

**'Testamentary Capacity & Rational Suicide: the Law,
Medicine & Safe-guarding your Intentions'**

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I CHAPTER ONE

A Introduction

Estate litigation has been described as one of the more unedifying aspects of human behaviour ... There is probably no corner of this earth that is spared this phenomenon – country, creed, colour, culture and caste are quite immaterial.¹

While the area of law concerning the transfer of personal wealth upon a person's death can be traced back to at least the ancient Greeks, there are a number of factors that show its modern character to be a site of increasing controversy and contestation. Not only is the lifecourse lengthening, but with this has come changes to the health status of older Australians, in particular the prevalence of dementia which is the leading cause of mental impairment in the over 65 age group.² A second, less discussed factor is the consistently high rates of suicide amongst males and females aged 80 years and over.³ Concomitant to this rate of self-elected death is the emergent trend of rational suicide. The term 'rational suicide' identifies 'a self inflicted death that follows thoughtful choice [and is] untainted by mental disorders

¹ Bala Mahendra, 'Testamentary capacity' (2000) 150 *Supplement to New Law Journal* 170.

² Access Economics, *Keeping Dementia Front of Mind: Incidence and prevalence 2009 -2050* (2009) Report for Alzheimer's Australia cited in Alzheimers Australia, *Key Facts and Statistics 2014* (2014) http://www.fightdementia.org.au/common/files/WA/Key_facts_and_statistics_updated_March_2014.pdf at 30 May 2014.

³ Australian Bureau of Statistics, *Causes of Death, Australia, 2012* Cat. 3303.0 (2014) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/3303.0~2012~Main%20Features~Age~10010> at 30 May 2014.

that distort careful or balanced reasoning'.⁴ Such deaths do not result from mental illness. Rather, these are the suicides that are only undertaken after careful and reasoned consideration. They are most likely to occur within a context of serious and incurable illness,⁵ but also extreme frailty that almost inevitably accompanies advanced old age.

Whereas suicide has never, of itself, presented a controversy for the law in terms of impacting upon a person's testamentary capacity,⁶ when coupled with other factors which have been traditional foci in cases of testamentary capacity – for example dementia, alcoholism, suspicious circumstances involving undue influence and even old age itself – the future of this area of law looks particularly challenging.

B Structure of the Dissertation

In this dissertation, the author will examine how the emergent phenomena of rational suicide may challenge legal deliberations in the area of testamentary capacity. To this end, the discussion examines the changing social demographics of those who have executed wills and for whom the time of death is not far off, the history of wills at statute and common law, the phenomenon of suicide (and the relatively recent recognition of rational suicide) and the ways in which this

⁴ Eric Caine and Yeates Conwell, 'Self determined death, the physician and medical priorities' (1993) 270 *Journal of the American Medical Association* 875.

⁵ Jeanette Hewitt 'Rational suicide: philosophical perspectives on schizophrenia' (2010) 13 *Medicine Health Care and Philosophy* 25.

⁶ *Wilkinson v Service*, 249 III 146, 94 NE 50 (1911).

behaviour is framed within the medical literature and at law (including the role of expert medical witnesses), as well as the influence of other factors upon testamentary capacity. The dissertation concludes with the creation of a guide of steps that could be undertaken to safeguard one's testamentary intentions. The target audience for this guide is older Australians for whom rational suicide is a serious end of life choice.

C Changing Demographics

One of the most significant developments of the past 100 years is a comprehensive lengthening of the modern lifespan. According to the Australian Institute of Health and Welfare, the average age of death in Australia in 1901 was just over 55 years whereas by 2012 this had risen to 80 years for males and 84 for females. This demographic change means that people are dying at a significantly older age.⁷ According to Fiona Burns, these changes herald the fact that increasing numbers of Australians will be executing their wills in their old age.⁸

⁷ Australian Institute of Health and Welfare, *Life Expectancy* <http://www.aihw.gov.au/deaths/life-expectancy> at 15 May 2014.

⁸ Fiona Burns, 'Elders and testamentary undue influence in Australia' (2005) 8 *University of New South Wales Law Journal* 1.

D Changes to Health

In tandem with the contemporary aging of the population are the heightened levels of sickness and disease that have been found to accompany old age. The health data routinely show that the older one becomes, the more likely it is that one will suffer from illness. In the report *Australia's Health 2010*, self-assessed health status has found to decrease with age. While 24 percent of Australian women aged 65 – 74 years reported their health as fair or poor, this proportion rose to 38 percent in the over 85 year age cohort.⁹ 'Physical or multiple and diverse disability' has been reported to affect 45 percent of older Australians with almost one quarter (23 percent) of people aged over 65 years requiring assistance with 'self-help, mobility or communication'.¹⁰ Similarly, the diseases most likely to affect older Australians are chronic in character and include heart disease, cerebrovascular disease followed by the cancers, many of which can be slow-moving.¹¹ Once rates of mental illness such as dementia are considered, these data confirm that old age is one of the least healthy times during the modern lifecourse. Despite the efforts of modern medicine, there is as yet no cure for old age. Almost a decade ago, the Australian Institute of Health and Welfare estimated that 30 percent of the health expenditure on people aged sixty-five and over was spent in the last 12 months of life.¹² This is, perhaps,

⁹ Australian Institute of Health and Welfare, *Australia's Health 2010* (2010) [320] <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=6442452962> at 13 May 2014.

¹⁰ Ibid 321.

¹¹ Ibid 326.

¹² Email from John Goss to Fiona Stewart, 13 April 2004.

testimony of the lengths to which modern medicine is put to keep the elderly and the sick alive.

E Changes to Cognition

A further key focus for scholars working in the area of older people and testamentary capacity concerns the ever-rising rate of impairment from dementia and Alzheimer's Disease among the elderly. While the population is certainly living longer, as Franklin Redmond has pointed out, this also means that more people will be apt to have the kind of medical condition that impairs testamentary capacity. According to Alzheimer's Australia, more than 322,000 Australians currently suffer from dementia with this figure expected to more than double by 2050. The Australian Institute of Health and Welfare has reported dementia to be the leading cause of disability in Australians aged 65 years and over,¹³ with one person being diagnosed with the condition every six minutes.¹⁴ This wave of impairment will almost certainly increasingly occupy the attention of the courts (and mediation services) adjudicating in the area of testamentary capacity. Given that many more people with cognitive disabilities will be making or changing their wills towards the end of their lives.

¹³ Australian Institute of Health and Welfare, *Dementia in Australia* (2012) <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737422943> at 10 May 2014.

¹⁴ Access Economics, above n 2.

F Changes to Method of Death

Where cause of death is concerned, the Australian Bureau of Statistics has consistently reported high rates of suicide among men and women aged 85 years and over. Indeed, this is the age cohort that experiences the highest rate of suicide of all age groups with a recorded rate of 28.2 per 100,000 males in 2011.¹⁵ This compares to a standardized male suicide rate of 15.5 deaths per 100,000 in 2013.¹⁶ These data are not unique to Australia.¹⁷ While a portion of these deaths will almost inevitably be the outcome of mental illness, a significant minority are not. Indeed, in personal correspondence to the author, the Victorian Coroner's office has revealed that alternate categorization of so-called euthanasia deaths is currently being sought.

In order to differentiate suicides undertaken with the popular euthanasia drug, Nembutal (sodium pentobarbital), from those employing the violent and often impetuous methods such as hanging, jumping from high structures or pedestrian deaths caused by trains and buses, the Coroner's office has requested advice 'describing the suicide of a person who used the information provided in *The Peaceful Pill Handbook* ... The term 'rational suicide' is close to the term I am looking

¹⁵ Australian Bureau of Statistics, *Gender Indicators, Australia* Cat 4125.0 (2011) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by+Subject/4125.0~Jul+2011~Main+Features~Suicides~3240> at 12 May 2014.

¹⁶ Ibid.

¹⁷ Dolores Gallagher-Thompson, 'Suicide in later life' (1997) 28 *Behavior Therapy* 23.

for, but it appears to have attracted considerable ideological baggage in recent years so I am trying to avoid it if possible'.¹⁸

G Changes to Wealth

A concomitant trend to the demographic changes noted above is the increase of personal wealth. Shulman *et al* have argued that 'the shift towards an elderly society in whose hands there is a disproportionate amount of societal wealth' sets the scene for an increase in challenge to testamentary capacity.¹⁹ In this regard, the Australian Bureau of Statistics for example has reported a 30 percent rise in average household net wealth between 2003-04 and 2009-10 (after CPI adjustments) alone.²⁰ They report also that the consolidation of household wealth, in real estate and superannuation in particular, is unlikely to change in the foreseeable future. Those dying in 2014 can be argued therefore to be more likely, than previous generations, to have significant personalty and realty that needs to be disposed of.

H Introducing Capacity

At law, capacity has been broadly defined as the requirement for each party to 'have such soundness of mind as to be capable of understanding the general nature of

¹⁸ Email from Jeremy Dwyer, Acting Team Leader Coroners Court of Victoria to Author, 20 December 2012.

¹⁹ Kenneth Shulman, Carole Cohen and Ian Hull, 'Psychiatric issues in retrospective challenges to testamentary capacity' (2005) 20 *International Journal of Geriatric Psychiatry* 63, 63.

²⁰ Australian Bureau of Statistics, *Australian Social Trends* Cat 4102.0 (2011) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10Dec+2011> at 10 May 2014.

what he is doing by his participation'.²¹ As explained in *Gibbons v Wright*, the level and nature of the mental capacity required will be relative to the task at hand. One step further is testamentary capacity, that is one's ability to write a will. As one of a number of legal competences that we must navigate throughout our lives, testamentary capacity is one of the most broad in terms of consequences for others. In this regard, there will almost certainly be others with a vested interest in the contents of a person's will. This potentially high level of stake-holders serves to emphasise the value of writing a will that is proper, valid and preserved from contest.

Testamentary capacity has also been argued to be as much a legal concept as a specific focus of medical assessment.²² This places it at the very intersection of medicine and law. The outcome of court considerations of a person's testamentary capacity will not, therefore, be based solely on legal concepts. The court will inevitably draw upon extensive non-legal knowledge and expertise to reach an outcome. Case law, therefore, will provide the backdrop against which the various governing paradigms of mental illness, suicide and the law will play out. As Shulman *et al* have noted, testamentary capacity is one of the few capacities that is almost entirely dependent on common law, without much statutory direction. The way in which the courts create legal logic from an increasingly complex set of social, health and economic factors will continue to be closely watched. This is particularly

²¹ *Gibbons v Wright* [1954] HCA 17, 437.

²² Shulman, above n 18.

so as the consequences of such decisions have the ability to change lives, and deaths throughout society in a wide-ranging manner.

II CHAPTER TWO: THE LAW OF WILLS IN STATUTE & COMMON LAW

There is no country in the world in which the law permits a larger exercise of volition in the disposal of property after death than in England. But it requires, as a condition, that this volition should be that of a mind of natural capacity, not unduly impaired by old age, enfeebled by illness or tainted by morbid influence. Such a mind the law calls a “sound and disposing mind.”²³

A Introduction: The Development of the Law of Wills

While the writing of wills can be traced back millennia, the modern law of wills finds its roots in the 16th Century when Britain passed the *Statute of Wills*. This statute allowed all persons except for ‘married women, infants and idiots’ to devise land held in socage tenure.²⁴ This enactment was followed a bit over a century later by the *Tenures Abolition Act* of 1660 which abolished the hitherto feudal system of land tenure, enabling land to be freely devised. The *Statute of Frauds* of 1677 legislated for a formal, legal system of transferring land by way of a written will. Finally, the *Wills Act 1837* (UK) was enacted. It is this legislation upon which Australia’s various jurisdictions have based their own legislation.²⁵

²³ *Smith v Tebbitt* (1865-69) LR 1 PD 398, 400.

²⁴ Ken Mackie, *Principles of Australian Succession Law* (2007) 6.

²⁵ It is of note to point out that the UK passed an *Inheritance Act 1833* (UK), the *Administration of Estates Act 1925* (UK) and the *Court of Probate Act 1857* (UK) which work together to govern testamentary dispositions and the transfer of land and other property.

It is established law in Australia under both statute and general law, that if a document has been duly executed (complies with formal requirements under *Wills Act*), and is rational on its face, then a prima facie case of testamentary capacity will be raised.²⁶ In this respect, sanity is presumed until the contrary is shown.²⁷ In the early Australian case of *Nock v Austin*,²⁸ the High Court held that there will always be a presumption in favour of the testator knowing and assenting to the contents of his will, as long as no suspicious circumstances exist. As Issacs J stated, it is only where there is evidence of suspicious circumstances that the 'assumption does not arise'.

B Freedom of Testation

As a governing principle of succession law, freedom of testation has largely underwritten the development of Australian law in the area of wills and inheritance from the time of colonization. In doing so, the courts of Australia have participated in a rich history of decision-making across all types of testamentary documents and all manner of dispositions. Unlike in some other jurisdictions where succession is more strictly conceived and treated as an arm of family law – and where legislation sets out fixed inheritance rights – Australian legislation and common law has worked to preserve the testator's freedom to dispose of their assets in any way they see fit, even if they 'be capricious and improvident'.²⁹ Although, clearly, the Family Provision legislation which now operates in all Australian jurisdictions has

²⁶ *Symes v Green* (1859) 164 ER 785.

²⁷ *Burrows v Burrows* (1827) 162 ER 524.

²⁸ (1918) 25 CLR 519, 528.

²⁹ *Bird v Luckie* (1850) 8 Hare 301, 306.

somewhat tempered the modern testator's freedom. Courts are now vested with a discretionary power to intervene in defined circumstances; one of which is when there is doubt regarding testamentary capacity. Although as Kirby J stated in *Easter v Griffiths*, '[the] courts must steadfastly resist the temptation to rewrite the wills of testators which they regard as unfair, unwise or harsh'.³⁰ That said, the way in which the freedom of a testator to leave their property to whomever they choose is balanced against consideration for those who could or should have a claim, remains an ongoing issue in the law of wills and succession.

C Succession Law in Australia

In Australian law, there is a prima facie case of a will's validity if certain basic criteria are met. There will be a presumption of testamentary capacity as long as the document accords to various legislated formalities. In South Australia, s 12 of the *Wills Act 1936* (SA) states that a will, will be valid if 'the document expresses testamentary intentions of a deceased person;' 'and the deceased person intended the document to constitute his or her will'. At common law, the primacy of *animus testandi* has been emphasized consistently as the most important mental element.³¹

Other uniform legislated requirements can be found in s 8(a) which requires that the document be in writing and be signed by the testator and s 8(c) which sets out the requirement that the document be signed by two witnesses. However, even if

³⁰ (1995) 217 ALR 284, 296.

³¹ *The Estate of Masters (dec); Hill v Plummer* (1994) 33 NSWLR 446, 452.

the document does not fully comply with these requirements, in South Australia the courts retain a discretion to accept the imperfect document under s 25B. In this regard, the courts have held that documents as disparate as a deathbed letter,³² 'orders on a savings bank'³³ and even suicide notes can be effective testamentary dispositions.³⁴ In all states and territories of Australia, a will that is properly executed will be taken prima facie to be valid (s 12 *Wills Act* 1936 (SA)).

D Testamentary Capacity & the Banks v Goodfellow Test

Critical to the validity of a will is the testator's capacity to understand what they are doing, how they are doing it and the consequences of their action of making a will. Described as 'amongst the most enduring principles of the common law', it is the '*Banks v Goodfellow* test' for testamentary capacity that has come to provide the legal standard which determines if a person is of 'sound mind, memory and understanding'. John Banks was a testator suffering from persecutory delusions (and alcoholism). Delusion has been defined as 'a fixed and incorrigible false belief which the victim could not be reasoned out of'.³⁵ In the case of Banks, the court held that Banks' delusions did not deprive him of his capacity to execute his will. Based on the judgment of Cockburn J, the *Banks v Goodfellow* test provides that the testator shall:

³² *In the Goods of Edward Miller Mundy Esq* (1860) 2 Sw & Tr 119.

³³ *In the Goods of Peter Marsden* (1860) 164 ER 851.

³⁴ *APK v JDS* [2012] NTSC 96.

³⁵ *Bull v Fulton* [1942] HCA 13.

1. understand the nature of making a will and its effects;
2. understand the extent of the property of which they are disposing
3. be able to comprehend and appreciate the claims that they ought to give effect to – in the absence of any ‘disorder of mind’ or insane delusion’
4. understand the effect of the disposition that they are making
5. and that there shall be an absence of delusion or disorder of the mind in as far as it may affect the distribution of the estate³⁶

In the 1941 case of *Timbury v Coffee*, Dixon J confirmed these requirements in somewhat more modern language than that used by Cockburn CJ in 1870. In doing so he revealed their meaning had not changed. In modern Australia a testator must have the mental capacity to comprehend the nature and effects of what they are doing. In this they need to be able to realize the extent and character of the property that is being dealt with. Finally, they need to be able to weigh the claims which ‘naturally ought to press upon him’.³⁷ That is, they need to be cognizant of those who could be understood to have a moral claim to the property that the will concerns (eg. the testator’s close family).

E Applying the Banks v Goodfellow Test

While the various states’ legislations each reflect the principal elements of the *Banks v Goodfellow* test, the interpretation and application of the test lies of course with

³⁶ *Banks v Goodfellow* (1870) LR 5 QB 549, 565.

³⁷ *Timbury v Coffee* (1941) 66 CLR 277.

the courts. Historically, the *Banks v Goodfellow* test has been broadly applied by the courts. This is to say that the standard of knowledge required of a testator in understanding the nature and effects of their will is wide, and operates at a general level of understanding only.³⁸

In the 1954 case of *Gibbons v Wright* referred to above for example, the High Court held that the parties to a transaction need only have an idea of ‘the general nature’ of what they are doing.³⁹ That is, the party must understand the ‘general purport’ of what is being transacted when it is explained to them. As the expansive Windeyer J confirmed half a century later in *Kerr v Badran*, a testator does need to know ‘of every particular asset or ... value of that asset. What is required is ‘the bringing of the principle to bear on existing circumstances in modern life’.⁴⁰

This is not to suggest, however, that application of the *Banks v Goodfellow* test is so broad that the testator can be disengaged from the process of executing their will. Whereas a court will strongly presume that a testator knew and approved of a will that has been read back to them, this does not mean that the presumption is conclusive. It means only that in order for the presumption to be successfully rebutted, the clearest of evidence would be required.⁴¹ In 2010, the English case of

³⁸ (1954) 91 CLR 423.

³⁹ *Ibid* 438.

⁴⁰ [2004] NSWSC 735, 49.

⁴¹ *Re Bryden* [1975] Qd R 210.

Perrins v Holland confirmed that a person's knowledge and approval of their will stemmed directly from their ability to make and execute it.⁴²

F Considering the Legal Definition of Capacity

With no specific standard of sanity requisite for legal transactions⁴³, the legal test for capacity is remarkable more for what it omits than what it includes. For example, it is the absence, at least in part, of disability (eg. disorders or delusions) rather than any factor of ability that marks testamentary capacity. This conceptualization has left the courts with a relatively loose set of criterion to guide their deliberations.

Indeed, the courts' determination of a person's capacity - and their ability to make a will - is in some cases so broad that even the presence of delusions or mental illness has not prevented a court from concluding that a testator had capacity at the time their will was executed. In this regard there remains no precise standard for determining testamentary capacity.⁴⁴ Rather, the guiding principal in court deliberations in both Australia and elsewhere is the effect of a delusion or mental disorder on the testator's 'state of mind to judge the propriety of his dispositions'.⁴⁵

⁴² *Perrins v Holland* [2011] Ch 270.

⁴³ *Gibbons v Wright* (1954) HCA 17.

⁴⁴ Sharon Glisson Bradley, 'Testamentary capacity: is the alcoholic incapacitated?' (1985) 46 *Montana Law Review*.

⁴⁵ *Harwood v Baker* (1840) 13 ER 117, 118.

G Standard and Burden of Proof

As estate law is civil law, the standard of proof is the balance of probabilities. This standard is critical to the civil court's deliberations because it is the benchmark against which a testator's capacity will be measured. Once doubt is raised in the evidence, the prima facie of a will's validity will cease. As the High Court noted in the 1952 case of *Worth v Clasohm*, doubt need not be established 'to the point of complete demonstration'. Nor will '[r]esidual doubt' in succession law defeat a plaintiff's claim for probate. Rather, the civil threshold of the balance of probabilities requires the court to undertake a 'vigilant examination of the whole of the evidence'. For a court to be satisfied that a will should not be admitted due to testamentary incapacity, the doubt must be 'substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding.'⁴⁶

In regard to the onus of proof, in the absence of any doubt, there will be a prima facie acceptance of the will as valid. At common law, the burden of discharging the onus of proof will only come to rest on the propounder of a will, if doubt has been raised. Where no doubt exists, the onus will be on the defendant to prove that the deceased lacked testamentary capacity.

⁴⁶ (1952) 86 CLR 439, 453.

H Conclusion

The law of wills in Australia is governed by both statute – via the various States' Wills Acts or equivalent – and case law. While the *Banks v Goodfellow* test might be almost one hundred and fifty years old, its principles continue to underpin the way in which this area of law is applied and interpreted. This test of testamentary capacity continues to provide the bench mark against which the execution of a modern will is undertaken. The level of knowledge required and the tolerance of the test for mental health conditions has created a legacy that could be considered generous in its breadth and application.

III CHAPTER THREE: RATIONAL SUICIDE – A MEDICAL PERSPECTIVE

A Introduction

At common law, suicide was a felony for well over 700 years before its decriminalization in South Australia in 1935.⁴⁷ Today, suicide continues to be controversial. In this respect, an increase in suicide rates usually produces a loud moral panic with concern expressed that society is failing its young, its old, its farmers, its new mothers and everyone else in between. As the ultimate act of self-destruction,⁴⁸ the taking of one's life is viewed largely as a consequence of a mental illness. Compounding this negative assessment is the tendency of the mainstream religions to construct suicide as a moral wrong; that is as a sin against god, its voluntariness a breach of the sanctity of human life.⁴⁹ Despite Australia's increasingly secular character, the hold of religion on public debate of suicide is not new. However, given that there are more Catholic politicians in Parliament now than at any time in Australia's history,⁵⁰ it could be argued that the political

⁴⁷ See s 13A of the *Criminal Law Consolidation Act 1935* (SA).

⁴⁸ Lisa Lieberman, *Leaving You the cultural meaning of suicide* (2003).

⁴⁹ Michael Cholbi, 'Suicide' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2012) <http://plato.stanford.edu/archives/fall2009/entries/suicide/> at 22 April 2014.

⁵⁰ Jonathan Swan and Lisa Vesentin, 'Coalition celebrates a religious easter: eight of 19 cabinet members are catholic', *Sydney Morning Herald* (Sydney), 20 April 2014 <http://www.smh.com.au/federal-politics/political-news/coalition-celebrates-a-religious-easter-eight-of-19-cabinet-members-are-catholic-20140419-36xn4.html> at 21 April 2014.

construction of suicide as an intensely negative phenomenon is unlikely to change in the near future.

A second source of criticism of suicide generally, and rational suicide in particular, can be traced to the medical professional which has long held that suicide is almost always the result of major clinical depression, a substance use disorder, or both.⁵¹

In the medical literature on suicide, around 90 percent of suicides have been reported as involving some aspect of mental illness.⁵² Psychiatric conditions such as personality disorders form the remaining 10 percent. Until recently, based on available medical data, it has been difficult to establish that any more than one or two percent of suicide could be 'rational'; that is they were undertaken 'with thought and planning' and not 'in a context of illness, medical or psychiatric'.⁵³ The 2013 edition of the *Diagnostic and Statistical Manual on Mental Disorders* (known as the DSM-5) has created an altogether new suicide disease that has been titled 'suicidal behavioural disorder'.⁵⁴

The difficulty for those working in the field of end of life choices with older Australians who have no mental illness, and who approach suicide from a

⁵¹ Brian Barraclough, Jane Bunch, B Nelson and Peter Sainsbury, 'A hundred cases of suicide: clinical aspects' (1974) 125 *British Journal of Psychiatry* 355.

⁵² Yeates Conwell, Kurt Olsen, Eric Caine and Catherine Flannery, 'Suicide in later life: psychological autopsy findings' (1991) 3 *International Psychogeriatrics* 59.

⁵³ Peter Rabins, 'Can suicide be a rational and ethical act in persons with early or predementia?' (2007) 7 *American Journal of Bioethics* 47.

⁵⁴ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* (5th revised ed, 2013) 801-805.

Libertarian (or moral individualism) perspective⁵⁵ of end of life control – a group that could be termed the rational elderly - is that there is little space within these discourses for rational suicide to be considered a worthy topic of public debate.⁵⁶ Indeed, whether a person whose decision to die is the result of ‘deliberate, authentic, consistent [consideration in line] with her long-held values and not the result of mental illness’ should be allowed to die, is a question that society may not yet be ready to address.⁵⁷ As Georgetown University Associate Professor of Psychiatry, Daniel Hicks, has recently suggested, by accepting ‘rational suicide’ as a concept, the way may be opened to ‘eliminate the old, the poor, the disenfranchised’.⁵⁸

B Medicine & Suicide: Measuring & Defining Suicide Ideation

The quest of modern medicine to identify and address rates of suicide can be identified through the industry that has been spawned, most evident in the vast array of diagnostic tools aimed at addressing the problem of suicide. These include the 20-item, self-report ‘Hopelessness Scale’⁵⁹ the Modified Scale for Suicidal

⁵⁵ Carlos Prado, ‘Moral individualism and elective death’ (2013) 36 *International Journal of Law and Psychiatry* 471.

⁵⁶ Philip Nitschke, ‘We need a new word for suicide’ *Sydney Morning Herald* (Sydney), 1 April 2014 <http://www.smh.com.au/comment/we-need-a-new-word-for-suicide-20140401-zqp9b.html> at 1 April 2014.

⁵⁷ Cavin Leeman, ‘Commentary on Elger and Harding Can suicide be rational in persons who are not terminally ill’ (2004) 26 *General Hospital Psychiatry* 145.

⁵⁸ Daniel Hicks, ‘Comments by Daniel Hicks MD’ (2009) 50 *Psychosomatics* 194, 195.

⁵⁹ Aaron Beck, Arlene Weissman, David Lester and Larry Trexler, ‘The measurement of pessimism: the hopelessness scale’ (1974) 42 *Journal of Consulting and Clinical Psychology*, 861.

Ideation,⁶⁰ the Beck Depression Inventory,⁶¹ the Geriatric Depression Scale⁶², the DSM-5 Structured Clinical Interview⁶³ and the Mini Mental State Examination.⁶⁴ The singular focus of such test instruments is the identification of precursors to suicide. These precursors could include: verbal cues such as statements of wanting to end it all, behaviour cues such as the stockpiling of medication, as well as psychiatric illness identifying procedures; that aim to detect clinical levels of depression and other illnesses, predictive of a suicide or suicide attempt.⁶⁵

C Towards a Concept of Rational Suicide

In contrast to the plethora of testing for mental illness within the medical profession, where mental wellness and suicide ideation are concerned there are relatively few guidelines for identifying rational suicide in any given case.⁶⁶ Despite the dominant theme within the biomedical literature that consigns the act of suicide to mental illness, a minority of scholars argue that suicide can be a rational, 'existential option'⁶⁷ and, to this end, should not always be prevented.⁶⁸ Mostly these arguments have been put forward in the context of a person suffering from a

⁶⁰ Ivan Miller, William Norman, Stephen Bishop and Michael Dow, 'The modified scale for suicide ideation; reliability and validity' (1986) 54 *Journal of Consulting and Clinical Psychology* 724.

⁶¹ Aaron Beck, Clyde Ward, Max Mendelson, Joseph Mock and John Erbaugh, 'An inventory for measuring depression' (1961) 4 *Archives of General Psychiatry* 561.

⁶² Jerome Yesavage, T L Brink, Terrence Rose, Owen Lum, Vanthida Huang, Michael Adey and Von Leirer, 'Development and validation of a geriatric depression screening scale; a preliminary report' (1983) 17 *Journal of Psychiatric Research* 37.

⁶³ American Psychiatric Association, above n 50.

⁶⁴ Marshall Folstein, Susan Folstein and Paul McHugh, 'Mini-mental state. A practical method for grading the cognitive state of patients for the clinician' (1975) 12 *Journal of Psychiatric Research* 189.

⁶⁵ Gallagher-Thompson, above n 16, 27.

⁶⁶ *Ibid* 28.

⁶⁷ Thomas Szasz, *Fatal Freedom* (2002).

⁶⁸ James Werth, *Rational suicide: implications for mental health* (1996).

terminal illness or chronic pain (known also as ‘unbearable and unrelievable suffering’).⁶⁹ But even in these ‘soft cases’ the medical profession has still found rational suicide problematic.⁷⁰

Take the time of the *Rights of the Terminally Ill Act 1996* (NT) (‘the *ROTI Act*’) as an example. During a period of nine months, four terminally ill patients used this law to suicide (with medical assistance). Under s 7(1)(c)(iv) the subject had to be psychiatrically assessed in order to qualify to use this law. The *ROTI Act* stated the person requesting to die could not be ‘suffering from a treatable clinical depression in respect of the illness’. In spite of this legislatively-entrenched safeguard, Professor David Kissane of the University of Melbourne still reported in an article in *The Lancet* that all patients exhibited ‘symptoms of depression’.⁷¹ The doctor who assisted with the four suicides would later point out that it was the way that this factor was used politically, to ground assisted suicide to mental illness (even when the former was deemed lawful), that prevented a concept of rational suicide from being legitimized.⁷²

⁶⁹ Hewitt, above n 5.

⁷⁰ Philip Nitschke and Fiona Stewart, ‘What’s it got to do with you? Challenging the medical profession’s future in the assisted suicide debate’ (2011) 45 *Australian and New Zealand Journal of Psychiatry* 1017.

⁷¹ David Kissane, Annette Street and Philip Nitschke, ‘Seven deaths in Darwin: case studies under the Rights of the Terminally Ill Act, Northern Territory, Australia’ (1998) 352 *The Lancet* 1098.

⁷² Philip Nitschke and Fiona Stewart *Killing me softly: voluntary euthanasia and the road to the peaceful pill* (2005).

One of the first scholars to begin working against the biomedicalisation of suicide was Columbia University Professor of Sociomedical Sciences, Karolynn Siegel. In 1986, Siegel devised a standard to define rational suicide. This set out:

1. that the individual possesses a realistic assessment of their situation
2. that the mental processes leading to the decision to suicide are unimpaired by psychological illness or severe emotional distress
3. that the motivational basis of the decision would be understandable to the majority of uninvolved observers from that person's community or social group.⁷³

Scholars James Werth and Debra Cobia would later build on Siegel's work with a revised testing procedure that sets out four succinct conditions. If the criteria was met, the suicide would be defined as a rational act. The criteria included:

- a) the existence of an unremitting hopeless condition;
- b) an informed decision to suicide;
- c) an absence of cognitive impairment that prevents realistic assessments and informed decision-making; and
- d) the decision is one of free choice without external pressure.⁷⁴

⁷³ Karolynn Siegel, 'Psychosocial aspects of rational suicide' (1986) 40 *American Journal of Psychotherapy* 405.

⁷⁴ James Werth and Debra Cobia, 'Empirically based criteria for rational suicide; a survey of psychotherapists' (1995) 25 *Suicide and Life-threatening Behavior* 231.

More recently, Welsh academic Associate Professor Jeanette Hewitt, has gone one step further by suggesting that some people with mental illness ‘can suffer equally as those with severe physical pain or disability’.⁷⁵ As such, she argues they should not be excluded from the rational suicide debate.

D Conclusion

While alternate approaches to suicide are not new, the dominant discourse surrounding suicide remains the biomedical perspective. This posits the act of suicide, first and foremost, as a consequence of mental illness. In this regard, the discipline of psychiatry views suicide as a ‘form of disease or irrational drive towards self-destruction, which must be prevented’.⁷⁶ To this end one recent Canadian study has been perceived as particularly controversial as it reported that rational suicides may account for up to 30 percent of all suicides.⁷⁷ That this study was undertaken within psychiatry, by academic psychiatrists with the imprimatur of scientific empiricism, is a point not lost on those working outside the privileged domain of medicine.

⁷⁵ Jeanette Hewitt, ‘Why are people with mental illness excluded from the rational suicide debate?’ (2013) 36 *International Journal of Law and Psychiatry* 364.

⁷⁶ Karolynn Siegel, ‘Rational suicide: philosophical perspectives on schizophrenia’ (2010) 13 *Medicine, Health care and Philosophy* 25, 28.

⁷⁷ Sharon Kirkey, ‘Suicide not always driven by mental illness paper argues; debate grows over rational suicide’ (2014) <http://www.canada.com/news/Suicide+always+driven+mental+illness+paper+argues+debate+grows+over+rational+suicide/9610150/story.html> at 15 April 2014.

IV CHAPTER FOUR: SUICIDE & THE LAW

A Introduction

In contrast to the medical literature that overwhelmingly posits the act of suicide as the consequence of a serious mental illness in all but a small minority of cases, the law has largely refrained from conflating suicide, mental illness and incapacity. In this regard, there has been no assumed linkage between mental illness and attempted suicide. This is a presumption which the courts in Australia appear to have carefully guarded.

B Suicide & the Law: Balancing Personal Liberty & Community Protection

While suicide has long since ceased to be illegal in Australia, it remains an act which, under certain conditions, is still lawfully preventable. In the landmark case of *Stuart v Kirkland-Veenstra*, however, the Court was very careful to balance community protection against personal freedom. This case concerned the Victorian Police's alleged failure to apprehend a man who was sitting in his car with a hose connection from the exhaust to the interior of the car. The facts signalled the man's possible intention to suicide from carbon monoxide poisoning. In a unanimous decision, the

High Court confirmed, inter alia, that a ‘testator’s suicide, following shortly upon the making of a will ... [will] not raise a presumption of testamentary incapacity’.⁷⁸

In commenting that an attempted suicide will not be taken to reflect mental illness, French CJ noted the ‘long-standing caution of the common law about that proposition’. He stated given ‘the complexity and variety of factors which may lead to suicidal behaviour, it would be a bold legislative step indeed to sweep it all under the rubric of mental illness, however widely defined’ (at 635).⁷⁹ From a policy perspective, the Court held that ‘the philosophy of the common law’ entitles people ‘to act as they please, even if it will inevitably lead to their death or injury’. The High Court noted that this policy intention could be seen in s 10 of the *Mental Health Act 1986* (Vic) which sets strict conditions as to when a person may be apprehended by a police or protective services officer.

C Suicide & Testamentary Capacity

As the law has steadfastly refused to ground the cause of suicide in mental illness or disease, regardless of whether the method of suicide was well planned and peaceful (such as that which follows ingestion of a barbiturate such as Nembutal), or is devoid of planning and violent (such as hanging),⁸⁰ it follows that neither will

⁷⁸ (2009) 237 CLR 215, 46.

⁷⁹ The High Court held that the Victoria Police had not been subject to a duty of care because the duty had not been enlivened at the time they spoke to the subject. This was despite a patrol duty sheet describing Mr Veenstra as depressed.

⁸⁰ Stewart and Nitschke, above n 65.

suicide give rise to a presumption of testamentary incapacity. The New South Wales case of *Re Estate of Paul Francis Hodges Deceased; Shorter v Hodges* serves as authority for the legal proposition that a suicide will not, of itself, strip a testator of the capacity to execute a will.⁸¹ In his judgment, Powell J drew on both American and British jurisprudence to confirm three specific legal principles in relation to suicide and testamentary capacity.

Firstly, citing *American Jurisprudence*,⁸² the court held that a suicide does not give rise to a presumption of testamentary incapacity, even if the suicide is committed on the day following the execution of a will.⁸³ Secondly, while the suicide of a testator will be admissible in evidence, it will be one of many considerations in determining whether a testator was of sound mind when their will was executed.⁸⁴ Thirdly, Powell J held in *Re Hodges* that the act of suicide cannot be judicially regarded as proof *per se* of insanity, or as conclusive evidence of insanity.⁸⁵ This is regardless of how proximate in time a suicide is to the execution of the will or the method employed.⁸⁶

Re Hodges concerned the suicide by gunshot of 27-year-old electrician, Paul Hodges. Powell J held that Mr Hodges' will (which had been duly executed in that it had been signed by the testator in the presence of two witnesses and with regard to the

⁸¹ (1988) 14 NSWLR 698 .

⁸² *American Jurisprudence* (2nd revised ed, 1975) [358].

⁸³ *Duffield v Robeson*, 2 Del 375 (1837).

⁸⁴ *Estate of Dolbeer*, 149 Cal 227 (1908).

⁸⁵ *Wilkinson v Service*, 249 Ill 146 (1911).

⁸⁶ The law makes no distinction or value judgments between the relative 'benefit' of one suicide method over another.

surrounding circumstances), presented a prima facie case of being ‘the last will of a free and capable testator’. Acknowledging the *Banks v Goodfellow* test as the ‘locus classicus’ for determining testamentary capacity, Powell J focused upon the factors of ‘disease of the mind’ and ‘insane delusion’. Concluding that Mr Hodges was affected by neither at the time he executed the will, the will was found valid. As the High Court pointed out in *Stuart v Kirkland-Veenstra*, the test of testamentary incapacity which Cockburn CJ applied in *Banks v Goodfellow* and which courts continue to apply, is considerably narrower than other definitions of mental illness (including that adopted in legislation such as s 8(1A) of the *Mental Health Act 1986* (Vic)).

What is striking to the author about a case such as *Re Hodges* is the positivist approach the court took to the determination of capacity on the part of the testator. While medicine has an increasingly sophisticated toolkit of diagnostic aids, the law continues to take a far less nuanced approach. The practical effect of a court’s emphasis upon an absence of delusions or mental disorders provides those executing wills with a greater likelihood of being found to have testamentary capacity than would be possible in a strictly biomedical context.

This characterization is apparent in *The Estate of TLB* where the fact that ‘B’ had suicided was held by the court to be ‘only a consideration in determining whether she had testamentary capacity’.⁸⁷ In considering *Re Hodges*, the South Australian

⁸⁷ [2005] SASC 459.

Supreme Court found that B's suicide could in no way be taken as an indication that she 'was not of sound mind' when she gave the instructions for the preparation of her will. This case also drew on American jurisprudence to confirm that suicide 'cannot be regarded as conclusive proof of insanity'.⁸⁸ Critical to the court's finding on this occasion was the expert testimony of the deceased's treating psychiatrist. The court heard he had seen B on a number of occasions in the nine months leading up to her death. He concluded that despite her suicide, she had simply forgotten to sign her will and, if asked, she would have put her suicide on hold to do so. The court accepted the deceased's Will Instruction Sheet as expressing her true testamentary intention.

In the recent Northern Territory case of *APK v JDS*, the Supreme Court held that the subject's testamentary capacity was not affected, because he decided to end his life.⁸⁹ In this case, a 41-year-old man killed himself by hanging. He left behind a three-page written note that the Court ruled was a valid will. This was despite the fact that it suffered from formal invalidity.

Barr J found the will to be valid based on the fact that 'the contents of the document provide[d] clear evidence that it was written in contemplation of his imminent death'.⁹⁰ He continued 'the deceased's intentions were expressed in his will in

⁸⁸ *American Jurisprudence* (92nd ed, 1975) 79, 358, 367 and 387-388 cited in *Estate of TLB*.

⁸⁹ [2012] NTSC 96.

⁹⁰ *Ibid* 9.

simple, clear and rational terms'.⁹¹ In the words of Cockburn CJ, Barr J stated: '... though mental disease may exist, it presents itself in such a degree and form as not to interfere with the capacity to make a rational disposal of property, why, it may be asked, should it be held to take away the right?'⁹²

This is not to say, however, that there will not be cases where the circumstances of a suicide will raise doubts. If these doubts are significant, the will in question may not be accepted by the court on the grounds that the testator lacked testamentary capacity. This will occur where one of the limbs in *Banks v Goodfellow* fails.

For example, in the 2004 New South Wales case of *Phillpot v Olney*, the two hand-written notes which were found next to the deceased's body after her suicide, were held by the court not to constitute wills. White J explained that this was not because of that fact that suicide was the cause of death, but because of the circumstances that surrounded the suicide. On expert testimony, the court heard that Tracey Aubin had been suffering a 'disorder of the mind which prevented her from comprehending and appreciating' 'the claims on her estate to which she ought to give effect'.⁹³ Tracey was a young woman desperate to adopt a child. She believed a recent drink-driving charge would be fatal to her application to adopt. As such neither of the two hand-written notes found next to her body constituted a will under s 18A of the *Wills Probate and Administration Act* (NSW).

⁹¹ Ibid 15.

⁹² Ibid 14.

⁹³ *Phillpot v Olney* [2004] NSWSC 592, 21.

D The Role of the Expert Witness

The way in which the medical profession has sought to dominate the public discourse of suicide to the exclusion of rational suicide (in that the concept remains a contradiction in terms)⁹⁴ has direct implications for how the courts receive the professional opinions and expertise of psychiatrists and other medical professionals in their capacity as expert witnesses. While the modern law employs a secular approach to considerations of suicide (suicide is no longer seen as a sin against god), this does not mean that the courts are not susceptible to the dominant biomedical paradigm. In noting that there are ‘medical specialists regarded as “plaintiffs’ doctors”, to whom plaintiffs’ lawyers will send their clients’ for favourable opinions, former Federal Court Judge, Peter Gray, has highlighted how ‘very rare’ it would be for a common law court ... to appoint a court expert to give truly independent evidence of opinion’.⁹⁵

In the contested area of suicide/ rational suicide, an expert witness from mainstream psychiatry, who views suicide as ‘a form of disease or irrational drive’, is more likely to ‘denounce the idea that ... [suicide] can ever be a reasoned act’. This is because, as Werth has argued, ‘health care professionals are indoctrinated

⁹⁴ Hewitt, above n 68.

⁹⁵ Peter Gray, ‘The expert witness problem’ (2010) 17 *Journal of Speech, Language and the Law* 201, 203.

into observing psychological pathology in people who express suicidal ideation'.⁹⁶ The increased use of expert witnesses in contemporary civil litigation,⁹⁷ sets the scene for medical knowledge to be a potentially serious influencing factor in cases of testamentary capacity.

One case that illustrates how an expert witness can influence court deliberations where suicide is the cause of death is the *Estate of the late Evert Jacob Bulder*.⁹⁸ This case was concerned with whether the suicide note left by Mr Bulder was a valid will under s 8 of the *Succession Act 2006* (NSW). The court action was brought by the Bulder children. Of relevance is that family relations had deteriorated some years earlier when the Bulder's eldest daughter had sought to move her mother - who suffered from dementia and Parkinson's disease - into a nursing home. Mr Bulder's reaction to this was described as one of 'rage'.

While the suicide note, which was reproduced in the court transcript, was clearly written, there were several grounds that concerned the court. Firstly, unlike Mr Bulder's previous wills, this will excluded his children as beneficiaries. In their place was a range of charities and political / community organizations including Greenpeace Australia, the Humane Society International, the Foundation Brigitte Bardot and the World Wildlife Fund. The document also made special note of Mr Bulder's long-time carer and housekeeper Surya Kanta, stating 'Please be good to

⁹⁶ Werth, above n 63.

⁹⁷ James Spar and Andrew Garb, 'Assessing competency to make a will' (1992) 149 *American Journal of Psychiatry*, 169.

⁹⁸ *Estate of the late Evert Jacob Bulder* [2012] NSWSC 1328.

Surya. She has been a wonderful friend, helper and carer for the past ten years for your mother and me'.⁹⁹ A further factor under consideration was the precatory language used in the note.

In his report to the court, consultant psychiatrist Dr Julian Parmegiani for the applicants stated, *inter alia*, that 'the act of suicide strongly indicated the deceased was not thinking or acting rationally at the time.'¹⁰⁰ Nicholas J concluded that he found 'Dr Parmegiani's opinion [that Mr Bulder lacked testamentary capacity] amply supported by the evidence as to the deceased's circumstances for at least the decade prior to his death ...'¹⁰¹ The court held that there was much evidence to confirm that the deceased was suffering from a 'disorder of the mind', though the evidence was far from unequivocal.

What is clear from this case is that despite the fact that the discipline of psychiatry has been 'plagued by difficulties in achieving reliable classification' of mental illness, when it does pronounce, its testimony may be given great weight by the courts. As scholars, David Faust and Jay Ziskin have noted:

expert testimony ... alters lives ... Depending on the expert's opinion, an individual may be confined to a mental institution, receive huge monetary

⁹⁹ Ibid 8.

¹⁰⁰ Ibid 35.

¹⁰¹ Ibid 37.

awards, obtain custody of a child, or lose his or her life.¹⁰²

E Conclusion

This brief review of Australian cases involving suicide and where a will is in dispute shows that at common law, courts have been reluctant to follow medicine's lead in relegating suicide as the action of a person who lacks the sound mind, memory and understanding to execute their will. This is despite the timing of the suicide and the method employed by the deceased. While this is a welcome finding in this analysis, the role of expert witnesses in biomedicine does sound a warning, especially where suicide is also a factor. This in turn may have ramifications for cases involving rational suicide and where a hostile family member seeks to contest the validity of a will. If an expert witness is *a priori* hostile to the concept that suicide is not always the result of mental illness and absent any other grounds (eg. undue influence) for declaring a will invalid, it is not unreasonable to argue that there is the potential risk the court will be influenced accordingly.

¹⁰² David Faust and Jay Ziskin, 'The expert in psychology and psychiatry' (1988) 241 *Science* 31.

V CHAPTER FIVE: TESTAMENTARY CAPACITY: OTHER INFLUENCING FACTORS

A Introduction

In cases of testamentary capacity, the courts have often considered the issue of suicide alongside other relevant factors. In their undertaking to be ‘vigilant and jealous’ in their deliberations, the possibility of suspicious circumstances is never far from a court’s contemplation. Such circumstances could include evidence of undue influence, as well as the presence of other psychiatric illnesses and disorders at the time the will was executed. These are all conditions that may provide grounds for failure to meet the limbs of the *Banks v Goodfellow* test.

The discussion below examines these issues with a view to understanding how and when a court is likely to find that a will is invalid by way of testamentary incapacity, due to one or more of these factors.

B Suspicious Circumstances

Generally speaking, suspicious circumstances will include anything that may show that the free will of the testator ‘was overborne by acts of coercion or fraud’.¹⁰³

Following *Wintle v Nye*, a court is required to be ‘vigilant and jealous’ in approach.

This is regardless of whether the evidence is ‘slight and easily dispelled’ or ‘so grave

¹⁰³ *Vout v Hay* [1995] 2 SCR 876.

that it can hardly be removed'.¹⁰⁴ In *Roos v Karpenkow*, Doyle CJ held that the evidence and motives of the parties must be carefully scrutinised with 'careful attention [paid] to any circumstances of suspicion that do arise'.¹⁰⁵ The task of dispelling suspicions will 'depend upon the[ir] nature and gravity'. As discussed in Chapter 2, where evidence exists as to suspicious circumstances, the onus of proving that the deceased had testamentary capacity will shift to the proponents of the will 'to establish affirmatively that the testator was of sound mind'.¹⁰⁶

C Undue Influence

An allegation of undue influence in a testamentary context is one instance of a suspicious circumstance and is a serious matter as it will directly affect the validity of the will in question. As a legal concept, undue influence cannot be inferred.¹⁰⁷ Rather, there must be clear evidence that the person's free will is usurped. As Windeyer J stated in *Revie v Druitt*, there must be evidence that the pressure exerted upon the testator amounted to 'coercion so that it overbore the free will of the testator'.¹⁰⁸ The 1885 English case of *Wingrove v Wingrove* was cited by Windeyer J as authority for the degree of influence required (the testator was 'coerced' and influenced by 'immoral considerations') before a court will declare a will invalid on the balance of probabilities.¹⁰⁹

¹⁰⁴ [1959] 1 WLR 284, 291.

¹⁰⁵ (1998) 71 SASR 497, 504.

¹⁰⁶ *Symes v Green* (1859) 164 ER 785, 401.

¹⁰⁷ *Boyse v Rossborough* (1854) 43 ER 321.

¹⁰⁸ [2005] NSWSC 92, 51.

¹⁰⁹ (1885) LR 11 PD 81, 83.

Where the making of wills is concerned, the principle of undue influence may be particularly likely to arise in cases that contain ‘unnatural provisions’;¹¹⁰ that is, clauses that exclude those who ought naturally be considered beneficiaries in the disposition. While acknowledging that influence on its own is neutral and ‘may be used wisely, judiciously and helpfully’ that undue influence may be alleged, should act as warning to those with a close relationship to the testator.¹¹¹

The way in which the law is open to treat care-givers who are beneficiaries in the wills of those they cared for, is well illustrated in the case of the *Estate of the Late Evert Jacob Bulder* (discussed in the previous chapter). In that case it was held that the long-time carer of Mr Bulder, Surya Kanta, exercised undue influence to obtain benefits from his estate. On the evidence, Nicholas J held that the Ms Kanta could not demonstrate that the benefits or payments she received were not the product of the ‘ascendancy, trust or confidence’ arising out of the relationship.¹¹² He concluded that the ‘payments were transactions unconscionably procured by the exercise of undue influence’. While not all cases will reach such clear-cut conclusions, the possibility is nevertheless a real one.

¹¹⁰ Spar and Garb, above n 89, 170.

¹¹¹ *Harris v Jenkins* (1922) 31 CLR 341, 26 citing *Poosathurdi v Kanappa Chettiar* (1919) L R 47 Ind Ap 1, (Lord Shaw).

¹¹² *Johnson v Buttress* (1936), 45 CLR 113, 55.

D Dementia

The courts' ability to establish testamentary capacity when dementia is present, is one of the most significant challenges for the justice system in countries where longevity is bringing increasing rates of the illness.¹¹³ With medical expertise in this area of mental health increasing, courts can expect to hear more expert testimony on confused states, delusions, depression and excessive alcohol consumption to name a few.¹¹⁴ Where there is evidence of dementia, the circumstances of each case will determine whether the court will be satisfied that the testator had capacity.¹¹⁵

In *Worth v Chasohm*, the will of the testatrix, Mary Jane Worth, was held to be valid despite her suffering from senile degeneration and being subject to delusions. Despite Mrs Worth's long-time doctor, Dr Goode, stating that she was 'not mentally capable of making a will ... [having been] queer for two or three years', that other witnesses found her in 'full possession of her mental faculties and knew exactly what she was doing' was given significant weight by the court.¹¹⁶ Mrs Worth's solicitors, for example, testified that she took an 'intelligent interest' in her affairs and was able to 'appreciate fully everything that was said'.¹¹⁷

¹¹³ Gustavo Roman, *Managing Vascular Dementia* (2003), 1.

¹¹⁴ *Vosahlo dec; Vosahlo v Kantor* [2003] VSC 81.

¹¹⁵ *Norris v Tuppen* [1999] VSC 228.

¹¹⁶ [1999] VSC 228, 444.

¹¹⁷ [1999] VSC 228, 452.

In overturning the decision of the trial Judge, the High Court concluded that there was 'no sufficient reason for denying that a testatrix who appeared to so many competent observers to be completely sane and made a completely rational will, lacked a sound disposing mind'.¹¹⁸ After 'anxious consideration', the majority found that the learned trial judge had erred in not allowing a combination of features (eg. lack of evidence of 'any inability to grasp the details of business matters') 'their due significance'.¹¹⁹ This case is also illustrative of the weight the court is likely to give to the evidence of those who interacted with the deceased on a regular basis.¹²⁰

In other cases, however, the factual matrix of dementia and capacity will lead the court to hear from many expert medical witnesses. In the Victorian case of *Vosahlo dec; Vosahlo v Kantor*,¹²¹ for example, the witnesses included two treating general practitioners, a treating consultant neurologist, assessment nurses from the Royal District Nursing Service, an assessment officer from the Aged Care Assessment Service, and a treating occupational therapist. Other witnesses who had never met Mrs Vosahlo included a consultant psychiatrist, a second consultant psychiatrist and psychogeriatrician and another consultant neurologist. The collective evidence of these experts was received by the court as 'powerful medical evidence as to ... [Mrs Vosahlo's] mental infirmity'.¹²²

¹¹⁸ [1999] VSC 228, 452.

¹¹⁹ [1999] VSC 228, 451.

¹²⁰ *Scattini & Anor v Matters* [2004] QSC 459.

¹²¹ [2003] VSC 81.

¹²² [2003] VSC 81, 41.

In *Nicholson v Knaggs*¹²³ - which concerned an estate of 15 million dollars - Vickery J found there was sufficient evidence to cast doubt upon the competence of the testatrix to make a will. The testatrix was described as a 'frail, vulnerable and anxious old lady' who had developed dementia caused by the onset of Alzheimer's disease. However, the court also went on to find that she 'knew what she was doing and she understood the effects of the principal clauses in the will'.¹²⁴

In contrast to *Revie v Druitt* where Windeyer J stated that the evidence of 'treating doctors during the lifetime of the deceased' tends to be of 'far more value' than reports of experts who had never met the person, in *Nicholson v Knaggs*, Vickery J opted for a middle ground. In this case, he found that expert witnesses 'while not without weight, cannot be decisive as to testamentary capacity ...'. He continued:

The Court must judge the issue from the facts disclosed by the entire body of evidence, including the observations of lay and professional witnesses who knew and saw the testatrix at the time of her making the relevant wills and codicils.¹²⁵

On this limited review of Australian common law as it relates to the capacity of testators with dementia, the courts have shown strong regard for both lay and expert testimony. While eminently qualified witnesses may once have held sway in the courts, in modern Australia, a Judge appears likely, within the context of the

¹²³ [2009] VSC 64.

¹²⁴ [2009] VSC 64, 584.

¹²⁵ *Nicholson v Knaggs* [2009] VSC 64, 41.

overall evidence, to give special weight to the lay evidence of those who knew and interacted with the deceased.

E Alcohol Abuse

A further factor that may cast doubt upon a person's testamentary capacity, especially where suicide is also a factor, is that of alcohol abuse. In one small Canadian study of 25 consecutive challenges to testamentary capacity, alcohol abuse was found to be a factor in 28 percent (or seven of the 25) of cases examined.¹²⁶ However, because alcoholism is a temporary condition, it can be 'difficult to determine precisely whether or not the testator ... was ... intoxicated to the extent that he/ she lacked testamentary capacity'.¹²⁷ Regardless of the degree to which the testator is subject to alcohol abuse, the court will only be interested in whether the person's use of alcohol 'rendered him incapable of understanding the nature and consequences of his acts at the time he executed his will'.¹²⁸

In the Queensland case of *Timbury v Coffee* the testator's '[a]lcoholism and attendant maladies' was found to have brought about 'mental impairment and induced suspicion and distrust of his wife.' On the evidence, the High Court held that the testator was not of 'sound disposing mind' when he made his last will.¹²⁹ His

¹²⁶ Shulman, above n 18, 67.

¹²⁷ Kenneth Shulman, Ian Hull and Carole Cohen, 'Testamentary capacity and suicide: an overview of legal and psychiatric issues' (2003) 26 *International Journal of Law and Psychiatry* 403, 407.

¹²⁸ Glisson Bradley, above n 41, 439.

¹²⁹ (1941) 66 CLR 277, 280.

invention of ‘imaginary happenings’ to justify a belief that his wife was a serial adulterer, contributed towards a finding of testamentary incapacity.¹³⁰

The above case contrasts with the earlier 1914 authority of *Landers v Landers* where the High Court held that a testator had full testamentary capacity. This was in spite of the fact that he was ‘seldom sober’ and, when drunk, believed that his wife was trying to poison him. As Issacs J stated, there was ‘a complete *prima facie* case of competency on the only days when competency is necessary, namely, the days when the instructions were given and the will executed’.¹³¹ As only then are the *Banks v Goodfellow* limbs addressed.

Writing more contemporaneously, Sharon Glisson Bradley has noted that while the courts (in the US at least) will seldom invalidate a will on the basis of a testator’s alcohol-induced incapacity, it remains for the drafting solicitor to ensure the ‘alert mental state’ of a person who ‘drinks excessively or is an alcoholic’.¹³²

F Old Age

In the old English law of *Swinburne on Wills*, immediately after the section on ‘On idiots’ and before that ‘On him that is drunk’ is that of ‘Of old men’.¹³³ Here the

¹³⁰ (1941) 66 CLR 277, 292.

¹³¹ *Landers v Landers* (1914) 19 CLR 222, 232.

¹³² Glisson Bradley, above n 41, 440.

¹³³ Henry Swinburne, *A Treatise of Testaments and Last Wills* Part II, sec 5 <https://archive.org/stream/treatiseoftestam00swin#page/74/mode/2up> at 26 May 2014.

I have changed the old English spelling for the sake of clarity in this quote.

esteemed ecclesiastical lawyer, Henry Swinburne, proclaimed that a man 'may freely make his testament, how old soever he be; for it is not the integrity of the body but the mind that is required in testaments'. Today, Australian courts still decline to accept that old age, of itself, is determinative of a lack of testamentary capacity. Following the 1818 case of *Kinleside v Harrison*,¹³⁴ in *Bailey v Bailey*, the High Court noted that while great age 'does not of itself establish want of capacity', it does 'necessarily excites the vigilance of the Court'.¹³⁵ *Bailey v Bailey* concerned the seventh will of an 88-year-old testator. In a majority decision, the court held that more than 'mere proof of serious illness' was needed before the *prima facie* case of testamentary capacity can be displaced. Rather, Issacs J stated, 'there must be clear evidence that undue influence' has been exercised or that the 'mental faculties' of the testator make him 'unequal to the task of disposing of his property'. The testator's 'old age' was a consideration in the Court's deliberations.

At a practical administrative level, a client of advanced years may attract the special attention of the solicitor drafting the will. In some cases this may be a challenge to be overcome. In the instructive case of *Pates v Craig*, for example, Santow J stated that a solicitor should be under a duty to take 'particular care' if the client was an 'obviously enfeebled testator'.¹³⁶ To this end, his Honour held that a solicitor would do well to involve at least one witness who was the client's treating doctor as a way of satisfying themselves of their client's testamentary capacity.

¹³⁴ *Kinleside v Harrison* (1818) 161 ER 1196.

¹³⁵ (1955) 29 ALJ 179.

¹³⁶ *Pates v Craig and The Public Trustee; Estate of The Late Joyce Jean Cole* [1995] NSWSC 87, 147.

VI CHAPTER SIX: PRACTICAL STEPS TOWARDS PRESERVING TESTAMENTARY FREEDOM

A Introduction

As Kirby J prophetically noted in *Easter v Griffiths*, freedom of testation ‘includes a freedom to be unfair, unwise or harsh with one's own property’.¹³⁷ As a long-established juncture of familial and other conflict, the execution of one's will has had the power to divide the families and friends involved. Regardless of the order of magnitude of the stakes involved, where the act of rational suicide is added to the matrix of facts, the tensions are almost certainly heightened. The presence of other factors such as the prevalence of dementia, conditions such as alcoholism and suspicious circumstances such as undue influence will likely complicate a testamentary matter even further.

At common law, modern courts have traditionally treated suicide as one of many considerations in assessing a person's testamentary capacity. In this regard, the law has resisted the conflation of suicide with mental illness. This is in contrast to medicine where the linkage is both historical and perfect. As noted earlier, some have even argued that ‘health care professionals are indoctrinated into observing psychological pathology in people who express suicidal ideation’. Given that many expert witnesses who appear in testamentary capacity cases come from the

¹³⁷ [2002] NSWSC 426, 294.

profession of psychiatry, a much more in-depth review of the case law would be required before concluding that this testimony is routinely privileged by the courts over that of lay others. The most that can be said is that the risk of adverse testimony from an expert witness from psychiatry remains a distinct possibility.

In this final chapter, the focus is upon a series of practical steps aimed at assisting with a person's testamentary dispositions in the context of rational suicide. The audience for this guide is the cohort of elderly Australians who belong to Australia's largest end of life rights advocacy organization, Exit International. This organisation states that it has more than 4000 members nationally, with an average age of 75 years.¹³⁸ In one internal survey, members of the organization reported that they joined the group to receive information about end of life options. As a subsection of Australia's elderly, these men and women could be argued to be those most likely to be in contemplation of rational suicide at some point in the future.

B The Role of the Medical Profession

In the case of a person's testamentary document becoming the subject of court action, it is not unreasonable to expect that expert witnesses from psychiatry profession will be called. Given the general intolerance of psychiatry towards rational suicide, it is advisable to minimising the grounds of possible dispute. One way to minimise the likelihood of estate litigation is to avoid any reason for a

¹³⁸ Philip Nitschke and Fiona Stewart, *The Peaceful Pill Handbook* (2008).

testator's capacity to be called into question. The involvement of the person's treating general practitioner is one course of action.

In *Pates v Craig*, Santow J held that a doctor could be involved not only as a witness to a will but they could cast their medical gaze upon the testator's condition by means of thorough questioning.¹³⁹ In the 1985 Canadian case of *Freisen and Holmberg v Freisen Estate*, the standard of inquiry was more than the asking of 'perfunctory questions'. Rather, the doctor should be alert to the free giving of the instructions to prepare the will while ensuring that the effect of the will is understood. The doctor's opinion should be noted in their medical notes. Should the doctor's opinion be adverse, further medical examination should be called for.¹⁴⁰ In Australia, O'Neil and Pesiah have noted that there is a developing expectation for doctors to act as signatories on testamentary documents.¹⁴¹

1 Practical Tip No 1

Request a consultation with your practitioner at the time you are preparing your will, using the visit to outline testamentary plans and provide an explanation. Ask your general practitioner if he/ she would be one of the two witnesses you require for your will to be formally executed.

¹³⁹ *Pates v Craig and The Public Trustee; Estate of The Late Joyce Jean Cole* [1995] NSWSC 87.

¹⁴⁰ (1985) CarswellMan 84, 77.

¹⁴¹ Nick O'Neil and Carmelle Pesiah, *Capacity and the Law* (2011)

<http://www.austlii.edu.au/au/journals/SydUPLawBk/2011/1.html> at 10 March 2014.

2 Practical Tip No 2

If you are unfortunate enough to have had a diagnosis of early dementia, submit yourself to an interview with your general practitioner as close to the time of writing your will as possible. Ensure that they take full medical notes of your consultation. Having the general practitioner present, as a witness, when you sign your will may be of assistance in verifying that you were operating during a 'lucid moment', despite your dementia.

C The Role of Family & Close Friends

In recent years, there has been an emerging preference on the part of the courts to give special weight to the opinions of those who knew the deceased, over and above that of expert witnesses who never met the person.¹⁴² For this reason it is advisable for a testator to ask those close to them, around the time they are making their will, to take steps to confirm the person's testamentary capacity along the lines of the *Banks v Goodfellow* test. A video statement could take the form of a short interview or conversation between the person and testator. The other person need not necessarily be aware that rational suicide is a possible consideration for the future.

¹⁴² Ibid.

1 Practical Tip No 3

Involve a supportive family member or close friend at the time you make your will. This could take the form of the person making a written statement, or participating in a video recording. The video statement could take the form of a short interview or conversation between the person and testator. The other person need not necessarily be aware that rational suicide is a possible consideration for the future.

D *The Role of the Solicitor*

In 1841 in *Jarman on Wills*, Thomas Jarman Esq wrote that ‘few of the duties which devolve upon a solicitor, more imperatively call for the exercise of a sound, discriminating, and well-formed judgment, than that of taking instructions for wills’.¹⁴³ One hundred and fifty years later in Australia, Santow J in *Pates v Craig*, would emphasise the centrality of the fiduciary duty that governs the relationship of lawyers to their clients. In this regard, Santow J confirmed that solicitors have a duty to act in the ‘unfettered service’ of their client’s interests.¹⁴⁴ This included the making of extensive client meeting notes, involving the person’s treating doctor, and, as recommended by the Law Society of New South Wales guide ‘A Practical Guide to Solicitors: when a client’s capacity is in doubt’, carrying out a ‘legal assessment’ of a client’s capacity to understand each of the limbs of the *Banks v*

¹⁴³ Thomas Jarman, *Jarman on Wills* (8th revised ed, 1951) cited in O’Neil and Pesiah, above n 135.

¹⁴⁴ *Pates v Craig* (1995) NSWLR 87, 143.

Goodfellow test.¹⁴⁵ As Nick O’Neil and Carmel Peisah argue, solicitors are now expected to place more reliance on the advice of the treating medical professional than on their own assessment of their client’s will-making capacity.¹⁴⁶

The level of professional conduct outlined by Santow J is distinguished from that found to be so lacking by Briggs J in the 2010 English case of *Key (decd), Re; Key v Key*.¹⁴⁷ In that case which concerned the execution of a will by an 89 year-old testator, shortly after his wife of 65 years had died, the solicitor made several significant professional errors. For example, he not only failed to take steps towards establishing that Mr Key had testamentary capacity in the sense of the *Banks v Goodfellow* test by failing to ask questions, but he omitted to make any attendance notes of the meeting. Nor was the deceased’s doctor involved at any step in the process. Not surprisingly, the will was found invalid due to testamentary incapacity.

1 Practical Tip No. 4

While an experienced solicitor will be aware of the steps that they should take to safeguard your testamentary capacity, it may be beneficial for you to remind them of their duty. This would include expressly ensuring that they are satisfied that you have testamentary capacity. In order to create evidence to this effect, you should

¹⁴⁵ Law Society of NSW, *A Practical Guide to Solicitors: when a client’s capacity is in doubt* (2009) <http://lawsociety.com.au/cs/groups/public/documents/internetcontent/023880.pdf> at 31 May 2014.

¹⁴⁶ O’Neil and Pesiah, above n 135.

¹⁴⁷ [2010] 1 WLR 2020.

ensure that your solicitor keeps a record of the meetings leading up to and including the drafting of your will. Finally, it may be advisable that you do not draft your will at a time where you could be said to be especially vulnerable as a result of a life upheaval or extraordinary stress.

E The Role of a General Statement of Rationale & Suicide Note

As discussed in Chapter 4, it is not unknown for a court to find that a suicide note can also be a valid testamentary document.¹⁴⁸ The notes that have been held to be valid are those that fulfilled the limbs of the *Banks v Goodfellow* test. One characteristic of notes that have been found to be valid wills is the background information that they have provided. These words have often provided the court with a context, not only in regard to the suicide but as to why the estate of the person was being disposed of in a certain way. This level of detail and the clarity of expression can help a court to understand a person's thinking behind a person's intentions.¹⁴⁹ For this reason, a statement outlining the testator's intentions may be a useful admission into evidence in court.

A second topic that a statement of rationale could cover, if applicable, involves an explanation of why the testator has elected to make significant changes to the content and beneficiaries in the last will from the ones that have gone previously. The pattern of prior gifting is one of the criteria considered in family provision

¹⁴⁸ *APK v JDS* [2012] NTSC 96.

¹⁴⁹ Shulman, above n 120.

legislation and is therefore a primary criterion for consideration.¹⁵⁰ For this reason it is worthwhile to explain why a particular person has been omitted as a beneficiary in the final will. These considerations stem from the principle that significant changes to a testamentary document in terms of the pattern of gifting are considered a risk factor in the preservation of a person's testamentary intentions.

1 Practical Tip No 5

Write a statement that outlines why you have decided to distribute your property in the way you have. This is different from the written or video statement that will be provided by your family member or close friend. Your statement need not concern your capacity. Rather, this is a background explanation of what you were thinking and what you intended at the time of drafting your will. If you have changed your will significantly from any previous version, this is a good time to explain why you have done this.

¹⁵⁰ *Boulton v Sanders* [2004] VSCA 112.

VII CHAPTER SEVEN: CONCLUSION

Changing social demographics mean that more Australians will be drafting their wills in their later years. This increase in longevity is itself anchored in a broader social context. Factors such as health and illness, personal wealth and the possibility of an elected early death (via rational suicide) situate the drafting a will as a site of potentially conflicting interests, priorities and tensions.

Where rational suicide is concerned, there will almost certainly be a degree of moral censure once the person is deceased. While some family members may feel betrayed and rejected, even those who are supportive of the suicide may struggle. As the son of one Victorian couple who suicided together after importing illegal drugs from Mexico put it, 'although on a rational level I fully understand and supported my parents' wishes in this matter, it does not reduce the emotional impact one iota. I am truly grateful they went peacefully, and together ...'¹⁵¹

While the common law in this area can be described as both secular and non-pathologising of suicide, this is not to suggest that court deliberations in regard to a person's testamentary capacity will not be unduly influenced by adverse medical expert comment. As discussed above, it is too soon to reach any firm conclusions on this point. It is sufficient to suggest that the possibility is a real one. This is

¹⁵¹ Email from Steve Flounders to Fiona Stewart, 1 May 2011. This email was received following the rational suicide of Steve's parents Don & Iris Flounders <http://www.smh.com.au/national/after-60-years-of-life-together-don-and-iris-die-together-20110503-1e646.html> at 29 May 2014.

especially the case if, as some scholars suggest, rational suicide among the elderly is only set to increase.

VIII BIBLIOGRAPHY

1. Articles / Books/ Reports

Access Economics, *Keeping Dementia Front of Mind: Incidence and prevalence 2009 - 2050* (2009) Report for Alzheimer's Australia cited in *Alzheimers Australia, Key Facts and Statistics 2014* (2014)

http://www.fightdementia.org.au/common/files/WA/Key_facts_and_statistics_updated_March_2014.pdf at 30 May 2014

American Jurisprudence (2nd revised ed, 1975)

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)* (5th revised ed, 2013) 801-805.

Australian Bureau of Statistics, *Australian Social Trends* Cat 4102.0 (2011)

<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10Dec+2011> at 10 May 2014

Australian Bureau of Statistics, *Causes of Death, Australia, 2012* Cat. 3303.0 (2014)

<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/3303.0~2012~Main%20Features~Age~10010> at 30 May 2014

Australian Bureau of Statistics, *Gender Indicators, Australia* Cat 4125.0 (2011)

<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by+Subject/4125.0~Jul+2011~Main+Features~Suicides~3240> at 12 May 2014

Australian Institute of Health and Welfare, *Dementia in Australia* (2012)

<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737422943> at 10 May 2014

Australian Institute of Health and Welfare, *Life Expectancy*

<http://www.aihw.gov.au/deaths/life-expectancy> at 15 May 2014

Barraclough, B, Bunch, J, Nelson, B and Sainsbury, P, 'A hundred cases of suicide: clinical aspects' (1974) 125 *British Journal of Psychiatry* 355

Beck, Aaron, Ward, Clyde, Mendelson, Max, Mock, Joseph and Erbaugh, John, 'An inventory for measuring depression' (1961) 4 *Archives of General Psychiatry* 561

Beck, Aaron, Weissman, Arlene, Lester, David and Trexler, Larry, 'The measurement of pessimism: the hopelessness scale' (1974) 42 *Journal of Consulting and Clinical Psychology*, 861

Burns, Fiona, 'Elders and testamentary undue influence in Australia' (2005) 8 *University of New South Wales Law Journal* 1. Australian Institute of Health and Welfare, *Australia's Health 2010* (2010) [320] <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=6442452962> at 13 May 2014

Caine, Eric and Conwell, Yeates, 'Self determined death, the physician and medical priorities' (1993) 270 *Journal of the American Medical Association* 875

Cholbi, Michael, 'Suicide' in Zalta, Edward, (ed), *The Stanford Encyclopedia of Philosophy* (2012) <http://plato.stanford.edu/archives/fall2009/entries/suicide/> at 22 April 2014

Conwell, Yeates, Olsen, Kurt, Caine, Eric and Flannery, Catherine, 'Suicide in later life: psychological autopsy findings' (1991) 3 *International Psychogeriatrics* 59

Faust, David and Ziskin, Jay, 'The expert in psychology and psychiatry' (1988) 241 *Science* 31.

Folstein, Marshall, Folstein, Susan and McHugh, Paul, 'Mini-mental state. A practical method for grading the cognitive state of patients for the clinician' (1975) 12 *Journal of Psychiatric Research* 189

Gallagher-Thompson, Dolores, 'Suicide in later life' (1997) 28 *Behavior Therapy* 23

Glisson Bradley, Sharon, 'Testamentary capacity: is the alcoholic incapacitated?' (1985) 46 *Montana Law Review*

Gray, Sharon, 'The expert witness problem' (2010) 17 *Journal of Speech, Language and the Law* 201, 203

Hewitt, Jeanette, 'Rational suicide: philosophical perspectives on schizophrenia' (2010) 13 *Medicine Health Care and Philosophy* 25

Hewitt, Jeanette, 'Why are people with mental illness excluded from the rational suicide debate?' (2013) 36 *International Journal of Law and Psychiatry* 364

Hicks, Daniel, 'Comments by Daniel Hicks MD' (2009) 50 *Psychosomatics* 194, 195

Kirkey, Sharon, 'Suicide not always driven by mental illness paper argues; debate grows over rational suicide' (2014) <http://www.canada.com/news/Suicide+always+driven+mental+illness+paper+argues+debate+grows+over+rational+suicide/9610150/story.html> at 15 April 2014

Kissane, David, Street, Annette and Nitschke, Philip, 'Seven deaths in Darwin: case studies under the Rights of the Terminally Ill Act, Northern Territory, Australia' (1998) 352 *The Lancet* 1098

Law Society of NSW, *A Practical Guide to Solicitors: when a client's capacity is in doubt* (2009)
<http://lawsociety.com.au/cs/groups/public/documents/internetcontent/023880.pdf> at 31 May 2014

Leeman, Cavin, 'Commentary on Elger and Harding can suicide be rational in persons who are not terminally ill' (2004) 26 *General Hospital Psychiatry* 145

Lieberman, Lisa, *Leaving You: the cultural meaning of suicide* (2003)

Mackie, Ken, *Principles of Australian Succession Law* (2007)

Mahendra, Bala, 'Testamentary capacity' (2000) 150 *New Law Journal*

Miller, Ivan, Norman, William, Bishop Stephen and Dow, Michael, 'The modified scale for suicide ideation; reliability and validity' (1986) 54 *Journal of Consulting and Clinical Psychology* 724

Nitschke, Philip, 'We need a new word for suicide' *Sydney Morning Herald* (Sydney), 1 April 2014 <http://www.smh.com.au/comment/we-need-a-new-word-for-suicide-20140401-zqp9b.html> at 1 April 2014

Nitschke, Philip and Stewart, Fiona, *Killing me softly: voluntary euthanasia and the road to the peaceful pill* (2005)

Nitschke, Philip and Stewart, Fiona, *The Peaceful Pill Handbook* (2008)

Nitschke, Philip and Stewart, Fiona, 'What's it got to do with you? Challenging the medical profession's future in the assisted suicide debate' (2011) 45 *Australian and New Zealand Journal of Psychiatry* 1017

O'Neil, Nick and Pesiah, Carmelle, *Capacity and the Law* (2011)
<http://www.austlii.edu.au/au/journals/SydUPLawBk/2011/1.html> at 10 March 2014

Prado, Carlos, 'Moral individualism and elective death' (2013) 36 *International Journal of Law and Psychiatry* 471

Rabins, Peter, 'Can suicide be a rational and ethical act in persons with early or predementia?' (2007) 7 *American Journal of Bioethics* 47

Roman, Gustavo, *Managing Vascular Dementia* (2003)

Shulman, Kenneth, Cohen, Carole and Hull, Ian, 'Psychiatric issues in retrospective challenges to testamentary capacity' (2005) 20 *International Journal of Geriatric Psychiatry* 63, 63

Shulman, Kenneth, Hull, Ian and Cohen, Carole, 'Testamentary capacity and suicide: an overview of legal and psychiatric issues' (2003) 26 *International Journal of Law and Psychiatry* 403, 407

Siegel, Karolynn, 'Psychosocial aspects of rational suicide' (1986) 40 *American Journal of Psychotherapy* 405

Siegel, Karolynn, 'Rational suicide: philosophical perspectives on schizophrenia' (2010) 13 *Medicine, Health care and Philosophy* 25

Spar, James and Garb, Andrew, 'Assessing competency to make a will' (1992) 149 *American Journal of Psychiatry* 169

Swan, Jonathan and Vesentin, Lisa, 'Coalition celebrates a religious easter: eight of 19 cabinet members are catholic', *Sydney Morning Herald* (Sydney), 20 April 2014 <http://www.smh.com.au/federal-politics/political-news/coalition-celebrates-a-religious-easter-eight-of-19-cabinet-members-are-catholic-20140419-36xn4.html> at 21 April 2014.

Swinburne, Henry, *A Treatise of Testaments and Last Wills* Part II, sec 5 <https://archive.org/stream/treatiseoftestam00swin#page/74/mode/2up> at 26 May 2014

Szasz, Thomas, *Fatal Freedom* (2002)

Werth, James, *Rational suicide: implications for mental health* (1996)

Werth, James and Cobia, Debra, 'Empirically based criteria for rational suicide; a survey of psychotherapists' (1995) 25 *Suicide and Life-threatening Behavior* 231

Yesavage, Jerome, Brink, T L, Rose, Terrence, Lum, Owen, Huang, Vanthida, Adey, Michael and Leirer, Von, 'Development and validation of a geriatric depression screening scale; a preliminary report' (1983) 17 *Journal of Psychiatric Research* 37

2. Case Law

APK v JDS [2012] NTSC 96

Bailey v Bailey (1955) 29 ALJ 179

Banks v Goodfellow (1870) LR 5 QB 549

Bird v Luckie (1850) 8 Hare 301

Boulton v Sanders [2004] VSCA 112
Boyse v Rossborough (1854) 43 ER 321
Bull v Fulton [1942] HCA 13
Burrows v Burrows (1827) 162 ER 524
Duffield v Robeson, 2 Del 375 (1837)
Easter v Griffiths (1995) 217 ALR 284
Estate of Dolbeer, 149 Cal 227 (1908)
Freisen and Holmberg v Freisen Estate (1985) Carswell Man 84
Gibbons v Wright [1954] HCA 17
Harwood v Baker (1840) 13 ER 117
Harris v Jenkins (1922) 31 CLR 341
In the Estate of TLB [2005] SASC 459
In the Goods of Edward Miller Mundy Esq (1860) 2 Sw & Tr 119
In the Goods of Peter Marsden (1860) 164 ER 851
Johnson v Buttress (1936), 45 CLR 113
Kerr v Badran [2004] NSWSC 735
Key (decd), Re; Key v Key [2010] 1 WLR 2020
Kinleside v Harrison (1818) 161 ER 1196
Landers v Landers (1914) 19 CLR 222
Nicholson v Knaggs [2009] VSC 64
Nock v Austin (1918) 25 CLR 519
Norris v Tuppen [1999] VSC 228
Pates v Craig and The Public Trustee; Estate of The Late Joyce Jean Cole [1995] NSWSC 87
Phillpot v Olney [2004] NSWSC 592
Re Bryden [1975] Qd R 210
Re Estate of Paul Francis Hodges Deceased; Shorter v Hodges (1988) 14 NSWLR 698
Revie v Druitt [2005] NSWSC 92
Roos v Karpenkow (1998) 71 SASR 497
Scattini & Anor v Matters [2004] QSC 459
Smith v Tebbitt (1865-69) LR 1 PD 398
Stuart v Kirkland-Veenstra (2009) 237 CLR 215
Symes v Green (1859) 164 ER 785
The Estate of Masters (dec); Hill v Plummer (1994) 33 NSWLR 446
Timbury v Coffee (1941) 66 CLR 277
Vosahlo dec; Vosahlo v Kantor [2003] VSC 81
Vout v Hay [1995] 2 SCR 876
Wilkinson v Service, 249 Ill 146 (1911)
Wintle v Nye [1959] 1 WLR 284
Wingrove v Wingrove (1885) LR 11 PD 81
Worth v Clasohm (1952) 86 CLR 439

3. Legislation

Criminal Law Consolidation Act 1935 (SA)

Mental Health Act 1986 (Vic)
Rights of the Terminally Ill Act 1996 (NT)
Statute of Frauds 1677 (UK)
Tenures Abolition Act 1660 (UK)
Wills Act 1837 (UK)
Wills Act 1936 (SA)

4. Other Sources

Email from Steve Flounders to Fiona Stewart, 1 May 2011
Email from John Goss to Fiona Stewart, 13 April 2004
Email from Jeremy Dwyer, Acting Team Leader Coroners Court of Victoria to Fiona Stewart, 20 December 2012