LEGACY LAW

Protecting the assets in your family tree

Cleaner and Carer Clean Up!

Do you or your parents have a cleaner or a carer? Don't get us wrong, we think that properly paid cleaners are a good thing and properly paid carers deserve their place in heaven.

However, just as these people can be underpaid, sometimes they arguably get much more than a family might think appropriate.

In the recent case of Carr v Homersham[1], Ms Cynthia Carr (the Carer) said that she commenced doing cleaning work for a Mrs Beryl Hordern (the deceased) in the Eastern Suburbs of Sydney. The deceased suffered from Alzheimer's disease more than 10 years before her death in 2014. A friendship developed between the women and they met frequently on a social basis. Ms Carr also performed many chores for the deceased.

When the deceased died, she left 100% of her estate to the Carer. We make no suggestion that the Carer acted in any way improperly or with a view to benefitting from the estate of her client. But we have seen it happen and the approach of the Court did not surprise us but we find that it can trouble clients.

The deceased executed a Will kit in 2001 leaving everything to Ann Richardson (the niece). She subsequently made a new will in 2004 under the belief that her niece complained about having to care for the deceased's late sister, who passed away when the deceased's niece was in her 20's. The niece was left out and so she challenged the 2004 Will.

The Court at first instance found "I am not satisfied that [the Carer] has satisfied the onus of proof that the 2004 Will is the will of a free and capable testator so found in favour of the 2001 Will kit which left her entire estate to her niece." The niece won Round 1.

The Carer appealed to the Court of Appeal, where three Judges reviewed the evidence. A geriatrician from St Vincent's Hospital had concerns about the deceased's capacity but the Court seemed unsure whether he saw her in her normal state. He stated that she had a whisky during the consultation and that she said she had already had a drink before he arrived! We note the irony of the geriatrician's name being "Dr Beveridge"!

While there was evidence of advanced dementia and difficulty remembering names, the number of the property in which she lived and managing money, the evidence of the two lawyers who witnessed the Will was persuasive of her capacity at the time she executed it.

19. The testator's solicitor, Mr Noel Bracks, gave evidence that he had questioned her about being sure that she wished to leave everything to Ms Carr. She said she was sure, describing Ms Carr as "my only real friend." Mr Bracks pressed, noting that she had a niece overseas. The testator responded:

[1] [2018] NSWCA 65

> "Yes, and a nephew, but I don't want to leave anything to them. I have a Will leaving it to Ann [the niece] but she has disgraced herself with comments about my sister (her mother) and the nephew doesn't deserve anything."

20. The other evidence came from Ms Carr, who was present when the solicitors came to the testator's apartment to witness her execution of the 2004 will. Her affidavit stated:

> "I said 'What about Ann [sic], I thought she was to get everything.' She said 'No, Ann has paid no attention to me since I spoke to her about the way she had spoken about her mother ruining her life .... When did she last visit me or even inquire as to my well-being? No, you deserve everything. You have been a very good friend to me and anyway Ann has got plenty, she doesn't need this.'"

Ultimately, the Court found that the deceased was mistaken in her belief that her niece had spoken ill of the deceased's sister. As a result, the 2004 Will stood. Round 2 (the final round as at the date of this article) to the Carer. Crucially, however, there was no evidence that the deceased was irrationally holding on to this belief.

For those who want to know more, we now set out some of the comments of the Judges.

MacFarlan JA in the Court of Appeal stated:

> "The authorities to which I turn below in my view establish that a false belief, even one that is material to the making of the will in question, is not of itself sufficient for this purpose. More is required: the nature of the deceased's false belief and the circumstances in which it was adopted and adhered to must point to a lack of capacity of the deceased "to comprehend and appreciate the claims to which he [or she] ought to give effect" (*Banks v Goodfellow*[2] at 565)."

> "It is only if there are repeated attempts to correct the view and they are rebuffed that it may get to the point of irrationality and ordinarily evidence will be required that there has been an attempt to reason the deceased out of the belief, such that the deceased's adherence to it suggests that the deceased has a mental disorder or deficiency precluding the deceased from comprehending and appreciating "the claims to which he [or she] ought to give effect" (*Banks v Goodfellow* at 565). He found the trial judge erred in thinking the talking out of the understanding was immaterial."

> "To adopt the language of Gleeson CJ in *Re Estate of Griffith*[3], whilst the deceased's approach may have been "harsh" and "unreasonable", it would not have reflected "a 'morbid aberration' which [so affected the deceased's judgment of Ms Richardson] as to warrant the conclusion that she lacked the capacity to make a valid will".

[2] Banks v Goodfellow (1870) LR 5 QB 549
[3] Re Estate of Griffith (dec'd); Easter v Griffith (1995) 217 ALR 284

Leeming JA pointed out the difficulties in such cases:

> "The task of the 21st century court is not to determine whether or not the deceased was suffering from something which the Court of Queen's Bench nearly 150 years ago [the *Banks V Goodfellow* case] would have described as an "insane delusion". I doubt the wisdom of asking a psychiatrist to provide an expert opinion couched in such terms, or of cross-examining him on his understanding of the term, although that is what happened in this trial. The question is one of common law principle, not of construction of the words used to frame one part of an elaborate judgment in 1870. Judgments should not be read as if they were statutes".
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> "The evidence of all witnesses was of events more than a decade earlier, in respect of which it was essential to distinguish between Ms Hordern's mental state in March and April as opposed to June 2004. It seems completely artificial to think that the unaided recollection of any witness of his or her dealings with an elderly and ailing woman 13 years earlier could much assist in the determination of whether she retained testamentary capacity in April as opposed to June, particularly those witnesses who had subsequent dealings with the deceased after her fall (there was evidence that at the Guardianship Tribunal hearing on 30 July 2004 she was unable to communicate). There is nothing I have seen in the various witnesses' affidavits and cross-examination which suggests they had a clear recollection of their dealings with the deceased many years earlier".
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> "The question is whether the deceased's belief and her actions consequent upon it were so irrational that a court should find that she lacked testamentary capacity. In answering that question, one must bear in mind the importance of respecting a testator's choices, and Gleeson CJ's statement that "[a] person may disinherit a child for reasons that would shock the conscience of most ordinary members of the community, but that does not make the will invalid": *Re Estate of Griffith (dec'd)* at 291.

Basten JA stated:

> "There was, in effect, an absence of persuasive evidence linking the antipathy for her niece with unsoundness of mind. A court must be vigilant against drawing such a link on the basis of its view that the judgment exercised by the testator, founded upon a false recollection of the reason for her antipathy, was quite unreasonable. Accepting that it raised a relevant doubt, a careful analysis of the whole of the evidence showed that there was no proper evidential basis to conclude that an irrationally based antipathy towards her adult niece warranted a finding of testamentary incapacity. The doubt should be rejected as insubstantial."

The Carer had to pay all costs of first and second cases. That could have been up to a million dollars and may have bankrupted her!

Conclusion

Mistaken views are ok but the key is whether there is evidence of attempts to talk the person out of it. If the deceased could have been reasoned out of the mistaken view, it would not have been incapacity. If there had been a statutory declaration by the deceased explaining her thought process, the case could have been decided differently.

We will never know if the deceased was deliberately compromising the assessment of the geriatrician by drinking. You could not make this stuff up.

In all seriousness, the case demonstrates the care that the Court goes to establish the facts and to honour the real testamentary wishes of a person. Unfortunately for the parties, the dirty laundry is closely examined and washed publicly. Without evidence, it is hard to win.

As the experienced consultant psychiatrist said in this case, "[misunderstanding of the family dynamics is] common enough in families". What family is immune from that?

The question "Who cares?" is an important one to ask.

Postscript

If you like this type of drama (and many do), there is more to come when the Supreme Court of NSW delivers its decision in the case of the author of *The Thorn Birds*, Colleen McCullough. Senior Counsel for the winner in the Carer case, David Murr SC, also appeared in the Thorn Birds case, acting for the author's husband.

To set the scene for that decision, we quote from *Traveller* magazine[4] which published a puff piece on Ms McCullough's house on Norfolk Island, without knowing the drama that was to follow after her death:

> "From the outside, Australian novelist Colleen McCullough's home on Norfolk Island is prim and picket-fence perfect, a long tree-lined driveway leading to a white two-storey colonial house in a leafy garden. Inside, it's a different story…".

Isn't it the same in many houses?

[4] http://www.traveller.com.au/write-at-home-a-glimpse-inside-writer-colleen-mcculloughs-house-gx3h3r