where Dawn had lost testamentary capacity by the time of the 2016 will, Gordon then remained bound by the testamentary agreement and could not act in breach of it by revoking his 2001 will and making the 2016 will.[12] The defendant resisted any finding that Dawn had lost testamentary capacity prior to the 2016 will. She submitted that the declaratory relief should be refused because the evidence did

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8 Further Amended Statement of Claim [5] Particulars (e)-(h), (j)-(l).
9 Further Amended Statement of Claim [5] Particular (m).
10 Further Amended Statement of Claim, [5C]
11 Outline of submissions on behalf of the first and second plaintiffs, [41].
12 Ibid [46].

not establish that Dawn lacked testamentary capacity at any material time or was relevantly unaware of Gordon's intentions concerning the 2016 will.[13]

[14] I will address each of these ultimate issues in turn.

The First Ultimate Issue: Were the 2001 wills, mutual wills subject to the alleged testamentary agreement?

The burden of proof and a need for cautious scrutiny

[15] The plaintiffs bore the burden of proving that the 2001 wills were mutual wills subject to the alleged testamentary agreement. Whilst that burden was the ordinary civil burden, proof on the balance of probabilities, it has been described in this context as "heavy".[14]

[16] In *Birmingham v Renfrew*,[15] Latham CJ observed:

> "… any court should be very careful in accepting the evidence of interested parties upon such a question. Perhaps most husbands and wives make wills 'by agreement' but they do not bind themselves not to revoke their wills. They do not intend to undertake or impose any kind of binding obligation. The mere fact that two persons make what may be called corresponding wills in the sense that the existence of each will is naturally explained by the existence of the other will is not sufficient to establish a binding agreement not to revoke wills so made".

[17] In the same case, Dixon J said of an agreement not to revoke a will:[16]

> "Such an agreement can be established only by clear and satisfactory evidence. It is obvious that there is great need for caution in accepting proofs advanced in support of an agreement affecting and possibly defeating testamentary dispositions of valuable property."

[18] In *Baird v Smee,*[17] Mason P relevantly said "[c]autious scrutiny is therefore required in cases, such as the present, where an implied agreement is invoked to defeat the solemn testamentary disposition by a person... who is unable to give evidence to explain [his or] her actions."

[19] Further, in the present case, the evidence included recollections of distant oral conversations involving Dawn and Gordon. The case law acknowledges the difficulties which can rise when considering and assessing this kind of evidence. In *Webb v Ryan*,[18] Whelan J observed:

> "An important matter which may arise in these kinds of cases is the difficulty of assessing evidence concerning things allegedly said by a

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13 Defendant's written address [227].

14 *Birmingham v Renfrew* (1937) 57 CLR 666, 674-5; see also *Campbell v Campbell* [2015] NSWSC 784 [332].

15 *Birmingham v Renfrew* (1937) 57 CLR 666, 674-5.

16 Ibid 681-2; see also *Re Goodchild (deceased)* [1997] 3 All ER 63, 69.

17 [2000] NSWCA 253 [8] (Mason P, with whom Handley and Giles JJA agreed).

18 [2012] VSC 377 [22].

> person who is dead. The court can never be certain it knows all the circumstances, and more often than not one may be sure that the court knows few of them. It is impossible to hear what the other party to the conversation, the deceased, says about it. There is a significant risk of reconstruction. There are dangers in relying on evidence of what may have been a casual observation made to a person who at the time had no reason to remember the exact words used. In the light of these concerns, a substantial burden is placed upon an applicant whose case relies upon such evidence. Such evidence must be very carefully examined."

[20] Finally, in *Wesley v Wesley*[19] Debelle J said:

> "It is not uncommon in human experience for a testator to give divergent accounts of his will to different persons either to maintain harmony or to curry favour with family or friends. Each case will have to be determined on its own facts and each will suggest the kind of caution which should be exercised."

The various wills, some objective facts and contemporaneous documents

[21] The 1995 wills are unsigned.[20] They were prepared by an Auckland firm of solicitors.

[22] Dawn's 1995 will is materially in the following terms:

> "THIS IS THE LAST WILL AND TESTAMENT of me DAWN ELAINE WRIGHT of Auckland in New Zealand, Married Woman
>
> 1. I HEREBY REVOKE all wills and testamentary dispositions heretofore made by me AND I DECLARE this to be my last will and testament.
>
> 2. IF my husband GORDON BEST WRIGHT shall be living at the expiration of one calendar month of my death then I GIVE DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever nature and wheresoever situate unto my said husband absolutely AND I APPOINT my said husband sole executor of this my will.
>
> 3. IF my said husband shall not be living at the expiration of one calendar month of my death then I DECLARE that the following provisions of this my will shall take effect but that otherwise the following provisions shall be absolutely null and void.
>
> 4. I APPOINT JOHN SAMUEL GOLDSTINE and MARK ROLAND WINGER both of Auckland Solicitors (hereinafter together with the survivor of them and the executors or executor of such survivor or other the trustees or trustee for the time being called "my trustees") to be the executors and trustees of this my will.

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19 (1998) 71 SASR 1, 5.

20 It would seem that the parties accepted that the 1995 wills were executed at some time in 1995: T 7-3 l 21.

5. I GIVE DEVISE AND BEQUEATH all and singular the whole of my estate both real and personal of what nature or kind soever and wheresoever situate or being unto my trustees UPON TRUST to sell call in collect and convert the same into money with power in their absolute discretion to postpone for such time or times as they may think fit the sale calling in collection or conversion of the whole or any part or parts thereof and after payment thereout of my just debts and funeral and testamentary expenses including all estate succession and other death duties payable in respect of my estate actual or notional TO HOLD the same for such of them my brother OWEN ATHOL REED of 254 Cairncroft Road Oakville Ontario L6J 4M3 and my sister-in-law CATHERINE ELLEN REED as shall survive me and if more than one then in equal shares between them.

6. I EMPOWER my trustees on any sale of my real or personal estate to sell or dispose of the same or any part thereof either by public auction or private contract either in one lot or in parcels and either for cash or on such terms as to credit as my trustees shall deem fit.

7. I DECLARE that any executor or trustee for the time being of this my will who may be a solicitor may make all such usual and reasonable professional and other charges in connection with my estate as he could do were he not such executor or trustee."

[23] Gordon's 1995 will mirrored Dawn's 1995 will in the sense that his will left his estate to Dawn as his sole executor but, in the event that she was not living one month after his death, he appointed Messrs Goldstein and Wenger as his executors and trustees and bequeathed his estate to Owen and his wife, Catherine.

[24] On 28 October 1996, Owen died.

[25] In 1998, Gordon and Dawn sold 'Glenelg" and migrated to Queensland. They purchased a house in Deception Bay which they also called "Glenelg".

[26] The 1999 wills were prepared by a Deception Bay firm of solicitors.

[27] Dawn's 1999 will is materially in the following terms:

" THIS IS THE LAST WILL AND TESTAMENT

of me DAWN ELAINE WRIGHT, of 82 Phillip Parade, Moreton Downs, Deception Bay, in the State of Queensland

I REVOKE all former Wills, codicils and Testamentary dispositions heretofore made by me AND DECLARE this to be my last Will and Testament.

I APPOINT my husband, GORDON BEST WRIGHT of 82 Phillip Parade, Moreton Downs, Deception Bay in the State of Queensland sole Executor and Trustee of this my Will AND I GIVE DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever kind or nature and wheresoever situate unto and to my said husband GORDON BEST WRIGHT for his own sole use and benefit absolutely.

IN THE EVENT of my husband GORDON BEST WRIGHT predeceasing me THEN I APPOINT my friend ALAN JOHN NOBLE of 42 Beaufort Place, Deception Bay in the said State Executor and Trustee of this my last Will and Testament PROVIDED ALWAYS that if the said ALAN JOHN NOBLE shall die in my lifetime or before my Estate has been completely administered or if for any reason he shall be unwilling or unable to act as my Executor and Trustee THEN I APPOINT my solicitor JAMES LEONARD BLANCH of Shop 38 Deception Bay Shopping Centre, Deception Bay in the said State to be the Executor and Trustee of this my last Will and Testament in the place and stead of the said AND I DECLARE that the expression "my Trustee" wherever it appears in this my last Will and Testament shall be deemed to mean and refer to the Trustee for the time being hereof whether original or substituted.

I GIVE DEVISE AND BEQUEATH all of my estate both real and personal whatsoever and wheresoever situate or over which I may have any power appointment disposition or control unto and to the use of my Trustee upon trust with power to sell call in and convert into money such parts thereof as shall not consist of money and with power to my Trustee to postpone such calling in and conversion of any part thereof for as long as my Trustee shall think fit and my Trustee will hold my estate upon the following trusts:-

1. To pay all my just debts funeral and testamentary expenses and all probate succession federal or state and other duties arising by reason of my death.

2. As to the rest and residue of my Estate to THE COUNCIL OF THE QUEENSLAND INSTITUTE OF MEDICAL RESEARCH, a Body Corporate established under the provisions of the "Queensland Institute of Medical Research Act 1945" to be applied in and for medical research into cancer treatment by the QUEENSLAND INSTITUTE OF MEDICAL RESEARCH constituted under the said act. In the event that the gift herein provided shall not be approved by the Minister administering the said Act for the purpose or purposes aforesaid, I HEREBY DECLARE that the said sum shall be applied by the said The Council of the Queensland Institute of Medical Research in and for such purpose or purposes of the said The Queensland Institute of Medical Research as shall be determined by the said Minister.

   I EMPOWER my Trustee:

   (A) To sell Mortgage lease or otherwise dispose of any portion of my estate as a whole or in parts on terms for cash or to postpone such sale mortgage or lease and to invest and reinvest the proceeds of such sale mortgage or lease as my Trustee in his/her absolute discretion thinks fit;

   (B) To apply the whole or any part of he income and capital of the share of which any infant beneficiary may be

> entitled in expectancy contingency or otherwise in or toward his or her maintenance education support benefit or advancement in life and to pay the same directly or to his or her guardian or to any person or institution on his or her behalf (without being liable to see the application thereof or being responsible for the loss or misapplication thereof) and credit shall be allowed to my Trustee for all payments so made by whomsoever shall ultimately become entitled to share in my estate;
>
> (c) To distribute my Estate in kind"

[28] Gordon's 1999 will mirrored Dawn's 1999 will in the sense that his will left his estate to Dawn as his sole executor and trustee but, in the event that she predeceased him, he appointed the same executors and made the same bequest to the Council of the Queensland Institute of Medical Research.

[29] Dawn sent a handwritten note dated 4 April 2001 to Tim which was in the following terms:

> "Dear Tim,
>
> We hope you & yours are all well.
>
> Thank you for your last letter enclosed with the lovely Canadian calendar. It's a gem.
>
> We have just been down and made out two new Wills.
>
> Enclosed is a card of our solicitor who handles our affairs. As we're taking some holidays, in the unlikely event of anything happening to us, you should contact Mr James Blanch, our solicitor.
>
> Gordon will write to you when we return from Sydney, with copies of the Wills, and explanations.
>
> After that we're off to explore the Top End of Q'land & hope to see an abundance of birdlife amongst other interesting things.
>
> Love from us both.
>
> Aunty Dawn."

[30] Later, Marian and Tim received a typed letter from Gordon and Dawn dated 19 April 2001 which was in the following terms:

> "Dear Marian and Timothy,
>
> We arrived back home last night after our trip down to Sydney and the Central Coast, more tired than refreshed.
>
> This letter is to bring you both up to date with our wills which Dawn wrote about to Timothy before we left on our holiday.
>
> We have approved the final draft and are now awaiting a summons from our solicitor to receive copies, one of which will be posted to you under separate cover.

On the advice of our solicitor we did not include William because of the complications with the Canadian Social Welfare Department who would no doubt reduce his benefit on a pro-rata basis. However, we trust that you will see to William's interests if and when the occasion arises. Owen explained this to us when we drew-up our previous wills.

Essentially, you are both jointly our sole heirs and everything, house contents, bank deposits, are left to you. However, you will have three options with regards the house viz:-

1. You can sell the house I which case you will each receive 1/3 of the sale price, 1/3 going to the Brisbane Medical Research for Cancer.

2. You can retain possession jointly and do whatever, until such time as you both decide to sell the house.

3. You can put the house on the market and buy the Medical Research's 1/3 share at a price agreed to jointly by you both and the third executor who is our solicitor.

Basically this means that if and when you sell the house
then 1/3 of the sale price goes to the Medical Research.
The conditions of the wills only apply to the house, everything else is yours unencumbered.

All our personal files and details are kept in our filing cabinet and our number coded safe.
Dawn will attend to the matter of explaining what to do in this regard and arrange for you to have the number code for the safe and a key to the filing cabinet.

I trust that the above is clearer than mud but, if you have any questions then do not hesitate to ask, after all, it is in your interest so to do.

Incidentally, Dawn and I have no immediate plans for shedding this mortal coil, we are just making sure that our estate goes to the family and not the Government Coffers.

Yours affectionately

Dawn & Gordon

Thine Aunt and Uncle down-under."

[31] There was handwriting at the end of this typed letter as follows:

"P.S We'd appreciate if you and Marian would keep the contents and intent of our Wills confidential between the four of us; no other family members to be privy to this confidentiality…"

[32] The 2001 wills were prepared by the same Deception Bay firm of solicitors.

[33] Dawn's 2001 will is materially in the following terms:

"THIS IS THE LAST WILL AND TESTAMENT of me DAWN ELAINE WRIGHT of 82 Phillip Parade, Moreton Downs, Deception Bay, in the State of Queensland.

I REVOKE all former Wills, Codicils and Testamentary dispositions heretofore made by me AND DECLARE this to be my last Will and Testament.

I APPOINT my husband GORDON BEST WRIGHT of 82 Phillip Parade, Moreton Downs, Deception Bay, in the State of Queensland to be the sole Executor and Trustee of this my last Will AND I GIVE DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever kind of nature and wheresoever situate unto and to my said husband for his own sole use and benefit absolutely.

IN THE EVENT of my husband GORDON BEST WRIGHT predeceasing me THEN I APPOINT my nephew TIMOTHY OWEN REED of 25 Red Cedar Crescent, Brampton, Ontario, Canada and my niece MARIAN ELLEN REED of 8/228 St. George Toronto, Ontario, Canada to be the Executors and Trustees of this my last Will and Testament PROVIDED ALWAYS that if the said TIMOTHY OWEN REED and the said MARIAN ELLEN REED shall die in my lifetime or before my estate has been completely administered or if for any reason he/she shall be unwilling or unable to act as my Executor and Trustee THEN I APPOINT my solicitor JAMES LEONARD BLANCH of Shop 11B Deception Bay Shopping Centre, Deception Bay Road, Deception Bay, in the State of Queensland Executor and Trustee of this my last Will and Testament in the place and stead of the said TIMOTHY OWEN REED and MARIAN ELLEN REED AND I DECLARE that the expression "my Trustee" wherever it appears in this my last Will and Testament shall be deemed to mean and refer to the Trustee for the time being hereof whether original or substituted.

I GIVE DEVISE AND BEQUEATH all my estate both real and personal whatsoever and wheresoever situate or over which I may have any power of appointment disposition or control unto and to the use of my Trustee upon trust with power to sell call in and convert into money such parts thereof as shall not consist of money and with power to my Trustee to postpone such calling in and conversion of any part thereof for as long as my Trustee shall think fit and my Trustee will hold my estate upon the following trusts:

1. To pay all my just debts funeral and testamentary expenses and all probate succession federal or state and other duties arising by reason of my death;

2. I GIVE my home at 82 Phillip Parade, Moreton Downs to my Executors on trust to permit TIMOTHY OWEN REED and MARIAN ELLEN REED to reside therein keeping the said home in good repair and insured in the name of my Executors and in a sum approved by them paying rates and the taxes levied on the said house and keeping the said house

in good repair having regard to the condition at my death. Should the Executors decide to sell the residence at 82 Phillip Parade, Moreton Downs then the proceeds of sale are to be distributed as follows:

(a) one third thereof to THE COUNCIL OF THE QUEENSLAND INSTITUTE OF MEDICAL RESEARCH, a Body Corporate established under the provisions of the "Queensland Institute of Medical Research Act 1945" to be applied in and for medical research into cancer treatment by the QUEENSLAND INSTITUTE OF MEDICAL RESEARCH constituted under the said Act. In the event that the gift herein provided shall not be approved by the Minister administering the said Act for the purpose or purposes aforesaid, I HEREBY DECLARE that the said sum shall be applied by the said "The Council of the Queensland Institute of Medical Research" in and for such purpose or purposes of the said "The Queensland Institute of Medical Research" as shall be determined by the said Minister.

(b) Two thirds thereof to my nephew TIMOTHY OWEN REED and niece MARIAN ELLEN REED or to the survivor of them as tenants in common in equal shares PROVIDED HOWEVER that should they predecease me or die within a period of thirty (30) days of my death leaving a child or children who shall survive me then such last mentioned child or children shall take and if more than one equally between them the share and interest in my estate which his her or their parent would have taken had he or she survived me.

3. AS TO THE REST AND RESIDUE of my estate to my nephew TIMOTHY OWEN REED and niece MARIAN ELLEN REED or to the survivor of them as tenants in common in equal shares PROVIDED HOWEVER that should they predecease me or die within a period of thirty (30) days of my death leaving a child or children who shall survive me then such last mentioned child or children shall take and if more than one equally between them the share and interest in my estate which his or her or their parent would have taken had he or she survived me."

[34] Gordon's 2001 will mirrored Dawn's 2001 will in the sense that his will left his estate to Dawn as his sole executor and trustee but, in the event that she predeceased him, he appointed the same executors and made the same bequests to Tim and Marian and the Council of the Queensland Institute of Medical Research.

[35] It may be observed that there was no provision in either of the 2001 wills to the effect that Dawn and Gordon had agreed that their respective wills were not to be revoked without the knowledge or consent of the other person.

[36] The plaintiffs submitted and I accept that the circumstances by which the 2016 will came into existence are largely unknown.[21] The 2016 will does not appear on its face to have been prepared by a solicitor. Its material terms were as follows:

> "THIS IS THE LAST WILL AND TESTAMENT of me GORDON BEST WRIGHT of 82 Phillip Parade, Deception Bay in the State of Queensland.
>
> I REVOKE all former Wills, Codicils and Testamentary dispositions made by me AND DECLARE this to be my last Will and Testament.
>
> I APPOINT my Niece JANET MARY SMITH (Barrister at Law) of Rose College, Lynch Road, France Lynch, Stroud, Gloucestershire GL 66 LT UK.
>
> To be the sole Executrix and Trustee of this my last Will AND I GIVE DEVISE AND BEQUEATH the whole of me estate both real and personal of whatsoever kind and nature and wherever situate as follows:
>
> I GIVE DEVISE AND BEQUEATH all of my estate both real and personal whatsoever and wherever situate over which I may have any power of appointment disposition or control unto and to the use of my Trustee upon trust with power to sell call in and convert into money such parts thereof as shall not consist of money and with power to my trustee to postpone such calling in and conversion of any part thereof for as long as my Trustee shall think fit and my Trustee will hold my estate upon the following trusts:
>
> 1: To pay all my just debts funeral and testamentary expenses federal or state and all probate and other duties arising by reason of my death.
>
> 2: I bequeath all monies held in my accounts at the Auckland Savings Bank, Auckland, New Zealand to my Sister – Margaret Elaine Smith of 15 Sherwood Road, Lytham St Anne's, FYB 4BL Lancashire, England or in the event of her predeceasing me to my nephew Richard Julian Smith and my niece Janet Mary Smith in equal shares.
>
> 3: The monies held in my or joint accounts at the WestPac Bank to be held in Trust for my wife's care at the Nazarene Nursing Home, 25-39 Higgs St, Rothwell, Queensland.
>
> In the event of my wife's death, the monies in my WestPac Bank accounts are to be shared equally between my two nephews Timothy Owen Reed and Richard Julian Smith and my two nieces Marian Ellen Reed and Janet Mary Smith.
>
> 4: The home property and household contents situate at 82 Phillips Parade, Deception Bay, Queensland 4508 to be sold or otherwise disposed of at the discretion of my Trustee and the proceeds to be distributed in equal shares to my Nephews Timothy Owen Reed and Richard Julian Smith and my Nieces Janet Mary Smith and Marian Ellen Reed.

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[21] Outline of submissions on behalf of the first and second plaintiffs [44].

> 5; I bequeath the entire contents of the safe (situate in the small bedroom wardrobe – (tumbler code 709327) to my niece Janet Mary Smith"

[37] The day after Gordon's death, on 31 January 2019, Janet sent an email to Marian in the following terms:

> "Dear Marion (sic)
>
> My name is Janet and I am Gordon's niece in the UK.
>
> I am very sorry to tell you that Gordon passed away earlier this week (on Tuesday). I understand from the hospital that it was peaceful. You may know that he was taken ill last year, the day before he was due to come and visit us here in England and had been unwell since.
>
> My mum and I travelled to Australia to see him earlier this month, and were able to help him make preparations to move into a nursing home. He looked very ill when we arrived but he seemed to perk up and we had several enjoyable visits to chat to him. He was discharged from hospital and moved to a temporary nursing home the day we left. Sadly he then had a relapse and returned to hospital where he died a week after we returned to England.
>
> He appointed me to be his executor under his will and I will now endeavour to give effect to his wishes. Your brother Timothy is a beneficiary, as well as yourself, my self, my brother, and my Mother (his sister).
>
> Do you have an e-mail address for Timothy?
>
> Many thanks, and sorry to have to contact you with this sad news.
>
> Best wishes,
>
> Janet"

[38] Later, on 31 January 2019, Marian replied to that email in the following terms:

> "Hi Janet,
>
> I'm very sorry to hear about Gordon – he was a good man and one of the most intelligent people I have ever met. We were lucky to have him as an Uncle.
>
> I'm glad that he went quickly and peacefully. If there is an afterlife, then I'm sure that Dawn was there waiting for him. They were quite devoted to one another.
>
> The last two times I saw Gordon he was very unwell and had just been discharged from the hospital. But he'd been in and out of hospital multiple times.
>
> When I visited him last summer he was very excited about his trip to England and was really looking forward to seeing your family.

> I didn't have the heart to tell him that I didn't think he would get that far but people have to work things out for themselves.
>
> I'm so glad that you and your Mum were able to travel to Queensland to see him before he passed away. That would have made Gordon very happy.
>
> Thank you for contacting me and letting me know about the will. My Brother Tim and I are in regular contact with one another and don't live very far apart.
>
> I live in Toronto and my Brother lives in Brampton (a suburb north of Toronto). My Brother Tim's email address is …
>
> Please continue to email both of us regarding any developments. You're welcome to email both of us together as that would probably save you a lot of time."

[39] Later again on 31 January 2019, Janet sent an email to Tim in the following terms:

> "Dear Tim,
>
> My name is Janet, Gordon's niece in England. I have been in contact with Marian, your sister, and she has given me your e-mail address.
> I am writing to pass on the sad news that Gordon died on Tuesday evening (UK time).
>
> He had been in hospital, and my Mum and I went to Queensland to see him. We made arrangements to help him move into a nursing home. He was very ill when we arrived but seemed to improve and was well enough to leave hospital when we returned to the UK.
> Unfortunately, he died about a well after we got back to England.
>
> I'm sorry to have to tell you this very sad news. I think we will all miss him very much.
>
> He appointed me to be the executor of his will and you and Marian, myself, my brother and my Mum (Gordon's sister) are all beneficiaries.
>
> I will keep you informed of funeral arrangements etc.
>
> Best wishes,
> Janet"

[40] Tim replied to that email on 1 February 2019 in the following terms:

> "Hi Janet,
>
> Yes, this is very sad news about Uncle Gordon. I used to try and call him almost every week to see he was OK but now and again he would be unreachable. Then after a couple of weeks or so he would suddenly answer the phone and often as not explain how he had been in hospital again. I talked with him several times earlier this month but noticed his general condition appeared worse than usual and furthermore he couldn't stay on the phone very long at all.

> Glad you and your mother also were able to visit him before it was too late. I'm sure he was happy to see you!!
>
> Thank you for letting our family know about this. It would be a pleasure to talk at some point, maybe on the weekend? Gordon mentioned you and your brother often.
>
> Here are my phone numbers in Canada:
> …
>
> Feel free to call,
>
> Tim Reed"

[41] Tim's wife, Irene, then spoke to Janet and emailed her in the following terms on 6 February 2019:

> "Dear Janet,
>
> It was lovely speaking with you again last evening. It's really a blessing that we are finally acquainted with Gordon's family in the UK albeit under the very sad circumstances of his passing. On our last visit with him in 2017 he spoke very affectionately of you, your mother, brother and your family, proudly showing us photographs of your wedding and your children. It was then that I hoped our paths would cross some day.
>
> I will remember Gordon as a gentleman and a scholar in the finest sense of the word. He was also an incredibly kind and decent man.
>
> Tim and I are grateful to have enjoyed many enlightening conversations with him. He would often surprise us with a poetry recitation that would leave us spellbound. Gordon's childhood memories were so vivid and detailed that on our last visit I suggested he begin writing his memoirs. He smiled with eyes dreaming, then immediately went to his desk and brought out a typewritten paper entitled THIS IS MY LIFE. "You can keep this if you like", he said in a rather modest tone, "it is my recollection of my youth up until the time I met Dawn".
>
> Here is Gordon's story in his own words and written with the wit, candor and wisdom so characteristic of him. He will be missed,
>
> Warmest regards,
>
> Irene Reed"

[42] On Monday 4 March 2019 Janet sent a copy of the 2016 will to Tim and Marian by email.

[43] On 12 March 2019 Tim sent an email to Janet, copying in Marian, in the following terms:

> "Hi Janet,
>
> When I read the will you just sent, I see that a great deception has taken place, Our Aunt Dawn was very clear that she wanted our

family's wealth to stay in the family, as can be seen in her will (and in Gordon's previous will).

Over the years, while you were in England, I had to assist them with their affairs especially when they were older and less capable. This is the first we see of the totally different disbursement – obviously Gordon was not being honest with his wife Aunt Dawn or with us! And obviously you, your mother and brother conspired with Gordon on this – leaving us totally in the dark. You probably think we are stupid and don't see what you're up to.

The vast majority of Dawn and Gordon's wealth comes under #2 (ASB accounts – well over $1 million). And yet none of it is going to the Reed side of the family – it is all going to the Smith side of the family. We now are only listed as beneficiaries of the much smaller assets.

What do you have to say? Are you willing to have a fair disbursement?

PS – With such large funds in the estate we do not agree to you nickle and diming us on expenses.

Regards,

Tim Reed"

[44] On 15 March 2019 Janet replied to Tim's email, copying in Marian. in the following terms:

"Tim,

Needless to say, I was extremely shocked and upset to receive your e-mail. I do not accept the very unpleasant personal attacks upon myself and my family which are completely unfair and totally groundless.

Clearly you are very angry not to be receiving as much money as you expected from Uncle Gordon's will, although he has treated his nieces and 2 nephews equally. You might disagree with his decisions but he made his own decisions for his own reasons. My duty as executor is to do my best to give effect to his will.

Australian solicitors are dealing with his Australian estate, NZ solicitors are dealing with his NZ estate. And a UK solicitor is verifying documents for the grant of probate in each of those countries.

I have reported your grievance to the Australian solicitors.

If you genuinely believe you have some legitimate grounds for complaint, then I suggest you take independent legal advice.

Janet"

The pleaded conversations

The 1994 conversation

[45] Tim swore an affidavit in which he recalled the 1994 conversation. He recalled being 35 years old and attending a family dinner at his parents' house attended by Gordon

and Dawn. Tim's parents were Owen and Catherine. Tim deposed that at the family dinner Gordon and Dawn pulled him aside and informed him that they wanted to discuss some private matters because he was the eldest of Owen's children. Tim recalled Dawn informing him that she and Gordon were preparing wills. They apparently joked that they were having the conversation with him in case they had a plane crash flying home. Tim recalled that "Dawn and Gordon" told me that their wills had been discussed with Owen but also wanted Tim to know that, in the event that they both died, they were leaving everything to his mother and father, including the family home "Glenelg" and all their bank deposits.[22]

[46] Tim further recalled that during the 1994 conversation both Gordon and Dawn said that their estates should go to Owen. They told Tim that Owen's and Dawn's late father, James, had struggled to purchase "Glenelg" and that Owen had made financial contributions which had assisted Dawn, Gordon and James in maintaining "Glenelg" and paying their living expenses.[23] Tim recalled "Dawn and Gordon both also acknowledged" that Owen had given his interest in "Glenelg" to Dawn which had meant that Dawn and Gordon had not had a mortgage and were able to save considerable amounts of money. Tim recalled Dawn saying to him, and Gordon agreeing with her, that there was "a strong family connection to Glenelg" because it had "housed two generations of 'Reeds'".[24] Tim deposed that, in the context of explaining why they had never had children, Gordon and Dawn told him that "our Reed family was all they had".[25] Tim recalled Dawn saying, and Gordon agreeing with her, that she believed their estate should "go to the Reed family". They both impressed on him the "extreme importance" of keeping the family assets within the Reed side of the family.[26]

[47] Tim deposed that during the 1994 conversation "I asked what would happen if one of them were to die first". Tim deposed that he recalled Gordon's response "because of the terminology he used". Tim recalled Gordon's response as comprising words to the effect that "the last one on this earth will give all their assets to Owen [Tim's father] upon meeting their maker." Tim deposed that Dawn agreed with Gordon after he provided this response.[27]

[48] Tim made no notes of the 1994 conversation.[28] He gave evidence that he "wasn't really that interested" in the 1994 conversation and "wasn't really interested in the subject of wills".[29] He accepted that there was nothing unusual in the idea that Gordon's and Dawn's estates would be left to Owen and Catherine.[30]

The 2001 conversation

[49] Tim deposed to having received a telephone call from Dawn and Gordon in early 2001 during which they advised him that they were "updating their wills again

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22 Ex 1 23 [16].
23 Ex 1 23-24 [17].
24 Ex 1 24 [18].
25 Ex 1 24 [20].
26 Ex 1 24 [21].
27 Ex 1 24 [22].
28 T 1-29 l 30.
29 T 1-30 ll 32, 44-45.
30 T 1-30 ll 1-3.

because they now lived in Australia and [his] father had died"[31]. He recalled Gordon saying words to the effect "we are changing our wills for the last time and the purpose of this telephone call is to tell you what our wills provide".[32] Gordon explained that "now that [Tim's] father had died, they were amending their wills so as to leave all their possessions 'to the next generation of Reeds'".[33]

[50] Tim relevantly deposed as follows:[34]

> "They said to me that the intent of their new wills was similar to their earlier wills. I remember both of them each saying how grateful they were to my father for the help that he provided them over the years, and particularly his generosity regarding the gift of his portion of Glenelg to them after James' death. One of them said (I cannot recall who) that my father's gift of his portion of Glenelg had meant they had never needed a mortgage and so could save substantial funds, plus that its sale enabled them to purchase the new property in Deception Bay. They said it would only be fair that their bank deposits and the property be left to us, and if the property were sold, we receive the majority of the sale proceeds.
>
> They said that once both had died, Marian and I would receive their estate in equal shares. They said that they were not leaving anything directly to our brother William because of his disability, but they trusted us to assist him from our shares of the funds we would receive.
>
> The only significant difference between the distribution of the assets from their previous wills (which I took this to mean their 1995 wills) was that if we (meaning Marian and I) sold Glenelg, then a third of the sale proceeds would be left to charity for medical research in light of their recent health concerns.
>
> I remember Gordon saying, and Dawn agreeing, that it did not matter who was the 'last one left' because either way most of the estate would go to me and Marian. I also remember Gordon saying words to the effect of that they were 'revising our wills for the very last time while we're both still healthy and alert', had 'no intention of changing anything in the future' and that they 'just want to make sure there is no uncertainty as we get older.' I thanked each of Dawn and Gordon for their generosity."

[51] Tim deposed that, later in April 2001, he received Dawn's handwritten note dated 4 April 2001 and then a few weeks later received the typed letter from Dawn and Gordon dated 19 April 2001. [35]

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31 Ex 1 24 [27].
32 Ibid
33 Ex 1 25 [28].
34 Ex 1 25 [29]-[32]..
35 Ex 1 25 [33]-[34]

[52] Tim made no notes of the conversation.[36] He accepted that when the conversation occurred, he would not have imagined that the conversation was ever going to be the subject of court proceedings.[37]

The 2012 conversation

[53] Tim travelled to Australia in early 2012. After he arrived, Gordon asked if Tim would accept the position as his attorney.[38] An enduring power of attorney was signed on 10 February 2012.[39]

[54] Tim deposed to a conversation with Gordon one afternoon during his stay in Australia at the Deception Bay hotel. Tim recalled that Gordon appeared sad. He recalled Gordon saying that he was not close with his sister or her two children. Tim's recollection was that Gordon told him that his family all refused to visit him or even talk to him.[40]

[55] Tim also deposed to another conversation with Gordon in the following terms:[41]

> "Near the end of my time in Australia, Gordon and I were siting in his dining room at Glenelg one evening and we were talking about Dawn's health issues. He then said to me words to the effect of:
>
> > 'The prognosis for me is not good. I could die anytime and Dawn is in the nursing home now and won't be moving back. As you're aware, Dawn and I agreed that when we're both gone, everything goes to you and your sister Marian since your Dad passed away. You can move into the house or sell it, whatever you two see fit. Plus, the deposits and safe are yours.'
>
> I remembered previous conversations with Dawn and Gordon about those matters and told him that I understood and remembered our previous discussions about their wills. I also promised Gordon that after I returned home to Canada, I would continue calling him and Dawn at regular intervals to check in with them about their safety and wellbeing."

[56] Tim made no notes of these conversations.

Other alleged conversations

The 1996 conversation

[57] Marian gave evidence about a May 1996 trip that she took with Gordon and Dawn to Greece and Turkey.[42] She recalled conversations with Gordon and Dawn during this trip. According to Marian, Dawn and Gordon said that they wanted their estates to

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36 T 1-42 l 24.
37 T 1-42 ll 36-38.
38 Ex 1 29 [55].
39 Ex 1 26 [57], 94.
40 Ex 1 29-30 [58]-[60].
41 Ex 1 30 [64].
42 Ex 1 155 [22], [24].

pass to "the next generation of Reeds".[43] She recalled that "Gordon and Dawn each said words to the effect "that they had always considered Marian, Tim and William as their own children".[44]

[58] Marian made no notes of these conversations.[45] They were not pleaded or particularised.

Marian's 2001 conversation

[59] Marian gave evidence about a discussion with Gordon and Dawn in 2001.[46]

[60] She deposed to recalling a telephone call after she was sent a copy of the 2001 wills in which Gordon or Dawn said that "this was the last time they would revise their wills" and that they were expecting no more life changes.[47] Marian recalled that one of Gordon or Dawn said that it did not matter who died first, because their estates would be distributed to the Reed family. She deposed that she overheard the other person (she could not remember whether that was Gordon or Dawn) calling out in the background, agreeing with the person speaking to her on the phone.[48]

[61] Marian made no note of the conversations. It was not a conversation that was pleaded or particularised. When cross examined about her recollection of Dawn and Gordon saying "this was the last time they would revise their wills", she said "… they wanted this to be the last one and … they wanted to move on and not have to worry about anything anymore and wrap up their affairs in that will. That's what they told both Tim and I". [49]

The 2003 conversation

[62] Tim gave evidence of a trip to Australia with his wife, Irene, and their children in 2003.[50] He deposed to a conversation involving Irene, Gordon and Dawn. Tim recalled that Gordon asked him if he still had a copy of their wills. Gordon had said "Good it's cast in stone now young Timothy. You or your sister might like to settle here in Glenelg one day after we are gone in order to escape those Canadian winters". Tim recalled Dawn saying that they were not gone yet, but that one day Tim would have to decide what to do with the house because "it will all be yours and Marian's, along with our savings and everything else of course".[51] Tim deposed that he vividly recalled how enthusiastic and positive Dawn and Gordon seemed to be about the prospect of leaving their estate to Tim and Marian. [52] Dawn had said that it was important to "secure the 'Reed family home'… with the family".[53]

[63] Tim made no notes of this conversation. It was also not a conversation that was pleaded or particularised.

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43 Ex 1 155 [24].
44 Ex 1 155 [24].
45 T 2-19 ll 4-9.
46 Ex 1 155 [25] ff.
47 Ex 1 156 [28].
48 Ex 1 156 [28].
49 T 2-35 ll 20-25.
50 Ex 1 26 [36] ff.
51 Ex 1 26 [39].
52 Ex 1 26 [40].
53 Ex 1 26 [40].

The 2005 conversations

[64] Marian gave evidence of a trip she took with her mother to Australia in 2005.[54] She deposed that Dawn and Gordon raised the subject of their wills in multiple conversations during this trip and they said that they were both making Marian and Tim their sole heirs and executors.[55] Marian said that on "multiple occasions" they each said that these wills were "final" and that they wouldn't be changing their wills.[56]

[65] Marian made no notes of these conversations. They were also not pleaded or particularised.

The credit of the witnesses

[66] Tim, Marian, Janet and Margaret each gave evidence. The evidence in chief of each witness was given by the witness adopting the truth of previously sworn affidavits. The witnesses were not present in Court when they gave evidence but appeared by video link from overseas. I observed the witnesses when they were predominantly under cross examination. I did not form the view that any witness was dishonest.

[67] Janet and Margaret were cross examined in a limited way about the extent of their dealings with Dawn and Gordon and their recollections of Dawn's physical and mental health later in her life. Each of Janet and Margaret appeared as credible and reliable witnesses.

[68] There was no contemporary record of the alleged testamentary agreement. The parties to the alleged testamentary agreement, Dawn and Gordon, were deceased and not available to admit or deny that agreement. Tim and Marian gave evidence of historical conversations from which the alleged testamentary agreement was said to be able to be inferred. They each had an interest in the testamentary agreement being recognised. All of these factors confirm the need for careful scrutiny of their evidence.[57]

[69] I did not find Tim and Marian to be impressive witnesses. I formed the view that much of their testimony was no more than their respective impressions or reconstructions of conversations or events which had occurred in informal family settings many years past. Their evidence in chief adopted expressions like "vividly recall"[58] and "vividly remember"[59] in relation to family conversations and events which had occurred upwards of 15 years ago in respect of which there were no contemporaneous records. Their evidence in chief also tended to recall oral statements in conversations as having been made by "Gordon and Dawn",[60] which was itself suggestive of reconstruction rather than genuine recollection.

[70] I did not regard Tim as a reliable witness. He was a person who felt aggrieved by the content of the 2016 will. The contemporaneous documents revealed that around the time when Tim was initially advised of the existence of the 2016 will, he believed

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54 Ex 1 156 [30] ff.
55 Ex 1 156 [31].
56 Ex 1 156-7 [32].
57 *Plunkett v Bull* (1915) 19 CLR 544, 548-549; *Robertson v Barker* [2021] NSWSC 1682 [134].
58 Ex 1 26 [40]
59 Ex 1 156 [31]
60 Refer by way of example to Ex 1 23 [16], [17], 24 [19], 155 [24].

that "a great deception [had] taken place".[61] By the time that he gave oral evidence, his belief was that there had "been a great deception perpetrated on [him]".[62] As I have indicated he was a person who "considered the wealth of Gordon and Dawn to be [his] family's wealth, not anyone else's family wealth".[63] He also was not a witness who was prepared to make appropriate concessions about the likely accuracy and state of his recollection. When cross examined about the 1994 conversation, he was initially quite adamant that his recollection was unimpeachable. It was reasonably put to him that, given that he had not taken contemporaneous notes of the conversation and had also said that he "wasn't really that interested" in the conversation, it was not possible that he could remember the conversation some 27 years later.[64] His response was "I guess, I'm pretty good at that."[65] It was put to him that, after 27 years he did not actually have a recollection of the conversation. His response was "I have a good memory for these kind of things".[66] He eventually accepted that he did not know what Dawn and Gordon had said word for word and then added "but I know what they said in terms of what the subject was and what they were trying to tell me".[67] I formed the view that Tim's recollections were conceived through the prism of his own self- interest and strong sense of having been deceived by Gordon and members of the Smith family. I have found it necessary to regard Tim's evidence with particular caution.

[71] Marian also gave evidence about distant family conversations, about which there were no contemporaneous notes. She presented as a witness who was not prepared to make appropriate concessions in relation to the difficulties which necessarily attend the accurate recollection of such conversations.[68] The plaintiff submitted that it is not unreasonable to think that a person who has a conversation about a windfall would remember the conversation even after, as here, such a long time.[69] The conversations being recalled had occurred more than a decade past. It might be that a long past event or occasion might be remembered with some confidence, but it is an entirely different matter to suggest that someone might retain an accurate or reliable recollection of what was said in a conversation at such an event or on such an occasion. I formed the view that her evidence about these conversations was not reliable and should be treated with particular caution.

Evidence and findings about Gordon's and Dawn's wider family relationships

[72] The plaintiffs led evidence about the nature and extent of Gordon's and Dawn's relationships with his and her wider families. The evidence was adduced to support the inference that, at certain times, Gordon and Dawn considered themselves obliged to provide for the Reed family arising out of Owen's historical generosity and by reason of their affection for Owen's children, particularly Tim and Marian. As to the former matter, it was clear that Tim regarded Dawn's and Gordon's wealth as being

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61 Ex 1 211.
62 T 1-28 l 14.
63 T 2-15 ll 23-27.
64 T 1-30 ll 25-37.
65 T 1-30 l 37
66 T 1-35 ll 25-26.
67 T 1-36 ll 5-6.
68 T 2-37 ll 1-10.
69 Outline of submissions on behalf of the first and second plaintiffs [28].

a product of Owen's benevolence. Indeed, Tim "considered the wealth of Gordon and Dawn to be [his] family's wealth, not anyone else's family wealth".[70]

[73] Tim's evidence extended to recollections of conversations with Gordon which tended to paint an adverse view of Gordon's relationships with his extended family. For example, he gave evidence that Gordon told him in 2012 that he was not close to Margaret or her two children.[71] However, there was a considerable body of evidence which suggested that Gordon enjoyed an affectionate relationship with his side of the family. Margaret gave quite detailed evidence about the nature of her relationship with Gordon and Dawn.[72] She described their relationship as being very close throughout their life, although they spent much of it living on opposite sides of the world. That she enjoyed a close relationship with Gordon was not a matter challenged in her cross examination. Gordon visited Margaret in the UK on four or five occasions and stayed with her. Margaret travelled to Australia to see Gordon shortly before his death in 2019. She maintained regular telephone, mail and email contact with both Dawn and Gordon. This aspect of her evidence was confirmed by her cross examination.[73] Margaret also gave evidence that when her parents died, they left the majority of their money to her brothers John and Gordon.[74] This evidence was not challenged in her cross examination.

[74] Janet deposed that she had infrequent contact with Gordon until after Gordon's brother, John, died in 2008. [75]In 2009, Gordon asked Janet to be the administrator of John's estate.[76] During the period of the administration of John's estate, Janet had frequent contact with Gordon and they became quite close.[77] After John's death, Janet and Gordon would speak on the phone regularly, sometimes a couple of times a month. If Gordon was unwell they would sometimes speak daily. They would also email.[78] Janet's affidavit exhibited email correspondence with Gordon in 2011.[79] The content of that email correspondence was suggestive of a close relationship.

[75] Further, in her email to Janet sent on 31 January 2019, Marian said of Gordon "When I visited him last summer he was very excited about his trip to England and was really looking forward to seeing your family".[80] In his email dated 1 February 2019 to Janet,[81] sent before he was aware of the content of 2016 will, Tim wrote: "Glad you and your mother also were able to visit [Gordon] before it was too late. I'm sure he was happy to see you!! … Gordon mentioned you and your brother often." Tim's wife, Irene, also sent an email to Janet some five days later in which she recalled that in 2017 Gordon had spoken very affectionately of Janet, her brother and family.[82]

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70 T 2-15 ll 23-27
71 Ex 1 29 [59].
72 Ex 1 260-263 [10]-[22]; 267-8 [2]-[4].
73 T 6-20 ll 12-35.
74 Ex 1 268 [3]-[4].
75 Ex 1 187-188 [8]-[12], 221-222 [1]-[11].
76 Ex 1 188 [10].
77 Ex 1 188 [13].
78 Ex 1 194 [41].
79 Ex 1 225 ff, 236 ff.
80 Ex 1 206
81 Ex 1 151.
82 Ex 1 209.

[76] Although this evidence of the familial relationships, provided some context to the dispute, it did not provide clear and reliable proof of the alleged testamentary agreement. Put another way, it did not tend to prove that Gordon and Dawn regarded themselves as contractually bound not to revoke their 2001 wills. Viewed at its highest, this type of evidence may have provided some explanation for the form of bequests contained in the various wills from time to time but did not provide a basis for inferring an agreement not to revoke the 2001 wills.

[77] In any case, the findings I make about the various familial relationships are as follows:

(a) Gordon and Dawn each worked until their retirement;[83]

(b) At all material times, Gordon and Dawn enjoyed loving, good family relationships with the members of the Reed family;

(c) Throughout Gordon's life, Margaret and Dawn were loving siblings in regular contact. Margaret was also in regular contact with Dawn.

(d) From 2008, following John's death, Janet and Gordon developed and enjoyed a good relationship as uncle and niece and they became close;

(e) Owen had been generous and benevolent in his dealings with Gordon and Dawn which had been to their financial benefit;

(f) Gordon had also benefitted financially on the death of his parents;

(g) Gordon's and Dawn's accumulated wealth and assets were the product of benefits they had received from Owen, Gordon's inheritance and their own working endeavours.

Material findings about the historical conversations

[78] I will deal with the pleaded conversations first.

[79] I find that it is probable that there was a conversation in 1994 in which Gordon and Dawn advised Tim that they would be preparing wills that would leave "Glenelg" and their bank deposits to Tim's father. It would seem to me likely that Gordon and Dawn wanted to explain to Tim that their rationale for their wills at that time was related to his father's historical generosity towards them. I do not accept that there was any statement made by either of them to the effect that it was extremely important to keep their assets within the Reed side of the family. Tim's evidence in this regard did not recalls words in a conversation or the effect of such words but rather what had been "impressed on [him]". He would later explain in cross examination that he "knew what they were trying to tell me". This aspect of Tim's evidence I reject as reconstruction. Further, the subsequent conduct of Dawn and Gordon in executing the 1999 wills provides strong objective evidence that, at least at that time, the prospect of keeping assets within the Reed side of the family was not something which they regarded as being "extremely important". There is no obvious reason why they would have held a different view in 1994.

[80] I find that it is more probable than not that the pleaded 2001 conversation did not occur. Tim recalled that alleged conversation as having occurred before he received

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83 Ex 1 24 [19]; T 1-33 l 24.

the 4 April 2001 handwritten note from Dawn.[84] That note, and the 19 April typed letter, made no reference to any prior conversation about the 2001 wills. Objectively each of those documents might have been expected to refer to such a conversation had it in fact occurred. The conversation as recalled by Tim began with Dawn and Gordon telling him that they were updating their wills "because they now lived in Australia and [Tim's] father had died".[85] However, Gordon and Dawn had lived in Australia since 1998[86] and Tim's father had died in October 1996.[87] Since those events, Gordon and Dawn had already made the 1999 wills. Hence, there was no logical reason for them to ring Tim in early 2001 and say they were making new wills because his father had died and they had moved to Australia. Indeed, Tim recalled Gordon saying "now that [Tim's] father had died, they were amending their wills so as to leave all their possessions 'to the next generation of Reeds'".[88] However, the objective evidence is that when Tim's father died, Gordon and Dawn had actually made a will leaving their estate to a charity. Further, Tim recalls that Gordon and Dawn said to him that the only significant difference between the distribution of assets from their previous wills would be that one third of the sale proceeds of "Glenelg" would go to a charity. However, at this time the existing wills were the 1999 wills and the statement attributed to Dawn and Gordon did not accurately reflect the differences between the 2001 wills and the 1999 wills. The conversation is also not evidenced by any contemporaneous document.

[81] I find that it is more probable than not that the 2012 conversation did not occur. Tim recalled Gordon saying words to the effect "as you're aware Dawn and I agreed that when we're both gone, everything goes to you and your sister Marian since your Dad passed away. You can move into the house or sell it, whatever you two see fit. Plus, the deposits and safe are yours". This statement, if made, would have inaccurately reflected the 2001 wills in an important respect because, if the house were sold, according to the 2001 wills, one third of the proceeds would have had to have been distributed to the Council of the Queensland Institute of Medical Research. In that important respect, Dawn and Gordon had not agreed (formally or informally) that "everything goes to you and your sister". The conversation is also not evidenced by any contemporaneous document.

[82] I will also observe that even if this conversation had been made out, I would not have regarded the statement 'Dawn and I agreed" as evidencing a binding agreement not to revoke as distinct from the more usual kind of informal agreements that husbands and wives might be expected to make.[89]

[83] I will now turn to the conversations which were not pleaded or particularised.

[84] I find it more probable than not that the 1996 conversation as recalled by Marian did not occur in the terms described by her evidence. I find that it is likely that there may well have been some discussion about or reference to the 1995 wills during the May 2006 trip. At some time during the trip, Gordon and Dawn may also well have said that they considered Marian, Tim and William as their own children. However, I am

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84 Ex 1 24-25 [29]-[33].
85 Ex 1 24-25 [27].
86 T 1-43 ll 40-41.
87 Ex 1 24 [25].
88 Ex 1 25 [28].
89 *Osborne v Osborne* [2001] VSCA 228 [15].

not satisfied that it is more probable than not that Gordon and Dawn said words to the effect that "they wanted their estate to pass to the next generation of Reeds". The objective evidence provided by the 1995 wills is that Gordon and Dawn had not turned their mind to this outcome as distinct from a bequest to Owen and his wife. The 1999 wills is some objective evidence that, as at that time at least, it was not the intention of Gordon and Dawn to benefit the next generation of Reeds. The conversation is also not evidenced by any contemporaneous document.

[85] In terms of the 2001 conversation recalled by Marian, I find that it is probable that in 2001, after she had received a copy of the 2001 wills, Gordon and Dawn telephoned Marian about those wills. I do not accept, and I do not find, that there was any type of definitive statement made to the effect that this was the last time that Gordon and Dawn would revise their wills. In cross examination, Marian's recollection was suggestive of more aspirational or merely hopeful statements to the effect that Gordon and Dawn had indicated that they wanted this will to be their last one as they wanted to be able to move on without having to worry about their estate. The conversation is also not evidenced by any contemporary document.

[86] I will also observe that even if this conversation had been made out, I would not have regarded the statement to the effect that this was the last time they would revise their wills as evidencing a binding agreement not to revoke as distinct from the more usual kind of informal agreements that husbands and wives might be expected to make.[90]

[87] I find that it is more probable than not that the 2003 conversation described by Tim did not occur in the terms described by his evidence. The statement attributed to Dawn to the effect that one day Tim would have to decide what to do with the house because "it will all be yours and Marian's, along with our savings and everything else of course" if made, would not have accurately reflected the terms of the 2001 will. Further, the other statement attributed to Dawn that it was important to "secure the Reed family home with the family", did not reflect the terms of the 2001 will because that will contemplated that the family home might be sold at any time and one third of the proceeds given to a charity. Tim's wife, Irene, was said to be a party to this conversation but was not called as a witness even though they are still married. There was no explanation as to why she was not called. I infer that any evidence she could give would not have supported the plaintiffs' case about this conversation.[91] The conversation was also not evidenced by any contemporaneous document and was not pleaded.

[88] As to the 2005 conversations recalled by Marian, I find that it is more probable than not that the conversations did not occur as described by Marian. Marian recalled that Gordon and Dawn, in 2005, explained a rationale for their wills as being "they wanted to leave their estates to us in lieu of our late father Owen, in acknowledgement for all that he had done for them in the past."[92] That rationale was not mentioned in either the handwritten note dated 4 April 2001 or the typed letter of 19 April 2001 which provided explanations for the 2001 wills. It was not a rationale that existed in relation to the 1999 wills. I also find that it implausible that Gordon and Dawn would have each said on multiple occasions that their wills, which had by now been executed four

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90 *Osborne v Osborne* [2001] VSCA 228 [15].
91 *Jones v Dunkel* (1959) 101 CLR 298, 312.
92 Ex 1 p 156 [31].

years ago, were "final". The conversations are also not evidenced by any contemporaneous document and were not pleaded.

[89] I will also observe that even if this conversation had been made out, I would not have regarded the statement to the effect that the wills were final as evidencing a binding agreement not to revoke as distinct from the more usual kind of informal agreements that husbands and wives might be expected to make.[93]

Relevant Legal Principles

[90] The starting point is that a will is, by its nature, revocable and may be revoked, *inter alia*, by the making of a later will.[94] In *Pridham v Pridham*,[95] Layton J observed that "[a]t the heart of the doctrine of mutual wills is the existence of a formal, legally binding agreement, often between husband and wife, not to revoke the effect of two wills which are made together and in essentially the same terms".

[91] In *Bigg v Queensland Trustees Ltd*, McPherson J said:[96]

> "Mutual wills are separate testamentary instruments of two individuals in reciprocal terms. The discovery that such wills have been executed by two or perhaps more persons has in itself no particular legal significance. See *Gray v Perpetual Trustee Co.* [1928] A.C. 391, 400. What matters is proof that the parties made an agreement to execute their wills in that form and that, expressly or by implication, they contracted not to revoke them. It is the contract rather than the form of the wills that attracts relief at law or in equity. That is because a will is by statute made revocable and the parties cannot by their agreement displace that characteristic of a testamentary instrument."

[92] In *Hussey v Bauer*,[97] Martin J, with whom Fraser JA and Chesterman JA agreed, identified the following principles as having been recognised by the authorities:

> "The characteristics of mutual wills and the means of proving their existence have been the subject of consideration in many courts. It is possible to draw from those authorities the following principles:
>
> (a) Mutual wills arise when two persons agree to make wills in particular terms and agree that those wills are irrevocable and that they will remain unaltered.
>
> (b) Substantially similar, even identical, wills are not mutual wills unless there is an agreement that they not be revoked.
>
> (c) The mere making of wills simultaneously and the similarity of their terms are not enough taken by themselves to establish the necessary agreement.

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93 *Osborne v Osborne* [2001] VSCA 228 [15].

94 *Baird v Smee* [2000] NSWCA 253 [64] (Giles JA); *Estate of Masters* (1994) 33 NSWLR 446, 455 (Mahoney JA).

95 [2010] SASC 204 [23].

96 [1990] 2 Qd R 11, 13.

97 [2011] QCA 91 [29] (Martin J, with whom Fraser and Chesterman JJA agreed).

(d) A will is, as a matter of probate law, revocable. But the revocation of a mutual will ordinarily results in the imposition of particular obligations:

> 'It has long been established that a contract between persons to make corresponding wills gives rise to equitable obligations when one acts on the faith of such an agreement and dies leaving his will unrevoked so that the other takes property under its dispositions. It operates to impose upon the survivor an obligation regarded as specifically enforceable. It is true that he cannot be compelled to make and leave unrevoked a testamentary document and if he dies leaving a last will containing provisions inconsistent with his agreement it is nevertheless valid as a testamentary act. But the doctrines of equity attach the obligation to the property. **The effect is, I think, that the survivor becomes a constructive trustee and the terms of the trust are those of the will which he undertook would be his last will**.'[98]" (emphasis in original)

[93] An agreement not to revoke is essential for the existence of a mutual will and is what distinguishes a mutual will from wills with merely the same or similar provisions.[99]

[94] As to the nature and quality of the required underpinning agreement, in *Baird v Smee*, Handley JA said:[100]

> "The need to prove a legally binding contract has always been insisted upon in these cases. …
>
> The making of mutual wills in reciprocal terms is some evidence of the making of such a contract…, but without more 'does not of necessity imply any agreement beyond that so to make them'… . The existence of such wills is consistent with a consensus between the spouses which they did not intend to be legally binding, or with an agreement that wills be made in that form without any agreement that they could not be revoked. The search for proof of contractual intention is not confined."

[95] A common reality is that a married couple may make informal agreements about their wills which are not intended to be legally binding. This reality was alluded to in *Baird v Smee*, where Mason P said:[101]

> "Thirdly, there is the absence of any hard evidence that Derek and Gwendoline perceived the need to take the matter beyond trusting the survivor in point of honour to deal fairly and reasonably in the light of circumstances as they might arise during the survivor's lifetime. Like Astbury J in *Re Oldham* (at 88):

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98 Citing *Birmingham v Renfrew* (1937) 57 CLR 666, 683 (Dixon J).
99 *Pridham v Pridham* [2010] SASC 204 [24].
100 Ibid [26]-[27].
101 Ibid [12].

> "I cannot build up a trust on conjecture, and there are many reasons which may have operated on the minds of these mutual will makers. Each may have thought it quite safe to trust the other, and to believe that, having regard to their ages, nothing was likely to occur in the future substantially to diminish the property taken by the survivor, who could be trusted to give effect to the other's obvious wishes. But that is a very different thing from saying that they bound themselves by a trust that should be operative in all circumstances and in all cases."'

[96] In the same case, Handley JA observed:[102]

> "There is a legal presumption of some strength that informal agreements between spouses are not intended to be legally binding: see *Balfour v Balfour* [1919] 2 KB 571; *Cohen v Cohen* (1929) 42 CLR 91, 96; *Birmingham v Renfrew* (1937) 57 CLR 666, 682. In the same case Latham CJ said at 674-5:
>
> > 'Perhaps most husbands and wives make wills "by agreement", but they do not bind themselves not to revoke their wills. They do not intend to undertake or impose any kind of binding obligation.'
>
> In cases of the present kind, as Viscount Haldane said in *Gray v Perpetual Trustee Co Limited* [1928] AC 391 at 400 a definite agreement to constitute equitable interests must be shown to have been made 'and without such a definite agreement there can no more be a trust in equity than a right to damages at law'."

[97] In *Osborne v Obsorne*,[103] Winneke P said:

> " … the fact of making identical wills will not, of itself, establish an implied agreement not to revoke. *This is because, as his Honour also noted, many husbands and wives make corresponding wills 'by agreement' without binding themselves not to revoke them. Such wills are infinitely more likely to be the product of mutual trust and moral responsibility than a binding obligation not to revoke.*" (emphasis added)

[98] The mere fact that two persons simultaneously make wills with mutually similar provisions does not itself establish such an agreement.[104] Further, it is important to observe that to establish the requisite contract, it is not sufficient to merely prove that testators intended at the time of making wills in reciprocal terms to leave their estates to particular beneficiaries. That intention is not necessarily probative of an agreement not to revoke. In *Aslan v Kopf*,[105] Gleeson CJ (with whom Kirby P and Priestley JA agreed) observed that people may make such wills "in a context where there is nothing more to it than that and they regard themselves as free to alter their wills as they please

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102 Ibid [24]-[25].
103 [2001] VSCA 228 [15].
104 *Baird v Smee* [2000] NSWCA 253 [6] (Mason P).
105 [1995] NSWCA 26 (BC9504562), 5.

or as circumstances alter". In *Re Goodchild (Deceased)*,[106] Leggatt LJ (with whom Morritt and Phillips LJJ agreed) said:

> "Two wills may be in the same form as each other. Each testator may leave his or her estate to the other with a view to the survivor leaving both estates to their heir. But there is no presumption that a present plan will be immutable in future. A key feature of the concept of mutual wills is the irrevocability of the mutual intentions. Not only must they be binding when made, but the testators must have undertaken, and so must be bound, not to change their intentions after the death of the first testator."

[99] There are some relevant principles of construction of wills that have some application to the present case. The paramount rule of construction is to ascertain the intention of the testator.[107] Prima facie, the words of a will are to be given their "ordinary and natural meaning"[108] or "usual meaning".[109] Where a will uses clear words of gift, those words are not to be cut down by subsequent words except where it is reasonably certain that the subsequent words have that effect.[110] This rule has been referred to as a rule of common sense.[111] In *Peter v Shipway*,[112] Griffith CJ considered that a bequest in terms "to my daughter… absolutely for her sole and separate use" was a "clear gift" to the daughter "absolutely". The Chief Justice observed "the words seem to leave no room for doubt".

Resolution of the First Ultimate Issue

[100] Having regard to the evidence and my findings I have reached the conclusion that the plaintiffs have failed to prove the existence of the pleaded testamentary agreement. My reasons for this conclusion may be set out as follows:

(a) The 2001 wills do not contain any provision which evidences an agreement not to revoke. There is also no contemporaneous document which evidences such an agreement.

(b) The terms of the 2001 wills gifted the whole of the estate to the surviving spouse "for [his or her] sole use and benefit absolutely". This was the language of a clear gift[113] which, in my view, is inconsistent with the idea that the surviving spouse was burdened with any limitations on use and enjoyment. There was also no language in the 2001 wills which supported the cutting down of this clear gift. A gift of this nature may not have precluded a contract not to revoke wills but it did recognise that the "absolute" beneficiary of the first operative will would be someone entitled to substantially full enjoyment of the fruits of the gift in favour of the survivor.[114] That gift to my mind is inconsistent with the second promise of the alleged testamentary agreement which in terms imposed a limitation on enjoyment and use. Even as to the so called first

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106 [1997] 3 All ER 63, 71.
107 *Peter v Shipway* (1908) 7 CLR 232, 240 (Griffith CJ).
108 *Re McPherson* [1968] VR 368, 371.
109 *Public Trustee of Queensland v Smith* [2009] 1 Qd R 26, 31 [21].
110 *Peter v Shipway* (1908) 7 CLR 232, 241 (Griffith CJ).
111 Ibid 240.
112 Ibid 238, 241.
113 *Peter v Shipway* (1908) 7 CLR 232, 240 (Griffith CJ).
114 *Baird v Smee* [2000] NSWCA 253 [10] (Mason P).

promise of the alleged testamentary agreement, the absolute nature of the gift does not sit comfortably alongside the implied agreement not to revoke. In *re Oldham*,[115] Astbury J observed "If the spouses intended to do what the plaintiff suggests, it is difficult to see why the mutual wills gave the survivor an absolute interest in the whole of the property of the one who died first."

(c) The 2001 wills were drawn by a solicitor and that solicitor was not called to give evidence. There was no evidence adduced from his file. If there had been a testamentary agreement of the kind alleged, as distinct from the more usual informal agreement that might arise between a husband and wife, it might ordinarily or reasonably have been expected that the agreement would have been the subject of instructions to the solicitor and either reflected in the 2001 wills or in an accompanying document. The fact that the 2001 wills do not contain such a provision, and there is no such accompanying document, is a matter which tends to militate against any such testamentary agreement having been made.[116]

(d) By reference to the findings I have made, none of the historical conversations provided clear evidence of the alleged testamentary agreement.

The Second Ultimate issue: if the 2001 wills were subject to the testamentary agreement, is it appropriate to make the declaration?

[101] I have found that the 2001 wills were not subject to the alleged testamentary agreement.

[102] If the testamentary agreement had been established, Dawn died leaving her 2001 will unrevoked. In those circumstances, absent knowledge or consent by Dawn, Gordon would be regarded in equity as under an obligation to give effect to the terms of his corresponding 2001 will. His 2001 will would have remained revocable and might have been revoked. His 2016 will would have been a valid testamentary disposition, but his estate would be held subject to a constructive trust for the benefit of the beneficiaries under the 2001 will.[117]

[103] To obtain the declaratory relief, Tim and Marian would have been required to prove, on the balance of probabilities, that:

(a) Gordon did not advise Dawn that he was preparing his 2016 will and was revoking the testamentary agreement; or

(b) that Dawn at the material time did not have testamentary capacity so that she could provide instructions, if she wished, for a new will to be prepared for her.

[104] There is no evidence as to whether Gordon told Dawn anything about the 2016 will. The plaintiffs did not prove that Gordon did not tell Dawn about his 2016 will.

[105] Dawn had signed an enduring power of attorney in favour of Gordon on 14 December 2010.

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115 [1925] 1 Ch 75, 87.
116 *Pridham v Pridham* [2010] SASC 204 [57]; *Charles v Fraser* [2010] EWHC 2154 [66].
117 *Baird v Smee* [2000] NSWCA 253 [65].

[106] The plaintiffs allege that prior to Gordon executing his 2016 will, Dawn had lost testamentary capacity.[118] They particularised that allegation by reference to a series of hospital, medical and carer records spanning the period 4 August 2010 until 20 December 2014. No treating doctor or nurse was called to give evidence on the issue as to whether, and if so when, Dawn lost testamentary capacity. There was no expert medical or legal opinion evidence adduced in relation to this issue. Rather, the plaintiffs sought to advance their case by way of inference.[119] The notes and records referenced dementia and cognitive impairment, which at times was described as "mild" in nature.[120] Some aspects of the notes and records may be emphasised:

(a) On 4 August 2010, Dawn was assessed as having mild cognitive impairment;

(b) On 6 August 2010, she was assessed as having "dementia and periodic confusion";

(c) On 3 May 2011, a doctor noted that she had "rapidly deteriorating alzheimers";

(d) On 16 May 2011, dawn produced a score on a test which was consistent with mild dementia;

(e) On 25 August 2012, her mental state was said to be "confused"

(f) On 20 December 2014 there is a note that 'Dawn likes to write things down in a book to remind herself about the events of the day";

(g) In 2015, her progress notes observed that she had a mild cognitive impairment;

(h) On 28 July 2017, an Acute Resuscitation Plan was prepared for Dawn which noted that she had "mild dementia"

[107] Three cognitive impairment tests were conducted in 2011 which noted mild impairment and memory loss. Unusual behaviours were noted as "agitation, anxious, hoarding food in draws."

[108] The existence of dementia and/or cognitive impairment, is not necessarily proof of a lack of testamentary capacity. For example, in *Croft v Sanders*[121] the deceased had signed a will when aged 85. He had developed delusions or hallucinations and had a mild underlying cognitive impairment. In that case, on its facts, it was found that the testator's underlying dementia had not deprived him of testamentary capacity. In *Drivas v Jakopovic*,[122] a testatrix had significant vascular disease in the brain. She was unable to recall her address and had problems with executive function. Despite those matters, she was found to have had testamentary capacity.

[109] I did not find the cross examination of Janet and Margaret on this issue to be of much, probative value. Janet was asked whether during her phone calls with Dawn in 2008, Dawn demonstrated periodic confusion or repeated herself.[123] Janet's response was

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118 Further Amended Statement of Claim [5C].

119 Outline of submissions on behalf of the first and second plaintiffs [41].

120 Eg Further Amended Statement of Claim [5C] subparagraphs (b)(i), (ii), (iv)(A), (vi), (vii), (ix), (x), (xi)(A), (xi)(B), (xi)(C), (xiii), (xiv), (xv), (xvi), (xvii), (xviii), (xix), (xx), (xxiv)(A), (xxiv)(B), (xxiv)(c), (xxv), (xxvi).

121 [2019] NSWCA 303.

122 (2019) 100 NSWLR 505.

123 T 6-10 ll 5-15.

that Dawn appeared "fine actually".[124] Janet said that Gordon periodically mentioned Dawn's health and had told her that Dawn had deteriorated in her mental health, but to what extent was not discussed.[125] Margaret accepted that Dawn had been diagnosed with dementia but could not recall when.[126] Margaret said after Dawn had entered a nursing home, she spoke to her once in 2014 on the telephone but could not recall whether she repeated herself during that call.[127]

[110] On 8 December 2017, Marian sent an email to Tim which materially stated:[128]

> "… I talked to Gordon last night and he said that Dawn pulled it together for your visit (as we both knew she would). Gordon was surprised at how well she mustered for the occasion. Of course, they both regressed after you left. … I saw her about 5 times when I was there and she clearly did not know who I was for about half of the visits."

[111] The plaintiffs were required to establish that Dawn lacked sufficient mental capacity to understand the nature of what she was doing, its effects, and that she was able to understand the extent and character of the property she was dealing with, and to weigh the claims which naturally ought to press upon her.[129] The evidence necessary to establish a lack of testamentary capacity will vary depending upon the circumstances of any given case. Here there is no testamentary instrument signed by Dawn which a party is contending was made without capacity. Rather, the allegation is that at some point during a period of time, Dawn lost testamentary capacity. The plaintiffs bore the onus to establish that allegation. A difficulty which confronts me is that none of the records before me were prepared with a view to addressing the specific considerations relevant to the test for testamentary capacity.[130] Further, this area of law recognises that a testator may lack general testamentary capacity but may nevertheless recover that capacity during lucid intervals.[131]

[112] On the basis of the material before me, I am not satisfied that it is more probable than not that Dawn lost testamentary capacity between mid-2010 and 21 January 2016. The 2015 progress notes observed that Dawn had a mild cognitive impairment. The 28 July 2017 Acute Resuscitation Plan noted that she had "mild dementia". In December 2017, Dawn apparently "pulled it together" for Tim's visit. There was no evidence from anyone who cared for her or observed her on a daily basis for any extended period. I find that the plaintiffs have failed to prove that Dawn lost testamentary capacity between mid-2010 and 21 January 2016.

Orders

[113] The orders I make are as follows:

(a) The claim for a declaration as contained in paragraph 1 of the prayer for relief to the Further Amended Statement of Claim is dismissed.

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124 Ibid.
125 T 6-11 ll 1-15.
126 T 6-20 ll 35-45.
127 T 6-21 ll 10-40.
128 Ex 1 174.
129 *Re Will of Wilson* (1897) 23 VLR 197, 199; *Timbury v Coffee* (1941) 66 CLR 277.
130 *Frizzo v Frizzo* [2011] QCA 308 [6].
131 *Re Walker* [1905] 1 Ch 160; *Re White* [1951] NZLR 393.

(b) I will hear the parties as to costs and further orders.