Supreme Court

New South Wales

Case Name:	The Estate of Colleen McCullough
Medium Neutral Citation:	[2018] NSWSC 1126
Hearing Date(s):	22-31 May 2018
Decision Date:	20 July 2018
Jurisdiction:	Equity - Probate List
Before:	Rein J
Decision:	See [131], [145], [147], [168], [180], [181] and [196]
Catchwords:	SUCCESSION – Probate – Testamentary instruments – Whether either of two informal documents prepared by a solicitor acting for the deceased, one initialled and one signed (the one signed being witnessed), constituted a valid and intentional testamentary disposition; Issue of whether the deceased was coerced or pressured by the Defendant into signing or initialling the documents; Issue as to the date the signed document was signed (being either 24 October 2014 or 17 January 2015); Held: Both documents were signed or initialled by the deceased on 24 October 2014; testamentary intention established, and coercion or lack of volition not established. SUCCESSION – Probate – Testamentary instruments – Informal document purporting to operate as a codicil – Whether purported codicil initialled on 14 January 2015 was effective to revoke any testamentary disposition by the deceased on 24 October 2014; HELD: Document not a codicil pursuant to s 15 of the Wills Act 2012 (Norfolk Island), and not effective to revoke the testamentary disposition of the deceased on 24 October 2014.

COSTS – Probate litigation – Departure from rule that costs follow the event – Where Plaintiff sought costs out of the estate and Defendant seeks order that Plaintiff pay his costs and on an indemnity basis – Shorter v Hodges (1988) 14 NSWLR 698 applied – Where circumstances led reasonably to an investigation in regard to the document propounded by the successful party – Where investigation caused by neither the testator nor a party to the proceedings; HELD: Exception to the usual rule applies; Each party to pay his or her own costs of the proceedings.

Legislation Cited: Civil Procedure Act 2005 (NSW)
Succession Act 2006 (NSW)
Uniform Civil Procedure Rules 2005 (NSW)
Wills Act 2012 (Norfolk Island)

Cases Cited: Banks v Goodfellow (1870) LR 5 QB 549
Baudains & Ors v Richardson & Anor [1906] AC 169
Boyse v Rossborough (1857) 6 HL Cas 1; (1857) 10 ER 1192
Burns v Burns [2016] EWCA Civ 37
Carr v Homersham [2018] NSWCA 65
Craig v Lamoureux [1920] AC 349
Glenda Phillips v James Phillips; John Matthew Phillips by his Tutor NSW Trustee & Guardian v James Phillips (No 3) [2017] NSWSC 409
Hatsatouris & Ors v Hatsatouris [2001] NSWCA 408
In Re Resch's Will Trusts [1969] 1 AC 514
In the Estate of Horne (1920) 20 SR 531
Jones v Dunkel (1959) 101 CLR 298
Lindsay v McGrath [2016] 2 Qd R 160; [2015] QCA 206
Nock v Austin (1918) 25 CLR 519
Oreski v Ikac [2008] WASCA 220
Parfitt v Lawless (1872) LR 2 P & D 462
Re Application of Brown; Estate of Springfield (1991) 23 NSWLR 535
Re Hodges; Shorter v Hodges (1988) 14 NSWLR 698
Ridge v Rowden & Anor (Santow J, Supreme Court of NSW, 10 April 1996, unreported)
Stojic v Stojic [2018] NSWCA 28
Walker v Harwood [2017] NSWCA 228
Wingrove v Wingrove (1885) 11 PD 81
Winter v Crichton; Estate of Galieh (1991) 23 NSWLR

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Category:	Principal judgment
Parties:	Selwa Anthony (Plaintiff) Cedric Ion Newton Robinson (Defendant)
Representation:	Counsel: Mr K. Morrissey and Ms M. Bridgett (Plaintiff) Mr D. Murr SC and Mr D. Ash (Defendant) Solicitors: Maxwell, Meredith & Co Solicitors & Attorneys (Plaintiff) McIntyres Lawyers (Defendant)
File Number(s):	2015/00116610
Publication Restriction:	Nil

REASONS FOR JUDGMENT

1 These proceedings concern the estate of the late Dr Colleen McCullough ("**Colleen**"), who died on 29 January 2015 at the age of 77 on Norfolk Island where she had lived for many years.

2 Colleen was a writer of considerable fame, having written, amongst other books, *The Thorn Birds*.

3 Colleen was survived by her husband and the Defendant in these proceedings, Mr Cedric Ion Newton Robinson ("**Ric**"), whom she had married in 1984. There were no children of the marriage but Ric had two children from a previous marriage. Colleen had no other living relatives.

4 The Plaintiff in these proceedings, Ms Selwa Anthony, was a long-time friend of Colleen and is one of two named executors in a will of Colleen's dated 12 July 2014, by which she bequeathed her entire estate to the University of Oklahoma Foundation Inc. ("**the Foundation**"). Colleen had received an honourary doctorate from the University of Oklahoma and had lectured there at some stage. The other executor of that will, Mr Joseph John Merlino, renounced probate. I shall refer to this will as "**the Oklahoma Will**".

5 Mr K. Morrissey (with Ms M. Bridgett) appears for the Plaintiff. Mr D. Murr SC (with Mr D. Ash) appears for Ric.

6 Ric contends that the Oklahoma Will is not the last will and testament of Colleen, relying primarily on what I will refer to as "**the Exhibit 5 Will**" and, alternatively, what has been referred to as "**Exhibit 6**", both of which I shall describe in more detail below. Thrown into the mix is a further document, which bears the date of witnessing as 14 January 2015 and consists of a handwritten question and answer, a mark or signature said to be Colleen's and bearing the signatures of two witnesses. The Plaintiff calls this document "the codicil". Ric disputes that it is a codicil or that it has the effect for which The Plaintiff contends. I shall refer to this document by its exhibit reference, namely, "**Exhibit D**".

7 This case is not concerned with the question of whether, if the Oklahoma Will is found to be the last will of Colleen, Ric is entitled to provision out of her estate. The parties were agreed that that question would need to be ventilated in separate proceedings if the Court determined that the Oklahoma Will is the last will and testament of Colleen.

8 In her case, the Plaintiff relies on the following affidavits:

(a) Affidavits of Selwa Anthony sworn 6 August 2015, 24 August 2015, 7 September 2015, 2 December 2015, 29 March 2018;

(b) Affidavits of Meredith Paton of 26 November 2015 and 22 May 2018;

(c) Affidavits of Piria Coleman sworn 28 November 2015, 2 August 2016, 19 April 2018, 8 May 2018, 16 May 2018 and 22 May 2018;

(d) Affidavit of Katherine Alison Drayton of 19 July 2016; and

(e) Affidavits of Nicola Wright of 24 October 2016, 16 March 2018 and 24 May 2018.

9 In his case, Ric relies on the following affidavits:

(a) Affidavits of Helen Jackson of 23 November 2015, 19 February 2016 and 23 October 2016;

(b) Affidavits of Lewis Quintal of 23 November 2015, 19 February 2016 and 23 October 2016;

(c) Affidavits of Ric Robinson of 23 November 2015, 16 June 2016, 8 October 2016 and 12 November 2016; and

(d) Affidavit of Dr Robert Challender of 23 July 2016.

10 I will endeavour in this, and the following few paragraphs, to set out what is not in dispute between the parties:

(1) Colleen and Ric were married in 1984.

(2) They lived on Norfolk Island together, but in 2005, Colleen spent several years in Sydney undergoing treatment for macular degeneration, with Ric commuting regularly to Sydney from Norfolk Island because Colleen could not fly by reason of the medical treatment she was receiving for her condition.

(3) In 2005, both Colleen and Ric executed wills in similar form leaving his and her estate, respectively, to the other. The University of Oklahoma was a beneficiary of part of Colleen's estate in Colleen's will if Ric predeceased her. Ric's evidence was that there had been similar mutual wills for many years before that: see CB2-16, paragraph 9.

(4) In 2007, codicils of a limited nature in identical terms were made by Colleen and Ric.

(5) By 2010, Colleen was residing full time on Norfolk Island (CB2-17). I shall use the Court Book reference from here on to each of Exhibit A1 (CB1) and Exhibit A2 (CB2).

(6) In February 2014, Colleen and Ric engaged Ms Nicola Wright, who was known as "Nikki", as a carer for Colleen (9am – 5pm during weekdays). Ms Wright has a nursing background in New Zealand and was living on Norfolk Island at the time.

(7) On 24 June 2014, Ms Wright contacted Ms Piria Coleman. Ms Coleman was, at the time, in practice as a solicitor on Norfolk Island. Ms Coleman then had a conversation with Colleen in which Colleen told her about her relationship with Ric, and that she wanted to find out about getting a divorce, making a new will and revoking a power of attorney given to Ric. Colleen also asked Ms Coleman whether she should contact the police, to which Ms Coleman replied in the affirmative, having discussed the issue with Ms Wright.

(8) On 24 June 2014, Colleen did call the police to the property in which she and Ric lived and owned (known as "**Out Yenna**"), and she told Ric that she had done so and that he should leave Out Yenna. She said to Ric in Ms Wright's presence: "I have called the police because I am afraid of you" (CB2-17, paragraph 18). Ric says that he was amazed by what Colleen had said to him as he had never done anything to put her in fear but he thought it best to move out until the problem was resolved. It was Ms Wright who actually called the police on behalf of Colleen.

(9) Ric left Out Yenna on 24 June 2014 and went to live with his son, Wade, a few kilometres away.

(10) On 26 June 2014, Ms Coleman met with Colleen and obtained more detailed instructions. They arranged to meet in Sydney at the Hilton Hotel. Colleen was heading to Sydney for a consultation with her eye specialist, and Ms Coleman was travelling to Sydney for other purposes.

Colleen told Ms Coleman that, as far as she was concerned, she and Ric had legally separated on 24 June 2014: CB1-90, paragraph 21.

(11) Colleen travelled to Sydney on 7 July 2014 accompanied by Ms Helen Jackson, a Norfolk Island resident, who acted as her carer and Mr Lewis Quintal, an electrician and also a Norfolk Island resident, who was able to lift Colleen when required and assist Ms Jackson with caring for Colleen.

(12) Colleen and Ms Coleman met at the Hilton Hotel on 8 July 2014. Colleen instructed her to prepare a will, leaving her entire estate to the Foundation, saying (at CB1-91, paragraph 30):

> "I have no family. I am very fond of [Oklahoma University]. I don't want to leave anything to Yale."

She also said, in the presence of Mr Quintal, according to Ms Coleman (at CB1-91-92, paragraph 32):

> "My husband Ric has never worked. I have always paid for everything. I've done enough for him already. I just want Oklahoma University to be the beneficiary under my will, nothing more."

(13) Ms Coleman prepared a will in the terms instructed and she also prepared a document headed "Attestation" and obtained a document headed "Bequest letter" addressed to the Foundation which she completed for Colleen. She was provided with an original medical certificate dated 2 July 2014 from Dr. W. Metcalfe (CB1-182).

(14) On 12 July 2014, Colleen executed the Oklahoma Will (Exhibit C), signed the Attestation (Exhibit F) and signed the completed Bequest letter (Exhibit E). The Attestation was in the following form:

> Attestation
>
> Having considered the extent of my estate I have determined not to make provision for my husband RIC NEWTON ION ROBINSON for the following reasons:
>
> 1. Adequate provision has been made for my husband RIC NEWTON ION ROBINSON during our marriage. If my husband RIC NEWTOWN ION ROBINSON does not predecease me, any further provision for him would see any beneficiary of my will unfairly disadvantaged.
>
> 2. In these circumstances any gift to my husband RIC NEWTOWN ION ROBINSON to the detriment of any beneficiary of my will would be contrary to my intention and the nature of my relationship with my husband.
>
> 3. I have sought to achieve equity in the gifts made by me in my will and intentionally exclude my husband RIC NEWTOWN ION ROBINSON as he has benefitted from me throughout the course of my marriage to him.

(15) On Ms Coleman's evidence, Colleen initialled the page of the Oklahoma Will bequeathing her estate to the Foundation ("**the dispositive page**"), but neither Ms Jackson nor Mr Quintal initialled or signed that page on

12 July 2014, nor the page setting out executor powers, "**the powers page**".

(16) Shortly after 14 July 2014, Ms Coleman prepared or organised the preparation of a revocation of Colleen's New South Wales power of attorney in favour of Ric. That revocation was signed by Colleen on 27 July 2014 and was witnessed by Ms Alison Drayton, a solicitor who was a friend of Ms Coleman with whom she had previously worked and who happened to be visiting Norfolk Island on that date.

(17) On 14 July 2014, Colleen returned to Norfolk Island, together with Mr Quintal and Ms Jackson.

(18) On 16 July 2014, Colleen and Ric met at Out Yenna with Mrs Quintal present, at Ric's request. Ric says this followed a call from Mr Quintal's wife, Mrs Karen Quintal, to him. According to Ric, he and Colleen had the following conversation:

> Colleen: "Ric, I would like you to come back home, and continue to look after me."
>
> Ric: "But what about you having called the police?"
>
> Colleen: "I was sick when I did that. You have never tried to hurt me."

(19) On or about 17 July 2014, Ric returned to Out Yenna.

(20) On 21 July 2014, Colleen informed Ms Coleman that she and Ric had reconciled, which Ms Coleman noted in a letter to Colleen of 5 August 2014 (see Exhibit B).

(21) On 21 October 2014, Ms Coleman visited Out Yenna and met with Colleen. That she saw Ric as well on that date is not disputed but the extent of her meeting with Ric is disputed.

(22) Between 21 and 24 October 2014, Ms Coleman prepared a new dispositive page in the same font and nature as the dispositive page of the Oklahoma Will, but removing the Foundation as the sole beneficiary and replacing it with Ric.

(23) On 21 October 2014, Ms Wright sent to Ms Coleman a draft letter dictated by Colleen (see CB1-410-413) which followed on from Colleen's discussions with Ms Coleman. In its second paragraph, that letter contains the words, "living beyond our means", and I shall refer to it as "**the LBOM Letter**".

(24) On 24 October 2014, Ms Coleman attended at Out Yenna with the new dispositive page and the other pages of the Oklahoma Will. Ms Coleman's evidence is that, on that day, Colleen placed her signature on a dispositive page described as "PC-16" (and which became Exhibit 5) and her initials on a substantively identical dispositive page described as "PC-15" (and which became Exhibit 6). Ric says that Colleen signed her name on Exhibit 5 on 17 January 2015. He does not know when Colleen initialled Exhibit 6, but accepts that Exhibit 6 may well have been initialled by Colleen on 24 October 2014.

(25) There is no dispute that the end of Colleen's signature ran slightly off Exhibit 5 and on to two documents that were placed underneath, being the powers page and the execution page from the Oklahoma Will.

(26) On 25 October 2014, Ms Coleman wrote a letter to Colleen in which she said (at CB1-414):

> Dear Colleen
>
> **Re: Estate Planning - Sale of Portion 93d**
>
> **I refer to our conferences on 21 and 24 October 2014 and to your instructions to redraft your Will and prepare portion 93d for sale.**
>
> **I confirm that the updated Will Is now held in a security packet and that the instructions received are consistent with a harmonious approach to estate planning going forward.**
>
> To that end, I have made arrangements with Jane Taylor who resides on portion 93d and Island Realty (David Bell) to have the property inspected to obtain an appropriate sale price.
>
> …
>
> In seeking your consent for payment, I have issued an Invoice in the sum of $500 including 12% GST, as a flat rate and fixed charge for work associated **with drafting the fresh Will, our two conferences**, and all essential arrangements to act and assist on the sale of portion 93d.
>
> Yours sincerely
>
> Piria Coleman
>
> (emphasis added)

(27) An invoice for the work was enclosed (consistent with that letter), together with a covering email and sent to Ms Wright on 25 October 2014 (CB1-409), which stated:

> "Please find attached letter and invoice, which clearly document the content of discussions, instructions, and work completed this week."

(28) The invoice referred to above contained the following description of work completed (at CB1-200):

> "**Attending to further conference with Colleen McCullough to execute fresh Will. Discussed estate planning in more detail and noted letter to Ric had not yet been delivered, although written.** Indicated to Colleen that letter was consistent with recommendations at previous conference on 21 October 2014. Encouraged opportunity for Colleen to openly discuss financial issues as they relate to her health care with Ric. Noted it is essential that asset base be realised in order for Colleen to finance health care needs going forward. Accepted instructions to act on sale of portion 93d. File Notes.
>
> Units Spent. 10
>
> Billed By: Piria Coleman"
>
> (emphasis added)

(29) From 14 December 2014 to 17 January 2015, Ms Jackson was employed as a carer for Colleen on those days during the week when Ms Wright was not available. Whether she was working at Out Yenna in October 2014 as Ms Coleman asserts is disputed.

(30) On 9 January 2015, Ms Coleman visited Out Yenna meeting Colleen in the company of Ric. There is no dispute that there was a discussion concerning wills and I shall return to the detail of that meeting. Ric said the meeting was on 8 January 2015, but nothing turns on that discrepancy.

(31) Between 9 and 14 January 2015, emails passed between Ric and Ms Coleman, and between Mr John Brown (Ric's solicitor) and Ms Coleman. Those emails contain the following text:

(a) 9 January 2015 at 8:09am, Ric to Ms Coleman:

> Dear Piria,
>
> I refer to our discussion yesterday, when you came to speak to Col and me.
>
> Following that discussion, I have a couple of questions, which I have discussed with Col, and she has suggested that I ask you about them.
>
> As you know, we have a number of debts, and whichever of us passes away first will leave those problems to the other of us.
>
> In case that becomes my problem, I need to plan for it.
>
> **You have told me that Col's will leaves her estate to me.**
>
> **That being so, is there any reason for me not to be appointed as the executor, and have a copy of Col's will?**
>
> Col is welcome to a copy of mine, as she always has been.
>
> Regards,
>
> Ric
>
> (emphasis added)

(b) 9 January 2015 at 10:07am, Ms Coleman to Ric:

> Dear Ric
>
> **[If] Col wishes to appoint you as the executor, we would need to draft up a fresh Will to give effect to that.**
>
> **I am available to do so prior to Monday 19 January 2015 when I depart Norfolk Island for a short time.**
>
> **Given that we have correspondence from medical professionals that indicate Col is of sound mind, it would be prudent that I request a certificate of independent legal advice prior to drafting any fresh Will.**
>
> **At this stage and in all the circumstances, I think it risks being seen as coercive to vary the Will such that you are both executor and beneficiary.**

Alternatively, I could draft two fresh "mirror" Wills such that each is exactly the same as the other i.e. where each of you leaves the estate to the other.

Whatever Col's instructions are, or your joint instructions, I think it would be in your best interests to obtain independent legal advice so you aware of the advantages and disadvantages of the decisions you make.

I would even consider approaching more than one other legal practitioner on the Island, so that you can consider their potentially varying views and then decide what is most appropriate.

My main reservation after leaving yesterday is that it is somewhat problematic (at this stage) for me to draft a power of attorney in your favour on Col's behalf for land transactions.

I note in practice it is not uncommon for solicitors on the Island or for bank managers to be granted powers of attorney for land transactions and this is arguably more appropriate in Col's case.

What is awkward is what has precipitated the current change in circumstances i.e. that the revocations of your appointment both in Norfolk Island and New South Wales are so recent.

I think this is also why it is arguably more appropriate to retain the two independent parties as executors to Col's Will, and this reflects my position in terms of arms' length legal advice.

Please call me on 23295 or 51123 if you would like to discuss further but perhaps first try and talk to at least one other legal practitioner, so I can obtain clear instructions from Col.

I need to meet with Col again whatever she decides to do in order for her to complete the advanced health care directive and consider some form of fresh power of attorney for Norfolk Island.

Regards

Piria

(emphasis added)

(c) 10 January 2015, Ric to Ms Coleman:

Dear Piria, 10-1-2015

I don't know if you are aware of the fact that Col pays 30% of her income in withholding tax to the U.S. and British Governments. She cannot claim expenses.

Col also pays 15 % of the gross income to her agents. Given that the

executors are entitled to a 3-5 % commission and that my legal advice says;" I see nothing wrong with you (me) being nominated as executor." I would rather that be the case.

The other advice I received was that mirror or identical wills together with a deed providing that neither of us will change our wills is a good idea.

I also think it would be a good idea to get a doctor to certify that Col understands what she is doing.

Regards etc

(Emphasis added)

(d) 10 January 2015 at 12:13pm, Ms Coleman to Ric:

Dear Ric

By way of brief response to the attached letter dated 10 January 2015:

1. I haven't been provided comprehensive instructions as to Col's arrangements for the US, UK, and her agents but enough to be aware of certain arrangements she has in place that would change if she passed. It is important that a representative of Col's (whether legal or personal) liaises with her agents to ensure a smooth transition at the time she does pass and when her estate is being administered;

2. the current executors would be entitled to claim commission but you would also be entitled to claim commission as the executor. I haven't yet acted for a party in this jurisdiction that has claimed commission from the estate but there is provision for it in the legislation;

3. there is some merit in mirror Wills in marriages of a long duration, although it would it raises certain legal issues if I were to draft those Wills having regard to Col's (fairly) recent instructions and the circumstances since my involvement;

4. the 'deed' is entirely sensible as it is essentially a written promise between each of you so you know where you stand;

5. I agree to review any documents prepared by an alternate legal practitioner and to cooperate with providing the legal advice required to ensure there is no suggestion Col has signed a fresh Will under duress etc…

6. the first step would be to obtain the certificate of capacity from a medical doctor and it would need to be current at the time the fresh Wills are drafted;

7. in light of these recent developments, I will need to arrange a consultation with Col between 12-16 January 2015 in order to provide her independent legal advice in any event on various decisions she may wish to make in the near future; and

8. lastly I reaffirm my position that it would need to be an alternate legal practitioner that drafts the mirror Wills formalising your role as executor and beneficiary, **as it is ultimately contrary to the instructions I have received since Col originally sought my advice in a high state of distress in June 2014.**

Let me know what arrangements you come to in light of the above and I will attend to whatever may be required in the coming week, as I depart briefly on Monday 19 January 2015.

Regards

Piria

(emphasis added)

(e) 13 January 2015 at 10:49am, Mr Brown to Ms Coleman:

Dear Piria,

Ric has asked me to draft simple mutual wills for himself and Colleen, and a simple Deed agreeing to not change those wills.

He has asked me to send copies to you for your consideration.

They are attached.

Regards

John Brown

(32) Exhibit D has the following content:

"Q: Do you Colleen McCullough Robinson want your last will and testiment (sic) to be that which you drafted in private with your solicitor Piria Coleman

A: Yes I do"

Exhibit D has at its foot a mark apparently of Colleen and the signatures of Ms Wright and Ms Rebecca ("**Beachy**") Hayes. It has as the date of signing 14 January 2015.

(33) On 14 January 2015, Dr Robert Challender, a Norfolk Island general practitioner, who was based at or affiliated with Norfolk Island Hospital and had previously seen Colleen on several occasions, visited Colleen at Out Yenna at the request of Mr Brown. He wrote a medical certificate (CB2-70-71) which was in the following terms:

"This is to certify I've met with Colleen several times over the last 6 weeks in my capacity as her attending G.P. Physically, she's not in good shape but mentally, I can certainly vouch that she's sane rational and completely able to make well considered decisions. Equally I can vouch that I've seen absolutely no sign that she's under any sort of physical or emotional duress. Colleen is a very intelligent woman, a realist and pragmatic about her somewhat tenuous state of health. If I'm sitting with her in 5 years having a drink and debating literacy issues I'll be a happy man."

(34) On 17 January 2015, Ms Coleman visited out Yenna and met with Colleen. This is another occasion, the events of which are much in dispute, with Ric asserting that Colleen signed Exhibit 5 on that day and Ms Coleman denying that she did. It was accepted, however, that Ms Valerie Martinez attended on that day and that Colleen was asked to execute a power of attorney in favour of Ms Martinez to enable Ms Martinez to sell on behalf of Colleen some Norfolk Island properties that Colleen owned. Ms Coleman and Ms Wright gave evidence that Colleen was unable to sign the document due to her physical incapacity, and that a metal stamp containing Colleen's signature was applied by Ms Wright instead which, according to Ms Coleman, Colleen was not even able to initial: CB1-128, paragraph 91. A copy of that document is at CB1-237. The 'signature' is witnessed by Ms Wright and Ms Jackson, and they both declared in that document that they believed that Colleen was "of sound mind and understands the impact of the document."

(35) In the afternoon of 17 January 2015, Ric and Ms Coleman had a telephone conversation as Ric was taking Colleen to hospital. In the course of that conversation, Colleen said, in a voice loud enough for Ms Coleman to hear (and yelled on Ms Coleman's evidence: T116), "Give him what he wants" or "Just give the will to Ric" (Ric's evidence, see CB2-20, paragraph 38).

(36) Ms Coleman, on the afternoon of 17 January 2015, rang Mr Quintal and arranged to meet him at the BBQ area at Emery Beach. She says she brought with her Exhibit 5 and another document, being the powers page from the Oklahoma Will (see CB1-130, paragraph 102), and she asked Mr Quintal to "witness" Colleen's signature on those documents. Mr Quintal applied his initials on Exhibit 5. Ms Coleman says that Mr Quintal did not know what the documents were when he "witnessed" either of Colleen's signatures: CB1-104, paragraph 121, and CB1-105, paragraph 123. Mr Quintal agrees with that but says that Ms Coleman said to him on the phone when making the arrangement to meet at Emery Beach (CB2-254, paragraph 5):

> "I have needed to redo Colleen's will - to make some adjustments."

(37) In the evening of 17 January 2015, Colleen was admitted to Norfolk Island Hospital and remained there until her death.

(38) On 18 January 2015, Ms Coleman provided Ric with an envelope which Ric then took to Mr Brown where it was opened. There was a dispute about what was said by Ms Coleman to Ric when she arranged to deliver the envelope to Ric.

(39) In the envelope was a stapled document containing:

(i) A coversheet prepared by Ms Coleman with the words, "Norfolk Island Lawyers, Taylors Road, Burnt Pine, Norfolk Island 2899", and phone numbers in the bottom right hand corner (the coversheet to the Oklahoma Will had no such details);

(ii) Exhibit 5 with Mr Quintal's and Ms Jackson's initials or signature on it;

(iii) The powers page from the Oklahoma Will; and

(iv) The execution page from the Oklahoma Will.

These documents were stapled together by Ms Coleman, and it is this bundle of documents which is referred to as the Exhibit 5 Will.

(40) Also in the envelope was the medical certificate from Dr Challender (on Ric's evidence) or the medical certificate from Dr Metcalfe dated 2 July 2014 (Ms Coleman's evidence): see CB1-105, paragraph 132.

(41) On 18 January 2015, Ms Coleman wrote an email to Ms Drayton in which she said:

> "Colleen McCullough's health is very poorly (sic) … Are you interested in acting in her estate if it becomes necessary and applying for the grant of probate (see attached) ?
>
> I have suggested Colleen's husband consider you but I'm not sure whether it would be required soon or in the much longer term."

to which Ms Drayton replied that she was happy to be involved (CB2 – 73).

(42) On that same day, Ms Coleman wrote an email to Ric (CB2-73) saying:

> "I don't mean to pre-empt arrangements when it is unnecessary but below appears a feasible option for you (see both emails).
>
> I've extracted and attached the section from the legislation as to legal costs associated with applying for a grant of probate.
>
> I hope you can ease Colleen through this difficult phase of her life, so that it is as harmonious as possible for all involved."

The reference to the emails included her email to Ms Drayton (set out in [10(41)] above) which was attached.

(43) On 29 January 2015, Colleen died at Norfolk Island Hospital. The cause of death was stated to be renal failure and diabetes.

(44) On 6 February 2015, Ric sent an email to the Plaintiff attaching a copy of the Exhibit 5 Will which he had been given by Ms Coleman. He also gave a copy of the same document to Mr Merlino.

(45) On 11 February 2015, Ms Meredith Paton, the solicitor on record in these proceedings for the Plaintiff, but who also at one point in the history of this litigation acted for the Foundation, wrote to Ms Coleman asking her for the original will and Ms Coleman's files. Ms Paton also wrote to Mr Brown (see Exhibit 2) asking him to deliver to Ms Coleman what Ms Paton described as "the Original Will held by him", which Mr Brown did. Ms Coleman had also emailed Mr Brown referring to

arrangements to enable her to collect "the security packet that I handed to Ric Robinson on Sunday 18 January 2015": CB1-262.

(46) Ms Coleman, having obtained back from Mr Brown the Exhibit 5 Will that she had delivered to Ric on 18 January 2015, using the powers page and the execution page, she reassembled what had been the Oklahoma Will. She then delivered the reassembled Oklahoma Will to Ms Paton on 25 February 2015, together with (what she says) her file in the matter, including Exhibit 5 and Exhibit 6.

(47) On 1 June 2015, a Statement of Claim with the Foundation as Plaintiff was filed in this Court. By that Statement of Claim, the Foundation sought probate of the Oklahoma Will. The Statement of Claim also contained the following paragraphs:

> "9. In or about October 2014 an amended the first page of Will substituting the defendant for the University of Oklahoma Foundation Inc as the sole beneficiary, not bearing the pagination "1 of 1", was signed by the deceased and initialled by Helen Jackson. Another first page of the Will was initialled by the deceased.
>
> 10. The Plaintiff says that with rapidly deteriorating health, blindness resulting from macular degeneration, inability to walk or get up out of bed without the assistance of the defendant, totally reliant upon the defendant, that the influence of the defendant over the deceased was such that the deceased was not a free agent in October 2014, the marking of the amended first pages was not of the deceased's own volition and at that time she had no testamentary intention to revoke or amend the will made 12 July 2014."

Ms Paton says she drafted that Statement of Claim.

(48) When the Plaintiff resumed her role as executor of the Oklahoma Will, a fresh Statement of Claim was filed and it made no reference to the Exhibit 5 Will (or Exhibit 6).

(49) As at the date of Colleen's death, she left some assets in New South Wales, namely, some artwork, cloth and an edited manuscript for one of Colleen's books, said to be worth $18,000 (see CB1-418 and CB1-58) and there is agreement between the parties that these assets provide this Court with jurisdiction to grant probate or letters of administration in respect of any of the wills that are in contest in this case.

11 Another matter on which there is no dispute is the ill health of Colleen. As at mid-2014, Colleen suffered from diabetes, osteoporosis, she had very poor eyesight (as a result of macular degeneration) and had renal failure. She had had, sometime before mid-2014, a stroke, or several strokes, and suffered from depression. On 14 January 2015, Dr Challender described her in a letter to the District Nurse (see Exhibit Q) as:

> ".. seriously ill with advanced renal failure [and] recurring [transient ischemic attacks].

Her mobility is now very limited [and] she's become incontinent.

She has some nursing help but needs further assistance in many ways.

Her husband is exhausted…"

There is no doubt that, by mid-January 2015, Colleen was not able to read at all. There is some dispute about the degree of Colleen's mobility between October 2014 and January 2015, but she was in need of assistance for many activities during that period, and became increasingly dependent on a wheelchair.

12 As I have noted, Dr Challender's certificate of 14 January 2015 stated (at CB2-204), *inter alia*, that:

> "… she's sane, rational and completely able to make well considered decisions… I've seen absolutely no sign that she's under any sort of physical or emotional distress."

13 Dr Challender said that, during his visit on 14 January 2015, Colleen seemed much more subdued than she had been when he last saw her (in December 2014) and that she spoke quietly: see T456.45-457.13 and T458.9-12.

14 There is another medical record – Exhibit 9. It records consultations of Colleen with Mr Tony Gallagher, a mental health counsellor connected with Norfolk Island Hospital, dated 30 December 2014, 6 January 2015 and 13 January 2015. I shall set out the notes in full because, not only are they relevant to Colleen's ability to communicate, but also because they contain other material of potential relevance to the competing contentions advanced in this case:

> Progress notes – Colleen McCullough-Robinson, D.O.B. 01/06/1937
>
> **Tuesday December 30 2014** 15:02:12
>
> Counsellor – Tony Gallagher
>
> **HOME VISIT:** Colleen presented with significant word finding difficulties today making discussion quite difficult. This is a significant change since I first began home visiting on 2/12/14. Despite this Collen was able to communicate that she is missing Nicky's (one of the regular carers) presence (she is returning from NZ on 11 January) and is finding Rick to be less patient with her, of late. When nicky is present Colleen feels more stimulated and engaged with. Discussion with Rick revealed that Colleen has been waking every one to two hours a night regularly and that her ability to walk has been quite poor; consequently Rick has been experiencing significant sleep disturbance- he speculated whther Colleen has experienced a further stroke of some kind. I suggested I would speak with Dr Challender and that a further medical review may be in order. Tony Gallagher

6 January 2015 I/V E Colleen:

Colleen admitted to NIHE on 4 January due to vague reasons, but in as much as to give Rick, a break. Her renal system is failing [and] she has declined Tx. Colleen expressed matter-of-factly – she “thinks she” “on the way out”, she is feeling anguish that Rick is not a talker [and] that he is jealous of Nicky, her carer. Colleen has no family left – Her brother was last of her ‘blood’ to have passed away thirty years ago. She described her word finding difficulties as ‘maddening’. She is expecting to go home tomorrow [and] I will visit again next Tuesday. Tony Gallagher Mental Health Counsellor.

13 January 2015. Home Visit:

Noted in medical director that Dr Challender has recorded Colleen is experiencing bladder irritability [and] night frequency.

Met by Rick at door. In Colleen’s company he asked that I read out his [and] Colleen’s recently drawn up wills to Colleen so an independent person can validate to Colleen what is stated therein. This done [and] Colleen acknowledged she understood [and] comprehended the contents. Rick has been advised by solicitor Colleen’s testamentary capacity be proved by M.O. agreed to discuss same with Dr Challender.

Colleen did not present with such significant word finding difficulties today – conversation was appropriate, what was noticeable was Colleen’s body slumped in chair [and] difficulties she had with eye-hand co-ordination, requiring assistance to drink. She spoke of her body being in ‘decline’ [and] being close to ‘the end’. She is pleased Nicky has returned. Nicky commented on how much Colleen has deteriorated. Colleen keen to have Sue Trembath visit whilst I’m on leave for next 3 weeks. Rick said Colleen slept right through last night. Discussed circumstances with Dr Challender. Tony Gallagher.

15 I should note too that:

(a) Exhibit O records a conversation (at page 4) with Dr Schiavone, with apparently (“D/W” semble “discussed with”) a ‘caregiver’ for Colleen on 22 November 2014, in which the caregiver reported that:

> “feels like severe depression
>
> Husband was having an affair, marital discord
>
> Says she wants to die.”

(b) Exhibit O (at page 4) also contains Mr Gallagher’s note of his first consultation with Colleen on 24 November 2014, where he noted:

> “Colleen linked her macular degeneration as primary cause of her feeling depressed. Perceives she has been depressed for at least past 8 to 9 months.”

16 Mr Morrissey made it clear that it is no part of the Plaintiff’s case that Colleen did not on 17 January 2015 meet the requirements for testamentary capacity as established in ***Banks v Goodfellow*** (1870) LR 5 QB 549 (or inferentially at any earlier time either): see T527.1. It follows that there is no dispute that

Colleen had the capacity to understand the nature of the act of making a will and its effects, an understanding of the extent of the property the subject of any will made by her and the capacity to comprehend the moral claims of potential beneficiaries: see ***Carr v Homersham*** [2018] NSWCA 65 at [5] per Basten JA (with whom Leeming JA concurred at [128]).

17 Other matters which were not in dispute were:

(1) The fact that, apart from three three-year terms in the Norfolk Island Legislative Assembly, Ric has not been employed or worked in any business. He received, in effect, $500 or $600 per week for his needs out of the joint account held by Colleen and himself. Colleen was, in all practical terms, the breadwinner of the household.

(2) The fact that Ric had taken a mistress in 2010, which continued until 17 July 2014 when he moved back in with Colleen. That Colleen had become aware of this relationship before June 2014 is clear (see CB1-305, paragraph 5), but when he told Colleen about it is in dispute.

(3) That, as at June 2014, Colleen and Ric's finances were in a poor state, at least in terms of liquidity.

18 The contentions of the Plaintiff, as set out in the Plaintiff's closing submissions ("**PCS**") and Mr Morrissey's oral submissions, have these elements:

(1) The Oklahoma Will is a valid will.

(2) The Oklahoma Will is the last will and testament because neither Exhibit 5 nor Exhibit 6 have been shown to have been signed (or initialled) by Colleen with testamentary effect.

(3) Exhibit 5 and Exhibit 6 were just "failed attempts" at a will by Colleen and should not be viewed as representing Colleen's testamentary wishes. There is, grafted onto this, a number of contentions of the Plaintiff concerning Ms Coleman and her conduct:

(a) Ms Coleman saw herself as Colleen's protector;

(b) Ms Coleman never saw Colleen alone and felt that Ric was pressuring Colleen (and herself) and that he seemed to control Colleen;

(c) Colleen did not provide instructions to Ms Coleman to make a new will;

(d) Colleen "did not demonstrate any testamentary intentions or volition";

(e) Ms Coleman did what she did as a 'decoy' to fool Ric into thinking that Colleen had made a will even though she had not;

(f) Colleen could not sign her name and the will making on 24 October 2014 was "abandoned" by Colleen;

(g) Ric does not provide any evidence that Colleen intended either Exhibit 5 or Exhibit 6 to be her will and Ric "denies [Colleen] made the attempts to sign" on 24 October 2014; and

(h) Neither Exhibit 5 nor Exhibit 6 conform with the requirements of s 6 of the ***Succession Act 2006*** (NSW) ("**the Act**"). That section, and s 8 of the Act, are in the following form:

6 How should a will be executed?

(cf WPA 7 and 9)

(1) A will is not valid unless:

(a) it is in writing and signed by the testator or by some other person in the presence of and at the direction of the testator, and

(b) the signature is made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time, and

(c) at least 2 of those witnesses attest and sign the will in the presence of the testator (but not necessarily in the presence of each other).

(2) The signature of the testator or of the other person signing in the presence and at the direction of the testator must be made with the intention of executing the will, but it is not essential that the signature be at the foot of the will.

(3) It is not essential for a will to have an attestation clause.

(4) If a testator purports to make an appointment by his or her will in the exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this section.

(5) If a power is conferred on a person to make an appointment by a will that is to be executed in some particular way or with some particular solemnity, the person may exercise the power by a will that is executed in accordance with this section, but is not executed in the particular way or with the particular solemnity.

(6) This section does not apply to a will made by an order under section 18 (Court may authorise a will to be made, altered or revoked for a person without testamentary capacity).

8 When may the Court dispense with the requirements for execution, alteration or revocation of wills?

(cf WPA 18A)

(1) This section applies to a document, or part of a document, that:

(a) purports to state the testamentary intentions of a deceased person, and

(b) has not been executed in accordance with this Part.

(2) The document, or part of the document, forms:

(a) the deceased person's will—if the Court is satisfied that the person intended it to form his or her will, or

(b) an alteration to the deceased person's will—if the Court is satisfied that the person intended it to form an alteration to his or her will, or

(c) a full or partial revocation of the deceased person's will—if the Court is satisfied that the person intended it to be a full or partial revocation of his or her will.

(3) In making a decision under subsection (2), the Court may, in addition to the document or part, have regard to:

(a) any evidence relating to the manner in which the document or part was executed, and

(b) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person.

(4) Subsection (3) does not limit the matters that the Court may have regard to in making a decision under subsection (2).

(5) This section applies to a document whether it came into existence within or outside the State.

(4) There are suspicious circumstances, or circumstances of undue influence, namely:

(a) Ric exerted pressure on Colleen and Ms Coleman;

(b) Colleen was in declining health around October 2014 and, in January 2015, was seriously ill;

(c) Ric knew about the Oklahoma Will in October 2014, although he had said in his affidavit of 8 October 2016 that he only became aware of the Oklahoma Will in March 2015, and it should be inferred that he thought that to admit that he knew of the Oklahoma Will would have meant that there were suspicious circumstances; and

(d) That his motive for pursuing the Exhibit 5 Will amounts to suspicious circumstances.

(5) That if there was an Exhibit 5 Will (or if Exhibit 6 is a testamentary document) then that will or testamentary document was revoked by Exhibit D which, it is asserted, is a codicil within the meaning of s 15 of the ***Wills Act 2012*** (Norfolk Island) ("**the Wills Act**").

19 It should be noted that, contrary to [18(3)(g)] above, Ric does not deny that Exhibit 6 was signed or initialled by Colleen on 24 October 2014. It is Exhibit 5 that he says he saw Colleen sign on 17 January 2015.

20 It should also be noted that, in relation to [18(4)], the Defence to Cross-Claim filed by the Plaintiff asserted pressure and ill health issues in January 2015, not October 2014, and it was not amended after the Amended Defence and Cross-

Claim were filed by Ric: see [25] below. The matters referred to in the Defence to Amended Cross-Claim (filed on 10 April 2017) refer to many matters, namely, that, as at January 2015, Colleen was housebound and isolated apart from Ric and her carers, she depended on Ric for assistance with daily living activities between 5pm and 9am weekdays and weekends, she was in ill health, including the effects of advanced diabetes, fatigue, blurred vision, thirst and dehydration, she had severe vision impairment, was bedridden or chair bound, she was unable to make or receive phone calls, and was not fully ambulatory. The Defence to Amended Cross-Claim also alleges that:

(a) Ric was 'instrumental' in causing Exhibit 5 to be made in his favour;

(b) There is no rational reason why the Foundation was excluded from the Exhibit 5 Will;

(c) Colleen did not have the opportunity to reflect upon any independent advice;

(d) That Colleen was not capable of reading Exhibit 5;

(e) Ric took advantage of Colleen's poor health, isolation, fatigue and her dependence upon him "so as to dominate, overbear and overburden her"; and

(f) Ric influenced Colleen such that she was not a free agent, and was not acting of her own volition.

21 Ric disputes the Plaintiff's assertions and his case is that:

(1) In October 2014 and or in January 2015, Colleen, with the involvement of her solicitor, Ms Coleman, gave instructions to Ms Coleman to prepare a will removing the Foundation as the sole beneficiary and leaving her entire estate to Ric, which Ms Coleman did and which will Colleen did sign or initial in respect of Exhibit 6, on 24 October 2014, and in respect of Exhibit 5, on 17 January 2015 or 24 October 2014, as an expression of her testamentary intention.

(2) That there is no evidence of coercion or pressure by Ric on Colleen and that Ms Coleman's claim that she had dual instructions from Colleen, or that she did what she did in order to protect Colleen and or keep her safe is not supported and should not be accepted.

(3) That Exhibit D does not and cannot constitute a codicil with any effect under s 15 of the Wills Act.

(4) That even if Exhibit D did constitute a codicil, it was revoked by the Exhibit 5 Will made on 17 January 2015.

22 It will be apparent from what is recorded above as the matters which are not factually in dispute that this is a most unusual case. As for what is factually in dispute, there is not only a significant divergence of accounts as to what was said and done, but there are many contradictions, or apparent contradictions in varying degrees, in what has been presented to support the parties' respective positions. If the track of the truth in this matter is to be found, it is narrow and poorly lit.

23 There are items of evidence which seem to have been ignored or treated as less significant than they might appear to be. Thus, for example, in the PCS, at paragraph 24(h), there is the contention that Ms Jackson was not even present on 17 January 2015 at Out Yenna (and therefore could not have witnessed Colleen sign Exhibit 5 on that day), yet the power of attorney said by Ms Coleman to have been executed (after a fashion) by Colleen on 17 January 2015 bears Ms Jackson's signature as a witness on that date. Ms Wright says that the only will of which she was aware of was the Oklahoma Will, yet she was the recipient of Ms Coleman's email of 25 October 2014 and attached letter with invoice of 25 October 2014 from Ms Coleman to Colleen and she read aloud to Colleen letters addressed to her: see CB1-443, paragraph 11. Ms Coleman said something in a phone call to Ms Paton on 11 February 2015 that led Ms Paton to write "the Original Will is with Ric": see Exhibit T (Exhibit T being a typescript of Exhibit R and Exhibit S). That note was tendered by the Plaintiff only long after Ms Coleman had concluded her evidence. It is consistent with the letter Ms Paton wrote to Mr Brown (see Exhibit 2). Diary notes of Ms Coleman for 21 and 24 October 2014 and the letter and emails of 24 and 25 October 2014, which I have set out above at [10(26)] and [10(27)], were not produced to the Defendant until two days before the hearing. Ric said that Ms Coleman's assertion that he had given Ms Coleman copies of the 2005 wills in mid-October 2014 was "a fabrication", but Ms Coleman's notes record that he did give her those wills and that she expressed the view that she could not utilise them: see CB1-415. Ms Jackson who, in her affidavits, had given clear evidence about matters relevant to the date and manner of witnessing the Oklahoma Will and the Exhibit 5 Will, seemed to have lost all memory of those

matters during cross-examination; even in respect of 17 January 2015, the last day that she worked for Colleen (see T408 and T438.48-439.1).

24 Ric asserts that Colleen had testamentary capacity (an assertion that, as I have noted, is accepted by the Plaintiff), and was able, albeit with difficulty, to sign Exhibit 5 on 17 January 2015 and did so on that day (an assertion strongly refuted by the Plaintiff), and that, based on Ms Coleman's evidence, Colleen initialled Exhibit 6 on 24 October 2014 (an assertion accepted by the Plaintiff, but with the rider that it was merely "an attempt").

25 I have set out the issues as they emerged from the hearing, but I need to make reference to several important changes that occurred immediately before or at the hearing. During the weekend before the hearing was due to start, the Plaintiff's solicitor, Ms Paton, wrote to Ric's solicitor providing him with the letter dated 25 October 2014 (set out at [10(26)] above), the email of the same date (set out at [10(27)] above) and the diary notes of Ms Coleman, all of which she had had in her possession since February 2015, and which had not been annexed to any of Ms Coleman's previously filed affidavits. Ms Paton, in her affidavit of 22 May 2018, deposed to the fact that she could not recall having seen the letter and or email and two diary notes before, and accepted that they had not been produced under a Notice to Produce issued by Ric's solicitors. As a result of the late production of that letter, Ric sought leave to amend his Defence to rely on Exhibit 6 (and Exhibit 5 as a testamentary disposition made on 24 October 2014, and alternatively, on 17 January 2015), which leave was not opposed. Until then, Ric's case relied upon the Exhibit 5 Will as a will made in January 2015. The Plaintiff then sought leave to assert that the Exhibit 5 Will and or Exhibit 6 (if valid) were revoked by Exhibit D. The Second Further Amended Statement of Claim, the Further Amended Cross-Claim, the Defence to the Second Further Amended Statement of Claim and an Amended Reply were filed in Court on 23 May 2018.

26 A second matter of significance is that, in his case, Ric had challenged the validity of the Oklahoma Will and asserted that, if the Exhibit 5 Will was not a valid will, the Oklahoma Will was not a valid will either, and that Colleen's 2005 will (the authenticity of which was never in doubt) was Colleen's last will and

testament. One of Ric's contentions about the Oklahoma Will was that it appeared to be a composite document and it also, on his expert's evidence, contained initials of Colleen on the dispositive page that were forged. Once Ms Coleman explained how she had assembled, disassembled and reassembled the Oklahoma Will and the Exhibit 5 Will, expert opinion concerning its history had reduced significance and Ric accepted at the hearing that the Oklahoma Will was a valid will, expressing Colleen's testamentary intentions as at 12 July 2014.

27 It will be apparent that the position of the Foundation was different to that of the Plaintiff, since the Foundation, whilst accepting the existence of the Exhibit 5 Will (described as the October Will), asserted that it had been obtained by undue influence over Colleen by Ric. The Plaintiff's position is that, first, there never was any will or testamentary instrument created later than the Oklahoma Will, and second, that if there was, it was obtained as a result of coercion or in suspicious circumstances. There seems to be a significant tension between a case which asserts that whatever was done by Ms Coleman was merely a pretence designed to fool Ric and one which says that Colleen meant to make a new will but was coerced by Ric to do so.

28 I turn now to describe the broad factual matters that are in dispute:

(1) Whether Ms Coleman did receive instructions from Colleen on 21 October 2014 to prepare the Exhibit 5 Will.

(2) Whether Colleen initialled Exhibit 6 and signed Exhibit 5 on 24 October 2014 intending those documents to have testamentary effect.

(3) Whether Colleen, in January 2015, gave instructions to Ms Coleman that she wanted Ric to have her entire estate and signed Exhibit 5 on 17 January 2015 intending that document to have testamentary effect.

(4) The precise circumstances of the signing by Colleen of Exhibit 5.

(5) Whether Ms Jackson initialled Exhibit 5 as a witness to Colleen's signature on 17 January 2015 (as Ric asserts) or on 24 October 2014 (as Ms Coleman asserts).

(6) Whether Ms Coleman understood her instructions from Colleen in January 2015 to be that she was to prepare the Exhibit 5 Will and give it to Ric or not. This issue links to several layers of conflict in the evidence, tied to both the Exhibit 5 Will and Exhibit 6.

(7) The state of Colleen's marriage to Ric as at October 2014 and January 2015. The relevance of this is that the Plaintiff's case is that it should be

concluded that the state of their relationship was so dire that Colleen would not have wished to leave Ric any part of her estate, and includes the question of whether Ric was in October 2014 and January 2015, by means of coercion or abuse or similar conduct, effecting control over her so as to deprive her of her volition.

Credibility of Witnesses

29 I will deal first with the credibility of the witnesses in this case.

Ms Drayton

30 Ms Drayton was not required for cross-examination and there is no reason to doubt the veracity of her evidence, which related to Colleen's execution on 24 July 2014 of the revocation of the Norfolk Island power of attorney previously granted to Ric by Colleen, and the fact that Colleen wanted to complete that document before Ric returned home.

Ms Anthony

31 Ms Anthony gave evidence:

(a) Of what Colleen said to her in early July 2014 as to why she was making a will in favour of the Foundation (CB1-66, paragraph 66), namely:

> "I've left Ric. I've kicked him out for good this time. He has a mistress! Selwa, I don't know where all the money has gone. I can't even afford to have a night time carer. I can't say anymore over the phone and I don't trust the carers that are looking after me."

(b) That Colleen told her about the fact that she was making a new will which would leave Ric 'nothing', with everything going to the Foundation. Colleen also said that she did not know where her money had gone. Ric "has spent it all" (see CB1-67, paragraph 76).

(c) That, very shortly after Colleen's return to Norfolk Island in mid-July 2014, Ms Anthony rang Colleen and Ric answered the phone, passed it over to Colleen and there followed a conversation in these terms:

> Ms Anthony: "I thought Ric wasn't living there anymore?"
>
> Colleen: "I have to take him back as I can't afford a night time carer and he needs the money. That's the arrangement."

32 It was made clear that Ms Anthony is running this case with the support of the Foundation (see, for example, T419.32-36). This is unsurprising since it is the sole beneficiary of the Oklahoma Will. Ms Anthony clearly regarded Colleen as her friend and not Ric (see CB1-68, paragraph 81), but she denied that she

had any ill will towards him (see T40.15-45). Even allowing for some animosity towards Ric, the evidence (set out above) is consistent with other evidence and the fact of the Oklahoma Will, and I accept it.

33 There is, however, a question going to Ms Anthony's conduct after Colleen died which has a bearing on the question of costs. I think Ms Anthony made it clear that she regarded her role as protecting and supporting the Oklahoma Will because she believed they were Colleen's last wishes. Whether that view was mistaken or wrong is not really a question of credit, even more so having regard to the fact that she has at all times been represented by a solicitor, Ms Paton, by whom she has been guided. I shall say more about this issue in the context of the costs issue.

Ms Coleman

34 Ms Coleman was admitted as a solicitor in New South Wales in May 2007. She practised as a solicitor on Norfolk Island from 2011 until 2014. She has practised in Victoria as a barrister from 2015 and retains a practising certificate in that state. She has practised as a barrister in New South Wales for some of that time, but says that she no longer holds a practising certificate in New South Wales. She has, she said, also performed work as an extra in legal shows: T52.6 and T52.46. She knew of Colleen but did not know her personally until she was contacted by Ms Wright in June 2014.

35 There are many aspects of Ms Coleman's evidence which impact upon her credibility. First, there are the following points:

(1) She made assertions to justify her conduct which could not be sustained; for example, that there was pressure from an unrelenting number of emails from Ric's solicitor, Mr Brown (see CB1-127, paragraph 79), when the chain of correspondence shows that, of 14 emails over a three-day period, six were from her and, of the remainder, two were answering specific questions of hers and two asked, "Is there anything further that you need?": see Exhibit 1. She admitted (at T135.10) that what she had said in her affidavit was a gross exaggeration.

(2) She asserted that Ric had been evasive in giving her the medical certificate from Dr Challender. Cross-examination revealed that this was not an honest account: see T147.27-150.21. The account did not make sense because the medical certificate was very helpful to Ric and not at all something that he needed to hold back or be evasive or reluctant

about. It is somewhat revealing that the only part of the certificate that Ms Coleman reproduced in her affidavit (see CB1-103, paragraphs 108-109) was the rather unusual last sentence – if that is all the medical certificate had said, one could understand why Ric might have been evasive. Ms Coleman said that she could not understand the contents of the certificate, but after extensive cross-examination, she admitted that it was, apart from the last sentence, clear: see T138.27-142.25.

(3) She frequently failed to answer the questions asked of her: T59.42-48, T71.23-72, T77.37-49, T82.15, T93.46-94.4, T99.49, T101.45-102.29, T104.30-40, T107.16-31, T109.16-25, T111.24-113.49, T136.10, T137.20, T142.34-35, T144.43-45, T163.39-46, T167.13-17.

(4) She described Colleen's statement to her of "Fuck Oklahoma", noted in her diary note of 9 January 2015 (see CB1-202) but not mentioned in the body of her affidavit, as having been said "deliriously" but her attempted justification for that description was unconvincing. She then proffered information in the witness box as an explanation for why Colleen said that: see T106-108. Ms Coleman said she was not sure if that was a reference to the Oklahoma Will but seemed to accept it was consistent with the contents of Exhibit 5 and Exhibit 6: T107.50-108.6. That statement by Colleen, made in the context of a discussion about wills, was potentially one of considerable importance in a case in which the Plaintiff asserts that Colleen had no wish to change her will back to giving her estate to Ric, rather than to the Foundation.

(5) She said that the letter of 25 October 2014 to Colleen would normally go to Mrs Quintal (T68.36) but she had in fact sent it to Ms Wright.

(6) She sent an email to Ms Drayton that, on its face, was entirely inconsistent with her claim that the Exhibit 5 Will she had given to Ric was merely a decoy, and in cross-examination, she provided no meaningful explanation about this: see T252.49-258.5.

(7) The attempt to suggest that, in late October 2014, Colleen was exhibiting what appeared to be bruising and was neglected because Ms Wright was in New Zealand, was seriously undermined by the fact that Ms Wright was not in New Zealand in October 2014 and was in fact working as Colleen's carer during that time. Ric gave unchallenged evidence that Colleen had a condition causing discolouration of the skin: T360.42. Ms Coleman's affidavit was clearly intended to give support to her claim that Colleen "did not appear to have the testamentary capacity or volition" (see CB1-99, paragraph 80) on 21 and 24 October 2014, and support for her claim that Ms Jackson was working at Out Yenna at that time, and hence, signed Exhibit 5 as witness on that date. Ms Coleman said (at T64.20) that she regarded the bruising as from anaemia, or a blood condition or a fall and that Colleen appeared to be neglected at that time. Ms Coleman agreed (at T73.39) that Colleen's condition in October 2014 was nowhere near as bad as it was in January 2015. As I have already noted, lack of testamentary capacity at any time is not now asserted by the Plaintiff.

(8) She referred in her affidavits to conduct by Ric in the most general but negative terms but was unable in cross-examination to provide any concrete examples of what he had said or done to her observation to warrant the description: T97.35-41, T105.35, T127-128, T130, T135, T147. One example of this is that, to her observation, "Ric's approach was one of sustained control and coercion" (CB1-108, paragraph 145), and another, "Col was being put through a process" (and see T92-94), but in support of which assertion she could provide no examples: see also, in particular, T103-105, T146.40-31, T162.40-163.6. Another example of this kind of evidence by Ms Coleman, but relating to the period prior to the Oklahoma Will, is found at CB1-95, paragraph 51, where she says, rather cryptically, that Colleen said to her "in a rhetorical way on a number of occasions… [Ric] controls me psychologically".

(9) The cross-examination of Ms Coleman at T95-T100 focusses on her correspondence with Ric on 9 and 10 January 2015 and her failure in her email to refute his comment in his email: "You have told me that Col's will leaves her estate to me", and is another example of the problems with Ms Coleman's evidence.

36 There are these critical aspects of Ms Coleman's evidence:

(1) That Colleen did not really give her instructions to change her will by revoking the Oklahoma Will and giving her estate to Ric, or alternatively, that she had received dual instructions from Colleen.

(2) That when Colleen placed her mark on Exhibit 5 and Exhibit 6 (both on 24 October 2014), these were just "failed attempts" and Ms Coleman treated them as such. These documents were designed to placate Ric and keep Colleen "safe". Ms Coleman described the draft documents (of Exhibit 5 and Exhibit 6) as 'a piece of paper' (T36.35) but then agreed it was a new will (T56.48).

(3) Ms Coleman described herself as performing a stop-gap function: see CB1-99, paragraph 81.

(4) That, although she put together the Exhibit 5 Will on 17 or 18 January 2015, there was no will at all, and she was doing what she was doing to placate and appease Ric so that Colleen (Ms Wright and herself, see CB1-131, paragraph 112) would be 'safe' and she never regarded that document as Colleen's will.

(5) That Colleen did not sign Exhibit 5 on 17 January 2015 and that she had no discussions with Colleen about executing a new will on that date; and indeed, Ms Coleman had not gone to Out Yenna for any other purpose than the execution of the power of attorney in favour of Ms Martinez.

(6) That when she reacquired custody of the Exhibit 5 Will in February 2015, she took parts of it and linked them up with parts of what had been the Oklahoma Will that, on her evidence, she had always treated as Colleen's last will.

37 Ms Coleman was confronted with a number of documents and actions which contradicted her version of events:

(1) Her letter of 25 October 2014 to Colleen (CB1-414).

(2) Her invoice of 25 October 2014 to Colleen (CB1-200-201).

(3) Her emails to Mr Brown and Ric.

(4) Her emails of 18 January 2015 to Ric and Ms Drayton to which I have previously referred.

(5) The fact that she had Ms Jackson and Mr Quintal witness (or purport to witness) the signature of Colleen on Exhibit 5.

38 Ms Coleman annexed diary notes to her second affidavit for 9, 16 and 17 January 2015. She did not annex notes for 21 and 24 October 2014 until her affidavit of 22 January 2018, which notes she described as "contemporaneous": see CB1-408, paragraph 14. Ms Coleman agreed that the notes for 16 and 17 January 2015 were not made on the dates which they bear and were quite possibly prepared at the same time. The date that she prepared them was not identified by her. There are parts of the notes for 21 and 24 October 2014 which, if contemporaneously made, support her version of events, namely, that Ric showed her the 2005 wills on 21 October 2014, that Ric was present at both conferences with Colleen on 21 and 24 October 2014, that Ms Coleman did not see Colleen alone, that Ric was present, and that on 21 October 2014 she felt she needed to "appease" him. The note for the 21 October 2014 contained the words, "Wants same executors so that no suggestion of coercion". It is not clear from the note who said this, but in her email of 9 January 2015 (at [10(31)(b)] above), Ms Coleman said the same thing, and in her affidavit (CB1-97, paragraph 66) she said that she suggested that the executors be Ms Anthony and Mr Merlino. The note of 21 October 2014 (CB1-415) has the following at the end:

> "Col can't go ahead, left up in the air. Ric saw problem, can't write, can't think, express clearly (Col)."

Ms Coleman's note for the conference of 24 October 2014 (part of CB1-416) says:

> "Conference with CMcC & Ric.
>
> Noted Col unable to write.
>
> No witness on arrival.

Query as to availability of

- Helen Jackson

- Lewis Quintal."

39 Ms Coleman's note of 21 October 2014 does not make any reference to discussion about a letter or estate planning, matters which are mentioned in the invoice of 25 October 2014. Ms Coleman's note of 24 October 2014 does not state that Colleen signed or initialled any document or attempted to do so. The note does not record that Ms Jackson witnessed Colleen's signature. Without more, the notes would suggest that nothing was signed or attempted to be signed by Colleen on 24 October 2014, yet Ms Coleman's evidence is that both Exhibit 5 and Exhibit 6 were signed or initialled, and that Ms Jackson witnessed Colleen's signature on Exhibit 5, on 24 October 2014. The notes of 21 and 24 October 2014 do not indicate that Colleen did not say much, or was virtually mute or non-communicative, in contrast to Ms Coleman's affidavit (at CB1-97, paragraph 68, although see paragraph 66, which describes Ric and Colleen appearing to express a joint wish that Ric be the sole beneficiary of Colleen's will, and Ric expressing a desire to also be its executor which Colleen supported). Ms Coleman said in cross-examination that Colleen spoke very little: see T63.25.

40 There are two diary notes of 9 January 2015 with a fair degree of overlap. The notes are somewhat contradictory because they record that Colleen and Ric were "lovey-dovey", that Colleen told Ms Coleman, "Fuck Oklahoma", and that Colleen instructed her to give Ric "what he wants" – but the notes also state that Ms Coleman could not get "clear instructions from Col". A note of 9 January 2015 records that Ms Coleman said that she would need a medical certificate as to the capacity of Colleen before she could be involved in preparing 'mirror wills' (also known as 'mutual wills'), which seemed to be the matter under discussion. A note of 9 January 2015 also records a query of Ms Coleman, "threatened?", and records Col as "mute": CB1-207.

41 Ms Coleman gave as the explanation for her letter to Colleen of 25 October 2014 the need to make Ric think that there was a will. She said that she believed that, although the letter was addressed to Colleen, it would be seen by Ric. The letter to Colleen was in fact sent to Ms Wright, whom Ms Coleman

knew to be very close to Colleen, by the email set out at [10(26)] above. It was not suggested to Ric in cross-examination that he had ever seen or been made aware of that letter, and Mrs Quintal was not asked about it either.

42 Ms Coleman's explanation for wanting Ms Jackson to sign the new dispositive page was "to satisfy Ric" (T176.16-19), and for her keeping the "failed attempts" was because they were a demonstration of the deterioration in Colleen's capacity to write her name. Ms Coleman said she regarded them as "important documents" (T176.20). I note that, on Ms Coleman's evidence, there was a total of three or four attempts by Colleen to sign her name on 24 October 2014, but only Exhibit 5 and Exhibit 6 were annexed to her affidavit or produced to the Court and I infer that there were no others.

43 Ms Coleman did not provide any plausible explanation as to why she had:

(a) Suggested Ms Drayton to Ric in connection with probate of Colleen's will if Ric was not the beneficiary; and

(b) Written to Ms Drayton asking her if she would be willing to act for Ric for the purposes of probate of Colleen's will.

see T252.26 - 257.27.

44 I did not find Ms Coleman's explanation for the detailed letter of 25 October 2014 to Colleen and the contents of the invoice and email to Ms Wright convincing, but it becomes even less so when coupled with her email to Ms Drayton, and the cross-examination of Ms Coleman concerning this.

45 Ms Coleman seemed to assert that she did not want to be involved in the will making exercise any further, although she had said that she thought in January 2015 that Mr Brown was going to sort out the mutual wills (T154.25), which would have meant that Colleen would have been in the hands of a solicitor who was clearly acting for Ric, and Ms Coleman had told Ric that his solicitor could not act for Colleen. Her email to Ric and to Mr Brown seem to exhibit cooperation with them and not resistance to the process or abandonment of her client.

46 Ms Coleman claims that Ms Jackson was working at Out Yenna as a carer on Friday, 24 October 2014, because Ms Wright was away in New Zealand. In her affidavit, Ms Jackson denied that she was working at Out Yenna on that date –

she said she was employed by Colleen from 24 June 2014 to 17 July 2014 and from 14 December 2014 to 17 January 2015: see CB2-230. In her oral testimony, Ms Jackson was extremely vague but thought she was not working at Out Yenna in October 2014: see [74] below. Ms Wright agreed that she (Ms Wright) was working at Out Yenna during weekdays in October 2014, and Exhibit 3 establishes that she was. Ms Coleman agreed that Ms Jackson would not have been working at Out Yenna if Ms Wright was there: T88.35-37.

47 Ms Coleman gave several explanations for her actions, including that:

(a) She felt pressured. She said that "between August 2014 and January 2015, it was becoming clear to me that Col was in an abusive relationship with Ric, and I needed to protect her interests whilst making sure she was safe, and Nikki and I were safe" (CB1-131, paragraph 112);

(b) She was pressured by the incessant emails from Mr Brown and Ric; and

(c) She wanted "out" of the role of solicitor for Colleen.

48 Ms Coleman's evidence that she had become aware between August 2014 and January 2015 that Colleen was in an abusive relationship with Ric was not based on any observations of her own of Ric's conduct, but was based on, what she said, were observations of Colleen's condition on 21 October 2014 to which I have referred at [35(7)] above, and what she says she had learnt from letters typed by Ms Wright and given to her, she says, by Ms Wright in January 2015 (see CB1-108, paragraph 44; T113, set out below and at T163.33-37). I shall set out later in these reasons an important segment of cross-examination relating to that but there was no evidence that Ric did anything to make Ms Coleman fear for her own safety or that of Ms Wright, as she asserted in her affidavit was the case (see CB1-131, paragraph 112, and see cross-examination at T146.40-147.39). Nor do either Ms Coleman or Ms Wright give any evidence of any observation by them of conduct of that nature by Ric directed toward Colleen. Ms Coleman's assertion of a belief that Colleen had died before her time, in effect, because of the constant pressure exerted upon her by Ric (see CB1-105, paragraph 131), is an extraordinarily strong statement for someone who claimed that she had no hostility towards Ric (see T70.19). Further, the suggestion that any issue concerning the will is what

brought on Colleen's early death is inconsistent with the medical evidence generally: see Exhibit O. Ms Wright's evidence (at CB1-350, paragraph 45), if accepted, points to Colleen's loss of appetite for life before January 2015 which is when the issue of a new will was next raised after October 2014.

49 At paragraph 146 of her first affidavit (at CB1-108), Ms Coleman said:

> "From the time Col and I spoke in July 2014, she instructed me to "Give Ric what he wants" but she also said to me:
>
> > "Don't give him what I want."
>
> This dual purpose she instructed me to fulfil came with inherent conflicts. I colluded in Col's dual purpose."

50 There is no file note of Ms Coleman in relation to that instruction. It is a very unusual 'instruction' and the further strange thing about it is that, on Ms Coleman's evidence, it was first said at a time after Colleen had made a new will in Sydney leaving Ric nothing and where no replacement will was in contemplation. Cross-examination of Ms Coleman demonstrated that "Don't give him what I want" and that her instructions were to discontinue (T62.10-29) were not words used by Colleen, but rather, were Ms Coleman's claimed 'take', in contrast to what Colleen had actually said to her: see T114-117.7 (reproduced below), and see also T106-108 and T112-114.

51 Ms Coleman did not include, in any of her first four affidavits, the letter of 25 October 2014 to Colleen and covering email (sent to Ms Wright), although she did include the invoice of 25 October 2014: see CB1-200.

52 Ms Coleman did not give a full account in her affidavits of the critical conversations with Colleen; for example, as I have mentioned, her note that Colleen said, "Fuck Oklahoma" (see CB1-202), although attached to her affidavit, was not referred to in the body of her affidavit. When she was asked about this in cross-examination, she said that Colleen had said this "deliriously", and then when cross-examined further, she said that Colleen had expressed irritation, at some unspecified time, at the University of Oklahoma for reasons connected with its unwillingness to accept freight charges for Colleen's papers. She also did not explain the context of the comment, "What we are doing is for your benefit" on 21 October 2014. She does not give evidence of a conversation with Ric on 17 or 18 January 2015 in which she

explained to Ric why she was giving him the envelope on 18 January 2015, or describing to him what it was she was giving him.

53 Ms Coleman says (at CB1-247, paragraph 50):

> "Val and Nikki left "Out Yenna" after the power of attorney document was finalised. I left shortly afterwards. I returned to my law practice office and spoke to Nikki on the phone. I called because I was concerned about feeling forced into making arrangements directed by Ric about Col's affairs, and felt pressured by him because he wanted the mutual wills completed."

Ms Coleman does say that Ric was anxious on 17 January 2015 about having the will done, but her evidence is that Exhibit 5 was not signed on that date and that there was no discussion concerning a will by Colleen, other than her saying to Ric on that day, "I cannot endorse the signing of mutual wills in circumstances where I cannot get adequate instructions from, or provide appropriate advice to Col" (CB1-103). Ms Coleman had, on her own evidence, not been forced into making any arrangement, let alone arrangements, directed by Ric. Also, Ms Wright says that Ms Coleman came to Ms Martinez's house after she had left Out Yenna and met her and Ms Martinez there (CB1-352-353, paragraph 56), rather than merely speaking to Ms Wright on the phone.

54 Mr Morrissey, in dealing with the evidence of Ms Coleman, said in closing submissions (at T486.28-45):

> "I need to at some stage, and I may as well do it now, address the, shall I say, the role of Ms Coleman, because much of this hearing has been focused on that and, with respect, my submission is that we, perhaps, shouldn't be distracted too much by Ms Coleman. She had a central role to play. She was the will drafter. She's not the witness of the plaintiff. She's not part of the plaintiff family. She's not - didn't have any relationship with the plaintiff. The plaintiff, as far as we know, she'd never met the plaintiff until that conference at Ms Peyton's chambers on 25 February 2015, after Dr McCullough's death.
>
> She has taken what one might describe as an unorthodox approach to matters in this case. No doubt Mr Murr will put it in stronger terms, no doubt about that, and your Honour may well, even in a judgment, but, it was unorthodox. She seems to have - and this is our submission - and it is just a submission - she seems to have taken on or saw herself as partly in the role of a protector. Protector, that's the only neutral word that I use. So not only was she a legal representative, but she was the protector and she seems to have seen herself having a dual role, a legal representative and a protector and that seems to have been the situation.

and at T487.10 he submitted that:

> “Ms Coleman seems to be a complex woman. She was an emotional woman. Some might say she seems to have her demons. I don't know. They are my words.”

55 Mr Morrissey conceded that there were aspects of Ms Coleman’s evidence “that may never be explained” (T503.34), but submitted that Ms Coleman should be accepted on “the important things”: see T503.34; see also T487.10 and T506.5.

56 Mr Morrissey’s submissions accept, I think, that Ms Coleman’s evidence is highly problematic.

57 I set out some fairly extensive segments of the cross-examination of Ms Coleman relating to her discussions with Colleen and Ric because of their importance to the critical issues in this case and to Ms Coleman’s credibility:

at T106.1-108.12:

> Q. Do you agree that on 9 January 2015 you had a meeting between the hours of three and four about Yenna with Dr McCullough and Mr Robinson?
>
> A. Yes, so I took that meeting seriously because Karen called me.
>
> Q. You made a file note of that meeting, didn't you?
>
> A. I assume so.
>
> Q. That file note is PC18, which is CB1-202.
>
> A. Sorry, CB.
>
> Q. Volume 1-202.
>
> A. I think I only have, of the Court book? The PC18, yes.
>
> Q. 1-202, do you have that?
>
> A. Yes.
>
> Q. That is the one in which you refer to them as being lovey-dovey, is that right?
>
> A. Yeah, they were lovey-dovey.
>
> Q. And you say, somewhat inconsistently, "could not get clear instructions from Col," but underneath the words "lovey-dovey" are, "gives him what he wants," correct?
>
> A. Yes.
>
> Q. Those words were Col's, correct?
>
> A. Yep.
>
> Q. The next words are, "Fuck Oklahoma"?
>
> A. Yeah, she said that deliriously.

Q. Deliriously?

A. Mmm-hmm.

Q. But in terms of clear instructions, "Give him what he wants," and, "Fuck Oklahoma," are pretty clear, aren't they?

A. Well, the dual instructions are very clear to me, yes.

Q. When you say the dual instructions, you mean those two instructions?

A. No. I - I mean that she would say on the one hand, "Give him what he wants," but that wasn't - she also - she wanted what she wanted.

Q. Listen, let's leave the mind reading to one side. She has told you, "Give him what he wants." One, two, three, four, five words - all one syllable. Not hard to understand, are they?

A. Yes, it's - I mean, that's - she did say that, you know, "Give him what he wants." Yeah.

Q. That's really not hard to understand, is it?

A. (No verbal reply)

Q. Well, do you think it is hard to understand? Just tell us?

A. No, I just - I - "Give him what he wants" was to try and get him off her back.

Q. Whatever her motives may have been, it's clear what the instruction she was giving, isn't it?

A. This instruction was--

Q. Look sorry, I'm going to interrupt you, because I really do want an answer to this question. Whatever her motives may have been, that instruction is very clear, isn't it? "Give him what he wants"?

A. Yes.

Q. "And fuck Oklahoma" is pretty clear too, isn't it, in the context?

A. She said that, so I wrote it down.

Q. Yes. You didn't write down anything about her being delirious or anything, did you?

A. Well, there was - it was the way she said it.

Q. No, sorry. Sorry, you didn't write down - you wrote down what she said, but you didn't say anything about, "But she was delirious when she said this"?

A. No, but it was the way she sort of - she put her, you know--

Q. You didn't write it down, did you?

A. Sorry, I just don't understand the question.

HIS HONOUR

Q. What don't you understand about you didn't write it down?

A. I didn't write down deliriously. No.

MURR

> Q. Thank you, because that's just a fabrication, isn't it?
>
> A. Deliriously?
>
> Q. Yes?
>
> A. No, I was just - how she put her head back to say it. The - the background to this was, I don't know, Oklahoma wouldn't accept boxes of manuscript, or there was a background to this, but I wrote it down because she said it.
>
> Q. Do you say that was not a reference to the previous will?
>
> A. Well, I'm not sure.
>
> Q. I see?
>
> A. I - you know, I - I took it to mean the fact that she was upset because they wouldn't pay for the carriage of these documents to be transported to Oklahoma.
>
> Q. That then would be consistent with the fact that the existing will, as everyone believed it to be, was a will in favour of Ric, wouldn't it?
>
> A. Well, there - there was a squiggle. That - that's - that had Ric's name on it.
>
> Q. Yes and there was the document which we've identified as PC15; that had Ric's name on it too, didn't it?
>
> A. Yes.
>
> Q. Going on, you say that then you told you needed a medical certificate and you told Ric again that independent legal advice was necessary for him; correct?
>
> A. Yes. Yes, I did say that. I'm just meaning that, you know, to approach another lawyer, really, to take on--

and at T112.49–113.37:

> Q. Sorry, I've put a very specific question to you, and I will repeat it. Are you telling the Court now, on your oath, that some time before 10 January 2015, within a time span that could be described as fairly recent, Col said to you words to the effect, "I do not want Ric to have anything"? Now did she say that to you, or did she not?
>
> A. She didn't say that to me--
>
> Q. No, did she say that, or words to that effect, or not?
>
> A. She didn't say those words to me.
>
> Q. Thank you. I mean, this is nonsense, isn't it? There were no fairly recent instructions were there?
>
> A. I believe there were.
>
> Q. Well tell us what they were?
>
> A. Well, I was told, I was, my recollection is that I was told by Nicky--
>
> Q. By Nicky? Nicky told you, "Col doesn't want Ric to have everything," is that right?
>
> A. Well, yes, I mean, at that stage--

> Q. Is that what you are referring to when you say, "having regard to Col's fairly recent instructions"?
>
> A. When I'm saying "fairly recent instructions"--
>
> Q. Sorry, is that what you were referring to when you say there "having regard to Col's fairly recent instructions"?
>
> A. That Col didn't want to leave Ric everything?
>
> Q. No, not that Col didn't want to leave anything, you have said that Nicky told you that Col said she didn't want to leave everything to Ric, and the question I am putting to you is, is that what you are referring to when you say, "having regard to Col's fairly recent instructions"? You have agreed with that proposition once, but I won't hold you to that. If you want to reconsider it and change your answer, do so, but I want to know what it is you are referring to.
>
> A. Yeah, in broad terms I am referring to that.
>
> Q. What do you mean "in broad terms"?
>
> A. Because there would have been a number of conversations or telephone calls.

and at T116.5–117:

> Q. It may well have been - I mean, I want to suggest to you that it is ridiculous for you to be saying that instructions that she was given at a time when there was a crisis between them, when they were living separately and apart, necessarily are going to be the instructions that she would want to give seven months later, when they had resumed cohabitation and when the situation was very, very different?
>
> A. I - what was clear with Col to me was that I was to - that I was to stay - stay with July. That was what I understood from here.
>
> Q. Right. We know you understood that. Just identify, with precision, what Col said to you that made you think that that is what you had to do. I'm not talking about reading between the lines, I'm not talking about interpreting documents; I'm talking about direct instructions where Col says to you, this is what you are to do?
>
> A. She - she didn't have a voice at that time.
>
> Q. She never said it; is that right?
>
> A. The only--
>
> Q. She never said it; is that right?
>
> MORISSEY: She's answered that question.
>
> WITNESS: She - on 17 January she yelled at me, "Give him what he wants."
>
> MURR
>
> Q. Yes?
>
> A. That was the only thing she said to me around that time.
>
> Q. You interpreted that to mean deceive him into thinking he's been given what he wants; is that right?

A. No.

Q. Carry out a plan of deception; is that the way you interpreted it?

A. Well, yes - well, not a plan of deception, but give him what he wants, don't give him what I want.

Q. What do you think he wanted? To be left out of the will?

A. He wanted to be left completely in the will.

Q. You were told, "Give him what he wants"; isn't that right?

A. Yes.

Q. Give him a will in which he is the beneficiary. That's what you were being told, isn't it?

A. I was--

Q. That's what you were being told, wasn't it?

A. I was being told to put forward the October document. That's what I took--

Q. You were being told to put forward the October document?

A. That's what I took her to be meaning.

Q. As her final will?

A. No, to placate Ric. To get him off his - to get him off her back.

Q. Placate was her word, was it?

A. She used the word "rage." I - she never used the word "rage" with me.

Q. Sorry, look, placate was her word, was it?

A. No, that's my word.

Q. "Get him off her back"; they were her words, were they?

A. No, her letters - her letters use the word "rage."

Q. "Get him off her back." Were they her words?

A. That's my - that's - they're - this is my language. Her language was his rages or pressure. She said, "You've put me under very great pressure."

Q. And so you saw all of this as translating give him what he wants, said in the forceful way that you have demonstrated to mean carry out a plan of deception so that he thinks he is getting what he wants. Is that your evidence?

A. I didn't intend to carry out a plan of deception, but I did--

Q. Okay, it just happened accidentally, did it?

A. No, we had approached the police in June--

Q. No, forget June, we are talking now about January?

A. Well, we weren't approaching the police in January--

Q. No, and it was in January that you carried out this plan of deception, wasn't it?

A. In October I followed up with the--

Q. In January you were carrying out the plan of deception, weren't you?

A. I was cognizant of Col's independent wish.

Q. It was in January that you were carrying out the plan of deception, wasn't it?

A. It wasn't intentional deception.

Q. Accidental was it?

A. No, it wasn't accidental.

and at T118.20–120.48:

Q. And you had told him? You told him that there was a will in his favour, that he was the beneficiary of the will; you had told him that, hadn't you?

A. He was present in October.

Q. You had told him, hadn't you?

A. Well that's what he says in his emails--

Q. And yet he didn't deny it?

A. I recall saying - no I recall saying to him what we're doing is for your benefit.

Q. What do you mean by that, it's not for his benefit?

A. Sorry?

Q. When you say it's for his benefit, what did you mean; I've just signed a will that you're excluded from or just had Col make a will that you're excluded from. Is that what you meant?

A. No.

Q. Well what did you mean it was for his benefit?

A. It was around the time of the intended sale--

Q. I didn't ask you when it was. I said what did you mean when you told him it was for his benefit?

A. That, you know, that the estate - there wouldn't be a loss, that the estate would be his, that sort of thing.

Q. And that's what you led him to believe, wasn't it?

A. Yes, we - yes.

Q. And nothing happened after you told him that that would have changed his belief that he was the beneficiary of the estate; that's right, isn't it?

A. No, I disagree with that.

Q. Okay, what happened precisely and I'm not talking about impressions or mind reading or body language or whatever. What specifically happened do you say that would have made Ric understand some time in January that he was not the beneficiary of Colleen's estate?

A. Well he knew - he knew about July.

Q. No, no. You have told us what you say he knew. My question is what specifically happened that would have made him realise that?

A. In January?

Q. Yes?

HIS HONOUR: That he wasn't the beneficiary of the will.

WITNESS: Col's - Col's - Col's change - Col's disposition.

MURR

Q. Right. What do you mean Col's disposition?

A. Well because they didn't always get along.

Q. We can accept that; it was a very difficult part of their life, wasn't it?

A. I attended Outer Yenna on 17 January, Col was exhausted.

…

Q. If you don't answer this question you can take it that the submission I will be making is that you are refusing to answer it, do you understand that?

A. Well I--

Q. Because I'm putting it to you, this is the third time; identify with precision what it was in January or before January that would have led Ric to believe or to change his belief which you seem now to accept he would have had on the basis of what you told him, that he was the sole beneficiary of Colleen's estate? What precisely would have made him change his belief about that?

A. I think that there were other documents in existence at that time.

Q. Thank you, that's an answer. Now what were the documents that you say would have made Ric change his mind about or change his belief that he was the beneficiary of Colleen's estate?

A. Well there was - I mean, I agree with what you are saying.

HIS HONOUR

Q. Do you mean there is nothing that would have led him to change his belief that he was the sole beneficiary by this stage of Colleen's estate?

A. Well that's - that was the impression that was intended he be given.

MURR

Q. And there's no reason to think that he did not have or would not have retained that impression, correct?

A. Well, he was about to get the mutual wills with John Brown and a deed not to change the wills. I don't know what was in his mind, but in my mind, in my mind I had what I understood Col wanted me to do.

HIS HONOUR

Q. You see, the focus of the question isn't about what was in your mind, it is giving you an opportunity to tell us what it was you say that would have changed Ric's belief that he was the sole beneficiary under the will by the end of 2014 and January 2015. What is it that you say? You mentioned some documents, but is there anything else that you can refer to, to support the proposition that he would have been dissuaded by that belief by something

either you said to him, or you said to Mr Brown, or a letter you wrote, or an email you wrote, anything of that kind?

A. No, there was what happened in July, the July will.

Q. We know that the July will dispossessed him. By the July will he got nothing.

A. Then October, he was present in the room.

MURR

Q. When he seemed to get everything?

A. Well, that was the impression, that was the impression that was--

Q. You told him, "This is for your benefit," and you have said before that you understood that he would take that to mean he was going to be left the whole estate. Now what we are asking is, what do you say, if anything, happened that would have changed that belief? And I take it your answer is--

A. From October?

Q. From October. Absolutely nothing, is the answer, isn't it?

A. There must have been something independent of me, because otherwise I wouldn't have been under so much pressure.

58 Ms Coleman admits to a course of conduct that is entirely inconsistent with what is required of a practising solicitor, namely:

(a) Asking a person (Mr Quintal) to add his initials to a document as a witness when he had not seen the person whose signature he was purporting to witness sign that document;

(b) Providing a document purporting to be the will of her client to the husband of her client in order to deceive him into believing that his wife had made a will in his favour: see T60.7-24, T68-69 and T118-120; and

(c) Stating in a letter and invoice to her client that she had performed work that she had not done.

59 Ms Coleman initially would not agree that, on her evidence, the invoice was false because it refers to a will having been executed and she claims that no will had been executed, rather, she described it as “inaccurate”: T82.15-46.

60 If I accepted Ms Coleman’s evidence, I would have to find that:

(a) She set about deliberately attempting to deceive Ric into thinking that Colleen had made a will in his favour, even though no such will had been created in October 2014 or January 2015.

(b) She sent false correspondence to Colleen in October 2014; and

(c) She created a false invoice describing work she had not performed in October 2014.

61 In considering Ms Coleman's credit, it might be said that, given that she has made some rather damning admissions about her behaviour, this provides a basis for accepting her account as truthful. I take this possibility into account but I think there is another explanation which is that, if Ms Coleman prepared the Exhibit 5 Will, acting on the instructions of Colleen and delivered that will to Ric because that was what she thought at the time Colleen wanted her to do, to have then received the Exhibit 5 Will back from Mr Brown in February 2015 and to have then recreated the (by then) revoked Oklahoma Will, was a most serious breach of her obligations to Colleen as her solicitor. To admit to deceiving Ric (and that is what her version of events entails) is less serious than seeking to set at nought the outcome that, on Ric's case, Colleen had indicated she wanted. Thus, all of Ms Coleman's evidence designed to support the proposition that Colleen did not really want to sign (in October), or was coerced Ric in October and January, or that she had a duality of instructions from Colleen, or that she suffered from the insufferable pressure of emails from Mr Brown, or pressure from Ric (or even fear of Ric) for her own safety, and that of Ms Wright, may be seen as an attempt to justify conduct of an even more egregious kind than that to which she admits.

62 I do not accept that Ms Coleman's evidence should be accepted as truthful because she makes significant admissions of inappropriate conduct, and having regard to the matters which I have identified and the evidence to which I refer later in these reasons, I am not persuaded that the findings identified in [60] above should be made.

Ms Wright

63 There is evidence which points to a quite significant involvement of Ms Wright in the developments at Out Yenna in the last year of Colleen's life:

(a) Ms Wright contacted Ms Coleman and conferred with Ms Coleman and Colleen in June 2014.

(b) Ms Wright discussed with Ms Coleman "threats from Ric" according to Ms Coleman's notes – threats of which no evidence is given by Ms Wright in any of her three affidavits.

(c) Ms Wright discussed with Ms Coleman that Colleen should call the police (see CB1-133) and Ms Wright called the police and told them that Colleen feared for her safety.

(d) According to Ric, Ms Wright was present with Ms Coleman and Colleen when Ms Coleman told him that what they were doing was for his benefit (CB2-18, paragraph 22). Ms Wright gave no evidence about that meeting.

(e) A medical certificate from a Dr Metcalfe, at the time Colleen's general practitioner based at or affiliated with the Norfolk Island Hospital, was obtained. Ms Wright was in a relationship with Dr Metcalfe at the time (see CB1-342, paragraph 10), and it appears likely that Ms Wright organised this medical certificate: CB1-175. The medical certificate is found at CB1-182.

(f) Ms Wright, according to her, became Colleen's "eyes and ears" and had a close relationship with Colleen, typing letters for her of a very personal nature.

(g) According to Ms Coleman, Ms Wright gave Ms Coleman letters that Colleen had dictated and Ms Wright had typed in June and July 2014 on 16 January 2015 (CB1-100, paragraph 89). Ms Wright said, in her first affidavit, that Colleen gave Ms Coleman those letters (CB1-346, paragraph 28), but she later said that she had given Ms Coleman the letters because Colleen instructed her to do so: see CB1-443, paragraphs 6 and 9. I shall return to the issue of the letters later in these reasons.

(h) Ms Wright prepared Exhibit D.

(i) Ms Wright, it appears, expressed views to Colleen's doctor, Dr Schiavone, concerning Colleen's relationship with Ric, and Colleen's attitude to life.

(j) Ms Wright was perceived by Colleen as being someone of whom Ric was jealous (implicitly because of her relationship with Colleen).

(k) Ms Wright appears to have told Colleen about Ric's rage (see CB1-447), although the apparent source of that information (Mrs Quintal) categorically denies any such conversation having occurred or any such knowledge, and no such incident was established to have occurred.

(l) Ms Wright was brought by Ms Coleman to Out Yenna to 'assist' in the signing of the power of attorney on 17 January 2015.

(m) Ms Wright, not Ms Coleman (on Ms Coleman's evidence) makes the decision as to how Colleen is to sign the power of attorney on 17 January 2015 – incidentally, the details of which were not mentioned by Ms Wright in her first affidavit.

(n) Ms Wright, according to Ms Coleman's evidence (see T112.49-113.3 set out below), seems to have expressed her views as to what Colleen wanted.

64 There are a number of aspects of Ms Wright's evidence which cause me to have significant doubts as to her veracity:

(1) Ms Wright gave evidence in her first affidavit concerning Exhibit D. She said (at CB1-305):

> "18. On 14 January 2015 Col got me by myself. She asked me to write out a paper. I wrote "Do you Colleen McCullough Robinson want the will drafted in private with your solicitor to be your last will." Col said "Yes I do" and wrote a large 'C'. That writing was witnessed by me and Beechy. I understood Col to mean that she did not wish to revoke the will she had made in Sydney in July 2014 with Piria"

In her second affidavit (at CB1-443, paragraph 11), she said that what Colleen had said to her was:

> "47 On 14 January 2015 I attended Out Yenna for my duties. Col had been left in the care of Helen Rondah Jackson during my absence. She was in a poor state and appeared dehydrated. She expressed being pressured to change her will. After attending to her, I recall this conversation:
>
> Me: *"Do you want to change your will?"*
>
> Col: *"No. I don't."*
>
> Me: "Do you want to use the will you made in Sydney?"
>
> Col' Yes I do"
>
> I wrote the following in my handwriting on a page of A4 paper:
>
> Q. *"Do you Colleen McCullough Robinson want the will and testament to be that which you drafted in private with your solicitor Piria Coleman?"*
>
> A. *"Yes I do"*
>
> R Hayes (known as "Beachy") was present at the time, I don't recall her christian name.. Col scrawled a large capital "C" with the pen I provided to her. Beachy and I both signed and dated that page 14/1/2015.
>
> Annexed hereto and marked "C" The original was sent to Meredith Paton with the letter "C" marked on it by Colleen McCullough."

Mr Murr submits that the second version is a very obvious attempt to "beef up" Ms Wright's version to exclude the possibility that Colleen was talking about a will made in October 2014, and that Ms Wright is "simply a liar": T521.25 and see T195.26-198 for cross-examination on this point.

The second version does not set out what Colleen said about "being pressured" or by whom and injects information that was not set out in the first affidavit, for example, that Colleen "appeared dehydrated" and that Colleen mentioned she was being pressured to change her will. It

also has Ms Wright asking questions of Colleen that were not described in her first affidavit. The second affidavit seems to point to the initiative for Exhibit D as not having come from Colleen but from Ms Wright herself. Even more significantly, the second version deposed to by Ms Wright simply does not make sense - if Colleen had said what Ms Wright now says Colleen said (i.e. "the will made in Sydney"), Ms Wright would not have had any reason to write the words she did write (i.e. the will and testament "which you drafted in private with your solicitor Piria Coleman) and would have instead referred to "the will made in Sydney" in Exhibit D. I do not regard her evidence as truthful and it significantly impugns her general credibility. Yet another version of the conversation was presented in Ms Wright's third affidavit (dated 24 May 2018, the day she was to be cross-examined) (CB1-445, paragraphs 28-29). It was not inconsistent with her second version but it has Colleen telling her that she is being pressured by Ric to sign wills made by Mr Brown and that she is "mentally exhausted and sick of it all". It does not make the second version any more plausible.

(2) Ms Wright recounted (at CB1-306, paragraph 10) that Mrs Quintal had rung her in a distressed state as a result of actions of Ric at the Norfolk Island Administration. Mrs Quintal denied that she worked in the land titles section or anywhere near it – she denied having heard of any such incident and she denied having spoken to Ms Wright about it and, as I indicate below, I have no reason to doubt Mrs Quintal's veracity.

(3) Ms Wright testified that when Dr Challender came to Out Yenna, he was not able to rouse Colleen from her sleep, that he did not speak to Colleen at all and then said, "I'll just record how she was last time that I saw her".

Dr Challender's strenuously disputed that he had not spoken to Colleen on 14 January 2015 but did not dispute that he had said something to the effect that he would have regard to earlier consultations with Colleen in relation to her mental capacity.

Mr Morrissey (at T533.5-21) accepted that Dr Challender did have "an exchange" with Colleen that he could add to his body of knowledge in order to give an opinion about whether Colleen had the capacity to make a will but contended that the issue of fact thrown up by Ms

Wright’s evidence was “a peripheral point”. I think that as the case had developed, the issue of capacity had become unimportant but Ms Wright’s evidence was designed to undermine the value of the certificate.

(4) Ms Wright’s evidence is that Colleen only spoke to her twice about her will; once, when she came back from Sydney, and second, when she mentioned that Mr Brown was drafting mutual wills: see CB1-443, paragraphs 14-16 (which I note occurred on or after 10 January 2015). I set out the cross-examination of Ms Wright at T201.9-202.4:

> “Q. But you were having contact with her at about this time [i.e. January 2015], weren't you?
>
> A. Yes I was.
>
> Q. And she was contacting Col?
>
> A. Yes.
>
> Q. And that was to do with the will?
>
> A. It was also to do with real estate and various other issues.
>
> Q. I will just put the question again, it was to do with the will, wasn't it?
>
> A. I don't have that information.
>
> Q. You seem to have information that it was due to that and also other things?
>
> A. Piria was Col's lawyer.
>
> Q. Yes, you were in attendance most of the time when she was talking to Col, weren't you?
>
> A. I was never in attendance when she was talking to Col professionally, ever.
>
> Q. Never, ever?
>
> A. Never, ever.
>
> Q. So it would be wrong to say that you were the channel of professional communications between her and Col?
>
> A. I handled emails and making appointments.
>
> Q. But you didn't attend meetings?
>
> A. I left the room.
>
> Q. Always?
>
> A. Always.
>
> Q. Leaving her with Col?
>
> A. Absolutely.

> Q. Is it the case that you didn't know of any involvement of Piria in the drafting of wills that were apparently being prepared in mid-January 2015?
>
> A. No.
>
> Q. No, you didn't know?
>
> A. Sorry.
>
> Q. I think it's one of those ambiguous phrases and I'm not trying to trick you. You didn't know about it, is that what you're saying?
>
> A. I was not aware of it, no."

The reference to "also to do with real estate" implies she knew that Ms Coleman was talking to Colleen about her will. There is, contrary to her denial that she never attended Colleen's meetings with Ms Coleman, evidence that she was present when Ms Coleman was discussing legal issues with Colleen: see Ms Coleman's diary note (at CB1-236) in relation to the proposed Norfolk Island power of attorney.

(5) She claimed that she only ever knew about "the will made in Sydney" (T196.6). That seems unlikely given her evidence dealing with the 25 October 2014 letter to Colleen in her affidavit of 24 May 2018: see CB1-443, paragraph 11, that she read aloud to Colleen letters addressed to Colleen. She gave no evidence of any discussion with Colleen about that letter and invoice, or even a comment by Colleen about it, or about Colleen's meeting with Ms Coleman to discuss a new will.

(6) Mr Murr put to Ms Wright that her evidence concerning Mrs Quintal was a fabrication because she perceived that Colleen had been very badly treated by Ric. At first, her non-responsive answer was that she had never made that comment, but when the question was repeated, she agreed she did hold that perception: T190.16-21. I note too that (at T198.35-199.6) in the context of cross-examination directed to an attack on her partisanship and her assertion that she had no interest in whether "Ric loses or wins", she would not answer whether she felt Colleen was "seriously wronged" by Ric.

(7) In her first affidavit (CB1-307, paragraph 21), Ms Wright recounts a conversation with Ric on 17 January 2015 in which Ric asks her, "Are they doing the will first?", to which she replies, "No, they're doing the power of attorney first", and that this made Ric "very angry". In her second affidavit (CB1-351, paragraph 50), Ms Wright gave a different version of the conversation:

> Ric: "Are they doing the Will?"
>
> Me: "No, they are doing the Power of Attorney."
>
> Ric: "I knew this would happen"

The second version makes no reference to the first version but simply excises the inconvenient "first" from both Ric's question and her answer.

(8) In her second affidavit (CB1-346, paragraph 28), Ms Wright said that she had made two copies of each of the letters that she typed for Colleen and gave Colleen a copy and had taken the other copy home which she retained until she sent them all to Ms Paton after Colleen's death. Ms Coleman, however, said that Ms Wright had given a set of the letters to her on 16 January 2015. This does not include the LBOM Letter, with which I will deal below.

(9) There were a number of matters referred to in Ms Wright's second affidavit of which no mention had been made in her first, such as her assertion that she had heard Ric ask Colleen many times on 17 January 2015 about making a will to which Colleen had not responded: see CB1-352, paragraph 52.

(10) Ms Wright did not mention in her first affidavit that she had put Colleen to bed upstairs to rest, but in her second affidavit (at CB1-352, paragraph 55), she said she had done so.

65 Ms Wright gave no evidence of having seen or heard Ric behave unpleasantly to Colleen, either before or after June 2014, but she gave an account of a conversation with Colleen in January 2015 (at CB1-307, paragraph 19) that seems designed to permit her to state Ms Wright's own uncharitable thoughts in response to apparently pleasant behaviour by Ric in January 2015:

> "19 I noticed that Ric's attitude to Col changed and he began to appear to be very attentive. I found the change very strange. I said to Col: "Are you being bullied?" She just put her finger to her lips."

66 Another example of this type of assertion is found at paragraph 6 of her first affidavit (CB1-305), where she explains her concerns about questions relating to the administration of drugs to Colleen. She then says that her fears were shared by the hospital and that a toxicology test was ordered. There is no evidence of a toxicology report having been ordered as a result of these concerns and I think this was designed to imply that Ric had been or might have been overmedicating Colleen. That that was the implicit suggestion is reinforced by Ms Coleman's evidence that she and Ms Wright had, on 17 January 2015, discussed their concerns about Ric "overmedicating" Colleen: see [113(13)] below. There is no support for the contention that Colleen was overmedicated, let alone by Ric.

67 Ms Wright deposes to Colleen having told her that she feared Ric. The letters which Ms Wright typed do not reflect this and I think Ms Wright implicitly recognised this because she says (at paragraph 8) in referring to the letters, “Much of her fear became anger”. In her third affidavit, she tells us that, as at 14 January 2015, “Col was still feeling unhappy about her relationship with Ric. Even though Ric moved back in to the house after he left in June or July 2014, she was not happy with the relationship”: see CB1-444, paragraph 19. Not one example of what Colleen said to Ms Wright about the relationship with Ric in the period after July 2014 is given. I have already referred to what appears to one source of the ‘fear’ in June 2014, namely, that which came from a report by Ms Wright to Colleen: see [63(k)] above and [82] below.

68 To the extent that Ms Wright’s evidence implies that relations between Colleen and Ric had not improved by October 2014 and beyond from the position in June and or July 2014, it is not supported by any note of Ms Coleman or the doctors or the mental health counsellor of what Colleen, as opposed to the caregiver (most likely Ms Wright), had told them. It is contradicted by Mrs Quintal’s evidence as well.

69 In other circumstances, the evidence of a nurse or career with no benefit to be obtained by either of two (or three) contested wills would be important evidence in assessing where the truth lies. I am, however, not able to accept Ms Wright as a truthful non-partisan witness whose evidence can be accepted without corroboration. Ms Jackson is another carer whose evidence cannot be safely relied on without independent corroboration although for different reasons: see [74] below.

Ric

70 In his affidavits and in cross-examination, Ric made concessions about matters such as his financial dependence on Colleen, that he had taken a mistress in 2010, that the financial circumstances in which he and Colleen found themselves in June 2014 were poor (T299.34, T302.41 and T307.38-40), that he had raised with Colleen the need for $60,000 to pay outstanding bills, that Colleen was concerned about having the funds to pay for a carer, and that Colleen was ailing: T308-309. He admitted that his relationship with Colleen as

at June 2014 was in “a terrible state”. He admitted that he was in part responsible for the liquidity problems which he and Colleen faced, but he would not accept he was the sole or major cause of those financial woes. Cross-examination did not establish that he was. He also said, and it was not challenged, that he had borrowed money from his family to assist his and Colleen’s finances: T294.47. He denied that he ever got angry about money: see CB2-107, paragraph 12. He denied that on his return to Out Yenna in mid-July 2014 he was simply “a part time paid carer for [his] wife”: T301.46.

71 Whilst, overall, the cross-examination did not establish that he was clearly untruthful or dishonest, there were a number of matters relevant to Ric’s credit which I will detail:

(1) On 24 June 2014, when police told Ric that Colleen had alleged that he had raised his hand, shouted at her and that he had become increasingly aggressive, he responded saying, according to the police note, that she was mentally unwell. He repeated that in cross-examination but admitted that, although Colleen had been diagnosed with depression, he was not aware of any diagnosis supporting a claim that she was not of sound mind: T347.45. The conversation with Colleen (referred to at [10(18)] above) has Colleen admitting that she had been ‘sick’.

(2) Ric’s evidence as to when he learnt of the Oklahoma Will and when he learnt of the Exhibit 5 Will is confusing and inconsistent. He seems to say (at T356.50-357) that he found out about the Oklahoma Will on 21 October 2014 when Ms Wright told him that, but he then said (at T368) that he did not know that Colleen “had already attempted to change it back”. The only evidence he gives that Ms Coleman told him about the Exhibit 5 Will is, “What we are doing is for your benefit”, on 21 October 2014, but he said he did not know what she meant by that statement: T362.2-10.

(3) Ric said that he did not attend the conferences of 21 and 24 October 2014 that Ms Coleman held with Colleen (except when he found Colleen with Ms Coleman and Ms Wright and had the discussion referred to in [71(2)] above), but Ms Coleman’s assertion that he did attend on 21 and 24 October 2014 is corroborated to a significant degree by her diary notes. If Ms Coleman’s diary note of 24 October 2014 did make clear that Exhibit 5 and Exhibit 6 were signed or initialled by Colleen at that conference, and if her note of 21 October 2014 did make reference to the proposal for a letter relating to financial arrangements, this would have more significance, but they do not.

(4) Ric gave no evidence of any discussions he had with Colleen either in October 2014 or January 2015 about changing her will or the reasons for it.

(5) Ric asserted in cross-examination (for the first time) that Ms Wright controlled Colleen's finances after a few months in the job: T293.47. There is no support for that claim on the evidence presented, and Mrs Quintal, who would have been able to support it and who was called in Ric's case, gave no evidence of that.

(6) Ric said that Colleen's health had deteriorated between October 2014 and January 2015 "marginally" (at T306) but said later that there was a big difference: T362.35.

(7) Given the tone of Colleen's comments to Ms Coleman recorded in Ms Coleman's notes and Colleen's email to her friend, Ric's evidence that Colleen encouraged him to take a mistress and socialise with them seems rather unlikely.

(8) Ric asserted in cross-examination (for the first time) that Ms Wright came out on 17 January 2015, a Saturday (she worked on weekdays only), to help Colleen "and put pressure on Colleen."

(9) Ric said that he was not "too worried" about whether Col had another will: T365.45–366.5. I found that somewhat implausible, particularly since in January at least, the idea of mutual wills with an agreement not to change those wills was ventilated by him.

(10) Ric said that he had not given Ms Coleman copies of the 2005 wills until January 2015, but Ms Coleman's diary note shows that he gave or showed her a copy of those wills on 21 October 2014.

(11) Ric said that Ms Coleman had not visited Out Yenna on 16 January 2015, but Ms Coleman's notes show that she did. The diary note, however, records the conference as being with Colleen and with Ms Martinez in attendance, and Ms Coleman says Ric was not present: see CB1-127, paragraph 81. That, however, undermines Ms Coleman's contention that she could never see Colleen without Ric.

(12) Ric was asked about having made a "large financial donation" to Mr Brown in the middle of 2014 and he said he did not recall making any payment: T300.21-34. The following day, he said that a loan had been made by Colleen of $500,000 to Mr Brown in connection with the Norfolk Island Airline: T358-359. It is true that the question asked by Mr Morrissey the day before was about a donation in the middle of 2013 and so it did not direct his mind to the right era and his 2005 will refers to a loan, but it is such a large amount that he could have been expected to acknowledge that he was aware of the amount to which Mr Morrissey was referring.

72 For these reasons, I am not able to treat Ric as a wholly reliable witness and I need to treat his evidence with caution. He, unlike all of the other witnesses, will derive a significant benefit if he is successful in these proceedings.

73 The matters identified in [71(2)] - [71(4)] and [71(10)] above could have considerable significance in relation to the issue of the allegation of coercion

but the potential consequence of those matters was not explored in cross-examination of Ric.

Ms Jackson

74 Ms Jackson had given evidence in her affidavits, helpful to Ric's case, that:

(a) On 12 July 2014, she had initialled the Oklahoma Will wherever Colleen had initialled it;

(b) She had not been working at Out Yenna in October 2014;

(c) On 17 January 2015, she had initialled Exhibit 5 as a witness to Colleen's signature; and

(d) Corroborates Ric's version of what occurred on 17 January 2015 in relation to the signing of the Exhibit 5 Will.

In the witness box, Ms Jackson did not recall any detail as to what occurred on 17 January 2015. She could not recall with any certainty whether she was present at Out Yenna on 24 October 2014 (as Ms Coleman asserts), although she seemed to think she was not: see T405.25-406.23, T465.25-38. Ms Jackson's position was that when she deposed to the matters in her affidavits, she believed them to be true but that she could not now recall the matters to which she had previously attested. Mr Morrissey contended that this left him almost in the position of facing a witness whose evidence he could not test, and I accept his submission. I recognise that a witness is likely to be able to recall matters of detail as to what occurred in October 2014 and January 2015 more readily in 2016 than in 2018, but Ms Jackson's loss of recollection was dramatic and it is difficult to place much reliance on her evidence unless corroborated by someone other than Ric.

Mr and Mrs Quintal

75 Mr and Mrs Quintal were cross-examined. They presented as entirely honest witnesses doing their best to recall the matters about which they gave evidence. Mrs Quintal was described by Colleen as "an honest and trustworthy person" who had been reliable for a very long time: CB1-98. Mr Morrissey submitted that I should not accept Mrs Quintal's evidence about the relationship between Colleen and Ric having returned to "fine" or "quite good" by late October 2014 (see T339.13-21), but Mrs Quintal was not shown to have

said anything else in her affidavit or oral testimony that was false or incorrect. I accept her evidence and that of Mr Quintal.

Dr Challender

76 Dr Challender appeared to be a forthright witness. He was not cross-examined on his conclusion that Colleen had mental capacity and that she was not under anyone's influence as at 14 January 2015, and the basis upon which he reached these conclusions was not the subject of scrutiny or challenge other than on the question of whether he had been able to speak with Colleen at the time of his visit to Out Yenna. He strongly refuted the suggestion (made by Ms Wright) that he had not been able to rouse Colleen or speak to her at all but he did not provide any content as to what questions he asked on 14 January 2015 (other than of a strictly medical nature) and what answers she provided to found his assessment. He accepted that his assessment was based not only of what he had seen on the visit on that day but also on his consultations a few weeks prior. He also accepted that he may have said something to indicate that his assessment of Colleen's mental state would link back to those earlier consultations.

77 I accept Dr Challender's evidence that he was able to speak with Colleen for about 20 minutes on 14 January 2015, and that having regard to Colleen's consultations with him, both on that day and in the relatively short period before that, he formed the view that, although she was seriously ill, she was mentally competent and able to freely make her own decisions about matters concerning her estate. Mr Gallagher's notes do not suggest that, as at 13 January 2015, he held any different view to Dr Challender and those notes are consistent with Colleen being able to communicate her wishes.

Ms Paton

78 The only evidence of substance in respect of the issues remaining at trial which Ms Paton gave related to what she had received or been told by Ms Coleman. The attack launched by Mr Murr in cross-examination was directed to her failure to ensure that the Plaintiff acted in accordance with her duties and I shall say more about this in the context of the costs issue.

Ric's Relationship with Colleen

79 There is no dispute that, on 24 June 2014, Colleen told the Australian Federal Police on Norfolk Island that Ric had "previously entered her bedroom, shouted at her and raised his hand at her", although she also said that Ric had never been physically violent towards her but he had become "increasingly aggressive". Colleen said that Ric and his mistress had "previously entered her bedroom where they both verbally abused her". The note also records that Ric told the police that Colleen's mental state was such that she was no longer able to make sound decisions, and that if she needed to travel to Sydney for medical treatment to try to save what is left of her eye sight, he would not be taking her: see Exhibit K. Colleen did state that she was not asserting criminal behaviour on Ric's part. Ric denied that his son, Wade, was present during Colleen's interview by the police. Since Ric was asked to wait outside, it is highly unlikely that the police would have permitted Wade to remain and Exhibit R does not record Wade as present. Ric said that his conclusion about her mental state, to which I have referred in [71(1)] above, arose from the fact that he had never threatened her or hurt her and yet she was making assertions of that nature. The significance of the issue of whether Wade was present was that Ms Wright asserted that Colleen had told her that she has not been able to speak to police in private: see CB1-306, paragraph 11. It has not been made clear by Ms Coleman or Ms Wright what could have been said to the police that Colleen is not recorded as saying.

80 Ms Coleman annexed to her affidavit her notes of her conversation with Colleen on 24 June 2014 before the decision was made by Colleen, with Ms Coleman's and Ms Wright's encouragement (see T58.24 and CB1-142), to call the police. I note that although Colleen told Ms Coleman that Ric was "volatile/bad tempered" (see CB1-133) and he had threatened her (CB1-132 and CB1-142), there was no report in the notes of 24 June 2014 (CB1-132-141 and CB1-142) of Ric's hand being raised, or Ric and his mistress abusing Colleen in her bedroom, nor was there any description of the threat, or any previous indication of when the claimed conduct had occurred.

81 I note also that when Colleen told the police on 24 June 2014 about their financial woes, she said that she had not taken an interest in her financial

situation and that they were a result of her husband spending money on whatever he chooses "and their past decisions of lending money to people they later realised they shouldn't have": see Exhibit K.

82 There appears to be two significant triggers for the issues of June 2014. The first is the issue of finances, with Ric wanting or demanding that Colleen put $60,000 into their joint account to meet debts and expenses: see Exhibit B and CB2-106, paragraph 10(3). The second issue relates to Ric's mistress. Colleen told Ms Coleman that Ric, "had the temerity to bring his girlfriend" to Out Yenna (CB1-154) and she wrote in an email to a friend on 24 June 2014 that she had reached the conclusion that Ric's mistress "wants the money as well as the man": CB1-447. Colleen did express, in an email of 24 June 2014, that she had fears for her safety (see CB1-447) but the reports of Ric being in "a murderous mood" in that email appear, very likely, to have come from Ms Wright: see CB1-306, paragraph 10 and see CB1-142 which records that is what Ms Wright told Ms Coleman. As I have noted, the reports from Ms Wright said to have come from Mrs Quintal were not shown to have any basis, and Mrs Quintal, whose evidence I accept, denied having given such a report to Ms Wright.

83 There was evidence that Colleen herself could be "cranky and impatient" (T93.42), and difficult and demanding (see Ms Coleman's affidavit at CB1-90, paragraph 22 and see T150.32 and CB1-1-138 for either Colleen's own admission (or Ms Wright's comment) that she was not an easy woman and that, by June 2014, Ric had had enough: CB1-138). The relevance of this is only that, whatever Ric's failings, it cannot be assumed that all of the blame for marital discord should be placed on him.

84 It was put to Ric that it was his profligacy which was the main contributing factor to the state of their finances. Ric did not accept that he was the main cause, saying that he and Colleen were both to blame. There were examples of expenditures which tended to confirm that – a loan to Mr Brown or donation of $500,000 in 2004 in an attempt to save the Norfolk Island Airline (of which only $100,000 had been repaid), financial support by Colleen for her former driver's two daughters' education at a Sydney private school, an expensive repair of the roof at Out Yenna, the installation of a lift for Colleen and upkeep

of a swimming pool that no-one apparently used. There were also significant medical expenses, including extensive paid care. Mrs Quintal, the bookkeeper for sixteen years, was ideally placed to provide support (if it was correct) for the Plaintiff's contention that it was Ric who was solely or largely responsible for their lack of funds (see T333.16-19) but cross-examination of her was not really directed to that point. In an email that Mrs Quintal sent of 10 July 2014, she commented that she "did try to reduce their spending over the years but could only do as I was told" (Exhibit H). Mrs Quintal confirmed that Colleen had opened a bank account in her sole name in early 2014: T337.18-35. Cross-examination of Ric did not establish that he was solely or largely responsible for the financial crisis, although I accept that Colleen's letters make it clear that she held the view that he was responsible, and that he had spent far too much for his own, and his son's, benefit in a context where she was the real breadwinner.

85 There are a number of unsigned letters addressed to Ric which Ms Wright says Colleen dictated to her and she typed in June and July 2014 – one of them is dated 29 July 2014: see CB1 – 311-338. None of these letters were sent or given to Ric and Ms Wright's evidence is that Ric was never meant to see them, raising the question of why Colleen was dictating them at all. Ms Wright at first deposed to the fact that Colleen gave Ms Coleman Colleen's copies of the letters (see CB1-346, paragraph 28) but Ms Coleman said that Ms Wright gave her the letters on 16 January 2015 (except for one which I refer to in [87] below: see CB1-108. These letters, whilst very critical and uncomplimentary of Ric, do not contain any allegations of threats of or actual physical abuse by Ric. The letters emphasise the perilous financial position to which Colleen believed they had arrived and Colleen's belief that Ric was responsible for that situation and that he has been too indulgent of his son, Wade, and they also contain the notion that support from Ric would increase the prospect of another bestseller. The letters appear to have provided Colleen with a means to vent her anger and irritations at a time when she was clearly upset and angry with him over a number of issues.

86 There is one letter which Colleen typed herself and signed (Exhibit N). It is not dated but refers to Colleen as being 77 years of age, so it must have been

written on or after 1 June 2014. It focusses on the steps that Colleen believed must be taken to conserve funds “in order to have enough for my hospital costs and my own welfare”. It is not suggested that it was actually given to Ric. Once again, it is critical of Ric.

87 There is another letter (at CB1-311-314), the LBOM Letter, which Ms Wright says was dictated by Colleen and typed by Ms Wright on 21 October 2014, and Mr Morrissey relies on the following parts of it:

> “…if we can manage to get things on an amical (sic) level we will both feel considerable relief.
>
> We have known each other for a very long time and it is only money and emotional needs that drive a wedge between us.
>
> You have made no attempt to disguise your antipathetic sentiments, which rather puts me behind the eight ball. The pity of it is you have a chauvinistic attitude to women, even though you are prepared to be supported by one.
>
> …you subject me to a lot of pressure and criticism simply to fuel your desire for more money…Sadly, it’s far easier to push and pressure other people into this work that is it oneself. You have no idea how I produce a book, or how must it takes out of me, the only thing that concerns you is that have a new source of money.
>
> I have noted that you seem to have borrowed a great deal of money from Adrian and Ann, and I cannot see your reason, there has also been money given from your mother. Also, there are pages missing from accounts that go nowhere. It seems to be that you are concealing reasons for taking money without declaring your intentions. If I cannot trust you to steal from me-for that is what it is-then I will have to take further steps. Piria has reviewed all account transactions for the last seven years and concurs.”

Mr Murr relies on the following paragraph in the same letter:

> “What happens to all of you when I die? Who is going to take my place? Its time you thought about that. If I don't do something about reducing our debts now you will never get out of the mess you land yourself in upon my demise. Until and if I ever write another big seller out future is by no means assured. When I married you I was worth some millions, but I am not worth that today. You are not a businessman and you don't see the perils and pitfalls in business deals, an option to make a movie may never be taken up for example.”

88 It appears that Ms Coleman had discussed the idea for a letter to be sent to Ric with Colleen on 21 October 2014 (see [10(28)] and T65.10-67.15), and that Ms Wright sent to Ms Coleman on that date a draft letter which she said Colleen was considering. Both parties claimed that the letter to which I have referred in [87] above supported their case. Mr Morrissey contended that the passages cited showed that Colleen’s sentiments there expressed are inconsistent with

her making a will three days later in Ric's favour. Mr Murr contended that the passage relied on by him referring to ensuring an improvement in her financial position to help him was consistent only with an intention to leave her estate to Ric. If he was to obtain no benefit from her will, it would not affect him if she died without any net assets. No one suggests that the draft was ever finalised, signed or given to Ric.

89 One aspect that neither side referred to is the fact that the letter makes no reference to Colleen's conference with Ms Coleman which had occurred that day, and which is said by Ms Coleman to have given rise to the letter.

90 The LBOM Letter was not dealt with in the first three of Ms Coleman's affidavits, but it was dealt with in her affidavit of 22 May 2018 (the first day of the hearing). Ms Coleman says (see CB1-406) that the LBOM Letter (Exhibit B to that affidavit) was received as an attachment to an email from Ms Wright on 21 October 2014. The email is annexed to Ms Coleman's affidavit as Exhibit C and says:

> "Though[t] you may like a read, Col is sleeping on this and intends to give it to Ric morla."

"Morla", I was informed, is a Norfolk Island term, meaning, "tomorrow".

91 Ms Coleman says of the LBOM Letter (at paragraph 6):

> "On 21 October 2014, Nikki sent me a short email that attached a four page letter Col intended for Ric. I took it as her considered state of mind about her relationship with Ric and financial circumstances."

92 Ms Wright, in her affidavit of 24 May 2018, says:

> "5. The email from Ms Coleman [i.e. the email of 25 October 2014, set out at [10(27)] above] was in reply to an email I sent to Ms Coleman on 21 October 2014 attaching a letter Col was typing to Ric."
>
> 6. I sent Col's letter to Piria because Col wanted Piria to have her letters. Col wanted them in a safe place and Col said to me words to the effect of "send my letters to Piria as they will be safe with her. I don't want Ric to read them."

93 The LBOM Letter, however, is not a letter typed by Colleen, and it was not typed on 21 October 2014. That it was not typed on 21 October 2014 is demonstrated by Ms Wright's own evidence in her second affidavit, in which she annexes the LBOM Letter as Annexure A, and in paragraph 27 of that affidavit (CB1-346), she describes it as a letter dictated by Colleen in June

2014. Nor does she say in that affidavit that she sent the LBOM Letter to Ms Coleman on 21 October 2014, but rather says (at CB1-346, paragraph 28) that it was one of the letters she sent to Ms Coleman after Colleen's death.

94 Ms Wright gave no content of the background to her statement, "Col is sleeping on it", and she does not in her email tell Ms Coleman that the LBOM Letter, if that is what she did in fact send, is a letter dictated by Colleen in June 2014. The letter that Ms Wright says Colleen was typing was not sent by Ms Wright to Ms Coleman and there is nothing to indicate which letter it was and what has happened to it. Nor does Ms Wright indicate what Colleen said to her after she had 'slept' on the LBOM Letter.

95 The inconsistency and implications of this evidence and its potential relevance to the credit of Ms Coleman and Ms Wright was not explored in cross-examination, perhaps because of the very late arrival of the affidavits to which I have referred, and or because it was not appreciated that the LBOM Letter is the same letter as the one attached to Ms Wright's second affidavit as a letter dictated by Colleen in June 2014. What is clear, however, is that the LBOM Letter was dictated in June 2014 and was not the letter that Colleen was typing on 21 October 2014.

96 It follows that Mr Morrissey's submission that Mrs Quintal's evidence about the state of Colleen and Ric's relationship in October 2014 should not be accepted because of the LBOM Letter, cannot be sustained.

97 The draft letters, taken globally, exhibit a significant degree of anger towards, and irritation with, Ric which does raise doubts as to the likelihood that Colleen would leave her estate to Ric in October 2014, but all of them were written in June or July 2014 (around the time of, or shortly after, their separation), and cannot be taken as a reflection of Colleen's attitude to Ric in late October 2014.

98 I take into account the letters and termination, albeit short-lived, of the relationship in June and or July 2014, which termination is obviously an indication of a fracturing of their relationship, but there are, however, other matters which need to be taken into account, namely:

(1) On 21 July 2014, Colleen told Ms Coleman that she and Ric had reconciled. I accept that part, at least, of the motivation for Colleen's

request in mid-July 2014 that Ric return and the reconciliation was connected to her need for care.

(2) That reconciliation might have been seen as surprising, having regard to the events of June 2014 and early July 2014 and the tone of the letters, even towards the end of July 2014.

(3) Whatever her attitude to Ric, it did not prevent Colleen wanting him to come back to live with her and care for her, and it suggests that she was not fearful of him.

(4) She took steps, with Ms Coleman's assistance, in late June and or early July 2014 to prevent Ric from spending money without her agreement, and she had actively become involved in managing her financial affairs, in contrast to the position prior to the separation.

(5) Mrs Quintal's evidence was that, in mid-July 2014 when Ric returned, things were still difficult and she had thought it unlikely that they would live "happily ever after" (T336.45) but she said, however, that by October, things had basically returned to 'normal' (T335.2) and were fine as far as she could tell (see T339.17), and later when further cross-examined, "were quite good" (T340.45). Mr Murr conceded in submissions that the state of relations between Ric and Colleen was far from ideal but the improvement of which Mrs Quintal spoke is consistent with a reversion by Colleen to Ric being Colleen's beneficiary whatever irritation and anger she had previously felt towards him over his lack of attachment to and even perceived antipathy towards her, his having taken a mistress (or perhaps his bringing the mistress to Out Yenna), and what she regarded as his complete lack of financial responsibility.

(6) No concrete example was given by any witness of her observation of violent, aggressive or abusive behaviour (physical or verbal) by Ric towards Colleen.

(7) Ric said that he had broken off his relationship with his mistress in early August 2014 and there is evidence that he had told Colleen that he had done so: CB1-307, paragraph 14. There was no evidence that that was untrue or that he resumed that prior relationship or commenced any new relationship.

(8) Mr Quintal remarked to Ms Coleman on 17 January 2015, "It's always been up and down in their relationship": CB1-105, paragraph 125.

(9) Ric was providing extensive care for Colleen on the occasions that neither Ms Wright or Ms Jackson were present (i.e. after hours and during weekends), to the point of exhaustion, although he was receiving an allowance from Colleen.

(10) On 25 October 2014, Ms Coleman herself wrote of instructions received that were consistent with a harmonious approach to estate planning going forward, and she also told Ms Paton on 11 February 2015 that there was a "off/on hot/cold relationship" (which I infer was a reference to the relationship between Colleen and Ric): see Exhibit R and Exhibit T.

(11) On 24 November 2014, Mr Gallagher recorded Colleen as regarding her macular degeneration as the primary cause of her depression: see [15(b)] above.

(12) In January 2015, Mr Gallagher noted that Colleen's expressed "anguish" concerning Ric was that he was "not a talker" (and she also said that he was jealous of Ms Wright), not that Ric was mistreating or uncaring of Colleen, or that their relationship was in crisis again.

(13) It also needs to be borne in mind that Colleen and Ric had been married for over 30 years and that even though there had already been signs of financial irresponsibility by Ric in Colleen's eyes in or by 2005 (see the Plaintiff's affidavit CB1-64, paragraph 50), he was still the object of her bounty until mid-2014. The Oklahoma Will was a radical departure from the situation that had existed up until then.

99 The matters referred to in [98] above lead me to conclude that, whatever the imperfections in their marriage, the tensions between them over financial matters, Colleen's concerns over Ric's spending over the years, and Ric's affair, the situation by October 2014, and beyond, had improved from that in June 2014 and was not so acrimonious as to necessarily preclude as a possibility that Colleen would decide to reinstate Ric, her husband of more than 30 years, as the sole beneficiary of her estate.

The Events of 21 and 24 October 2014

100 Ms Coleman says that, on 21 October 2014 she received a telephone call from Ric asking her to visit Out Yenna and when she arrived, she found Colleen in the sun room in her wheelchair. She says that Ric handed her an envelope containing the 2005 mutual wills and codicils. She then says (CB1-97, paragraphs 66-67):

> "66. Ric and Col then appeared to express a joint wish that Ric be made the sole beneficiary of a fresh Will. Ric expressed that he wished to be made executor as well. I observed that Ric was cordial but abundantly clear in his desire, and Col was supportive of it. I observed that Col was agreeable to whatever it was that her husband wanted. Ric used the word, "darling", liberally to which Col was receptive.
>
> 67. On my suggestion, Ric and Col accepted that Col's best female friend, Selwa Anthony, and her close male friend, Joseph Merlino, should act as executors. This was almost consistent with the 2005 mutual Wills I had just read, although only Joseph Merlino was mentioned as a proposed executor in those Wills."

101 In her affidavit, Ms Coleman (at CB1-97-98, paragraphs 68-71) seeks to explain her concerns and doubts about Colleen's real intentions:

> "68. I suggested this approach because I observed that although Col was listening, she had also become virtually mute, *or* at least completely non-communicative. I observed that she appeared heavily bruised. She chain smoked to an extent I had not seen before, starting the next cigarette without finishing the one that was already lit. Each successive cigarette deposited ash dust from in her shaking hand onto the marble table beside the ash tray. The air became hazy with smoke. Ric sipped red wine from a small wine glass. He was very was attentive to Col. When I had seen Col in conference in July 2014, she was far more lively by comparison to this conference.
>
> 69. My discomfort from this meeting on Tuesday 21 October 2015 raised more questions for me than answers about the nature of Col and Ric's long marriage, which I had formally known nothing about. My impression was that I was sitting beside a neglected elderly lady who may have been left alone in her large house without care for long hours, if not days, Col was highly compliant with her husband but her demeanour made me query whether she was suppressing a range of unexpressed emotions.
>
> 70. Nikki, Col's primary carer, was in New Zealand when I attended this conference. I felt uncomfortable having been called out to 'Out Yenna' at short notice, and in her absence. I could not take instructions from Col independently on this occasion. There was an expectation that I return within days with a new Will, ready to be executed.
>
> 71. The direct request, expressed principally by Ric, was that I prepare a document leaving the whole of Col's estate to him."

102 Ms Coleman says (at CB1-98, paragraph 73) that she returned to Out Yenna on 24 October 2014:

> "… to see Col and Ric under the pressure of executing the new will. The ambience was uncomfortable and controlled. Ric was loath for me to talk to Col alone. The carer, Helen Jackson, was present, not Col's regular carer, Nikki".

103 Ms Coleman (at CB1-98-99, paragraphs 74–79) describes the signing by Colleen of the Exhibit 5 Will in the presence of Ric and the witnessing by Ms Jackson, although Ms Coleman deposes that Colleen was not really signing but making an "attempt" on two occasions (Exhibit 6 and then Exhibit 5) and Ms Jackson was not "formally" witnessing "Col's attempt to sign it. She says that Ms Jackson also initialled the powers page (which bore, she says, Colleen's "small and neat initial CMCC" (see CB1-99, paragraph 79).

104 Ms Coleman says that she then left Out Yenna after the conference without the new will ever having been executed. She says that:

> "I observed that Col did not appear to have the testamentary capacity or volition to execute a will at this time. There was no contemporaneous and independent certification from her treating doctor made available to me. There were not two independent witnesses available on the day."

105 Ms Coleman then says (at CB1-99):

> "81. Given the stop gap function I appeared to be fulfilling, I did not intend to witness a fresh Will for Col, or any more documents. I was uncomfortable with the level of control being exerted by Ric. I appeared to be becoming embroiled in a web of financial mismanagement I had known nothing about before my first conferences with Col in June and July 2014."

106 Ric's version of events of 21 October 2014 is quite different. He says that on 21 October 2014 he walked into the house (at Out Yenna) and found Colleen there with Ms Coleman and Ms Wright and said, "what are you all up to?", and Colleen said, "I am talking to my lawyer and our conversation is a private one". Ms Coleman then said (at CB2-18, paragraph 22):

> "What we are doing is for your benefit."

Ric says he was not involved in the signing (or attempted signing) nor did he contact Ms Coleman, ask her to visit Out Yenna or have any discussions with Ms Coleman on that day.

107 Ms Coleman agreed that, on 21 October 2014, she had said to Ric words to the effect of, "What we are doing is for your benefit": see T99:14.

108 Ms Wright, in her three affidavits, gave no evidence of what occurred in October 2014. The claim by Ms Coleman that Ms Wright was not at Out Yenna but in New Zealand in late October 2014 was undermined by the combined effect of Exhibit 3 (time sheets at Out Yenna for Ms Wright during October 2014), Ms Wright's and Ms Jackson's evidence, and the emails that passed between Ms Wright and Ms Coleman between 21 and 24 October 2014. I have already commented on Ms Coleman's attempt to present Colleen as neglected due to Ms Wright's absence.

109 Cross-examination of Ms Coleman underscored the fact that the 'concerns', allegations of pressure, and references to ambience could not be substantiated by any credible detailed evidence. Rather, Ms Coleman, in her evidence, appeared to be channelling the draft letters dictated by Colleen which Ms Wright had given her in mid-January 2015, and what Ms Wright was telling her some time after October 2014 (see T112.5-37) and her awareness in June and or July 2014 that Colleen had wanted something quite different: see, for example, T67.16-17.

110 That Colleen placed her initials on Exhibit 6 on 24 October 2014 is not in contest between the parties. It is Ms Coleman's evidence that she did, although, as I have noted, she says that Exhibit 5 was also signed and witnessed by Ms Jackson on that date. I have referred to Ms Coleman's evidence that both the signature and initials were "failed attempts" by Colleen. The following matters support Ric's case that Colleen did initial Exhibit 6 (at least) on 24 October 2014 as a representation of her testamentary wishes:

(1) Ms Coleman took instructions from Colleen (either with or without Ric present the whole time) which Ms Coleman understood required her to prepare a new will and which Ms Coleman thought could be achieved by inserting a dispositive page, giving Colleen's estate to Ric and removing the Oklahoma Will dispositive page: see T55.11-57.13, and particularly T56.28-47.

(2) Ms Coleman had a conversation with Ric in Colleen's presence in which she said to Ric that what she and Colleen were discussing was for Ric's benefit.

(3) Ms Coleman wrote to Colleen saying that the updated will on 24 October 2014 was in accordance with Colleen's instructions in the context of improved domestic harmony.

(4) Ms Coleman told Colleen in the same letter that she would place the new will in a security packet.

(5) Ms Coleman charged Colleen for the work described in the invoice dated 25 October 2014 that matched work described in [110(1)] and [110(2)] above.

(6) The contents of the invoice, previously set out at [10(28)] above, which included a reference to the execution of the will.

(7) It seems unlikely that Ms Coleman would retain Exhibit 5 and Exhibit 6 if they were "failed attempts" at making a testamentary disposition.

(8) The letter and invoice of 25 October 2014 were sent to Ms Wright under cover of an email, in which Ms Coleman said that:

> "The letter and invoice clearly document the content of discussions, instructions and work completed this week".

(9) Ms Coleman's evidence, particularly having regard to cross-examination, did not establish that, what on their face were instructions given by Ric on behalf of Colleen in her presence, to Ms Coleman were not Colleen's 'real' instructions. By her answers at T57.8-18 and T58.41-48, she seems to assert that it was the way that Colleen initialled Exhibit 6 and signed Exhibit 5 that led her to conclude that Colleen did not want to proceed with the Exhibit 5 Will.

(10) Ms Coleman had been made aware by 21 July 2014 that Colleen and Ric had reconciled: see Exhibit T70-71. Ms Coleman sought in her

answers in cross-examination to gainsay what she had been told (see T71-72) but there was no evidence that she could point to of any departure by Ric from the house after his return on 17 July 2014 or any evidence that by October 2014 there had been a return to the low point of June 2014, either in Colleen's mind from anything said to Ms Coleman, or in fact.

(11) Ms Coleman's claim that Ric would not let her see Colleen alone, with the implication that Ric would not agree (see CB1-98, paragraph 73 and CB1-126, paragraph 68), is not established since:

(a) Ms Coleman did not, on her evidence, ever ask to see Colleen alone. I infer that if Ms Coleman (as Colleen's solicitor) felt that was necessary or appropriate she would have said so, although I note that her explanation for not having done so is that, if she asked to speak with Colleen privately, that would make the situation harder for Colleen: see CB1-126.

(b) There are several indications that, contrary to her assertion, Ms Coleman most likely did see Colleen alone in October 2014 for some time at the very least:

(i) Ric's evidence that he came home to find Colleen with Ms Coleman and Ms Wright and had a conversation in which Ms Coleman said to him, "This is for your benefit", provide a context supportive of the proposition that he had not been privy to what was going on. Ms Coleman agreed that she did say that but gave no explanation of the context in which she did say it.

(ii) Ms Coleman's evidence is that the LBOM Letter (at CB1-410-413) is the type of letter that she and Colleen discussed would be sent. Mr Murr submitted that it would be surprising if that were discussed in Ric's presence and I am inclined to agree. The need for, and discussion concerning, such a letter is not mentioned in the diary notes of 21 or 24 October 2014 (see CB1-415-416).

(c) Ms Coleman herself gave evidence of seeing Colleen without Ric on 16 January 2015: see CB1-127, paragraph 81, albeit in the context of the power of attorney.

(d) On 9 January 2015, Ric wrote to Ms Coleman saying, "You've told me that Colleen has made a will in my favour". Ms Coleman, in her detailed response, did not dispute that she had so advised him and that is consistent with Ric not having witnessed the will being signed.

(12) I think it is of significance that, in Ms Coleman's first affidavit, she did not deal with the 25 October 2014 letter and diary notes of 21 and 24 October 2014. If it were true that the 25 October 2014 letter and invoice were not really intended to reflect the truth of what had occurred but designed to protect Colleen, it is surprising that she did not recount in that affidavit all that she says she did in her endeavour to protect

Colleen. Nor has she explained how the proposed letter (which she received as the LBOM Letter) fitted into the plan.

(13) As I have noted, Ms Wright's affidavits say nothing about the October 2014 meetings (even though Ric says she was present when Ms Coleman said "What we are doing is for your benefit") and nothing about any discussions with Ms Coleman or Colleen about a new will, the LBOM Letter or the letter Ms Wright described Colleen as typing. That absence of evidence is significance in the context of a case in which it is asserted that Colleen did not really want to make a new will or sign Exhibit 5: see [167(9)] in relation to Ms Wright's description of herself.

111 Leaving aside the question of the date of signing, the following matters (and the matters relating to the state of the relationship between Colleen and Ric) are supportive of Ric's claim that Exhibit 5 and 6 are a reflection of Colleen's testamentary intentions:

(1) Ms Coleman took the trouble to have Ms Jackson witness Colleen's signature on Exhibit 5, although Ms Coleman says that Ms Jackson only came into the room after Colleen had signed. She also obtained Mr Quintal's initials as a purported witness of Colleen's signature. Further, she had Mr Quintal also initial Colleen's initials on the powers page taken from the Oklahoma Will. She did not ask Mr Quintal to witness Colleen's initials on the dispositive page of the Oklahoma Will (and she did not have Ms Jackson do so either).

(2) Ms Coleman put together the will that she gave to Ric on 18 January 2015. In doing so she included the execution page of the Oklahoma Will. That is, she gave him a critical part of the will that she asserts remained the valid will of Colleen made on 12 July 2014 as at 18 January 2015. That was a page she could not recreate if it had it been destroyed by Ric. She also says she included the original medical certificate of Dr Metcalfe – that is another document that it would have been important for her to keep if she thought the Oklahoma Will was still in effect.

(3) She wrote to Ms Drayton in the terms I have set out at [10(41)] and to Ric at [10(42)] above. In my view, those emails are consistent only with the belief that Ric would be the person seeking probate or letters of administration in connection with Colleen's will. Ms Coleman had absolutely no reason to be deceiving or tricking Ms Drayton about work she might receive in the future and Ms Coleman did not assert that she had said what she said to Ms Drayton for such a purpose.

(4) She told Ms Paton on 11 February 2015 (according to Ms Paton's file note tendered after Ms Wright had given evidence) that "the original will" was with Ric: see Exhibit R and Exhibit T. If she had thought at that point that the original will was the Oklahoma Will, I think it is likely that she would have said part of it was with Ric and part held by her.

(5) She must, I infer, have provided Ms Paton, after Colleen's death, with information that led Ms Paton to believe that Colleen made a will in October 2014, albeit one that was open to attack on the grounds identified in the Foundation's Statement of Claim: see [10(47)] above.

(6) Ms Coleman's assertion, set out at [105] above, about her discomfort is not only inconsistent with the letter and email of 25 October 2014, but it is inconsistent with her apparent willingness to engage with Ric and Mr Brown in January, and with Ms Drayton.

(7) Ms Coleman's evidence at T92-93 and T112 and her evidence at T116.27 – 117.10 (set out earlier) support the contention that Ms Coleman understood that Colleen wanted her to provide the Exhibit 5 Will to Ric and that the "placate Ric" version did not emanate from Colleen.

112 Irrespective of whether Exhibit 5 was signed by Colleen on 24 October 2014 (as the Plaintiff contends) or 17 January 2015 (as Ric contends) there is no dispute that it is Colleen's signature, and that Ms Coleman and Ric saw her sign it on the day that Colleen signed it.

The Events of 9 - 18 January 2015

113 I have already referred to much of the detail during this period. I will now set out the key aspects of Ms Coleman's affidavit evidence in respect of this period which are in dispute:

(1) On 9 January 2015, Ms Coleman says that she received a call from Mrs Karen Quintal asking her to urgently make contact with Ric which she did. Ms Coleman says that Ric said to her:

> "Can you come out to Out Yenna. It's about mutual wills for Col and me. Can you come now please?"

(2) She says that she attended a conference at which both Ric and Colleen were present (and no carer was present) and says that she told Ric that he would have to obtain independent legal advice and that a medical assessment of Colleen's testamentary capacity would be necessary (CB1–100, paragraph 83).

(3) She says that, to her observation, Colleen's health had deteriorated to such an extent "that the prospect of a fresh will was seriously out of the question" (CB1–100 paragraph 84).

(4) I have already referred to the email exchange between Ms Coleman and Ric and between Ms Coleman and Mr Brown. The purpose behind Ms Coleman's correspondence is in dispute.

(5) On 16 January 2015, Ms Coleman says she attended at Out Yenna in respect of a power of attorney that Colleen wanted Ms Val Martinez to be granted. Ms Wright was present and handed Ms Coleman a bundle of letters that had been addressed to Ric some long time before but not

delivered (CB1–101, paragraph 89). Ms Coleman does not say that Ms Wright handed her Exhibit D and nor does Ms Wright, although on Ms Wright's evidence it had been initialled by Colleen three days earlier.

(6) On 17 January 2015 (which was a Saturday), Ms Coleman attended at Out Yenna with the draft power of attorney for Ms Martinez.

(7) Ms Wright, who usually only worked weekdays, was present as well Ms Coleman says Ms Wright was present "to assist Col to execute the power of attorney."

(8) Ms Coleman says that she again discussed with Colleen the power of attorney and "Col acknowledged it was what she wanted by nodding her head" (CB1–101, paragraph 92).

(9) Ms Coleman says that "Ric was anxious about getting the mutual wills executed" (CB1-101, paragraph 93), but on Ms Coleman's evidence no will was signed by Colleen on that day – only the power of attorney and in respect of that she says (at CB1-102, paragraphs 98-99):

> "98. It became apparent to me that Col was unable to sign her name on this fresh power of attorney. Nikki initially intended to apply Col's signature stamp, or at least formally apply the stamp, by holding Col's hand. Col's hand was way too unsteady. Nikki reflected for a moment, then simply stamped Col's signature using the stamped imprint of her former signature. She looked at me as if to say, "What else can we do?".
>
> 99. Nikki and Helen acted as witnesses for Col and attested that Col, as the donor, "is of sound mind and understands the import of this document". I noted at the base of the power of attorney that I had handwritten the information required to complete it."

(10) Ms Coleman denies that Colleen signed any document other than the power of attorney in favour of Ms Martinez in the manner set out above. She denies that on that day Ms Jackson witnessed any signature of Colleen's and she denied that she said to Ric that she would "get Lew Quintal to initial it also."

(11) Ms Coleman says (at CB1-103 paragraph 106) that she said to Ric words to the following effect:

> "I cannot endorse the signing of mutual wills in circumstances where I cannot get adequate instructions from or provide appropriate advice to Col."

(12) Ms Coleman then says (at CB1-103, paragraphs 108-109):

> "108. After I explained to Ric that I could not proceed, in the absence of a formal endorsement from Col's treating GP, Ric reacted somewhat evasively but almost immediately produced a doctor's certificate from a, "Dr. Bob", as he was commonly referred to on Norfolk. It read, 'If I'm sitting with her in 5 yrs (sic) having a drink + (sic) debating literary issues I'll be a happy man."
>
> 109 I requested that Ric provide me a copy of the medical certification. I found the content difficult to interpret given my

observations of Col in the 6 months leading up to this doctor's personalised and subjective assessment of his new patient."

(13) Ms Coleman says that, after she left Out Yenna, she received a telephone call from Ms Wright who was at Ms Martinez's house. In relation to that conversation, she says:

> "We discussed how heavily we felt under pressure and whether we should go to the police".

During that conversation, they also shared their thoughts about Ric (CB1-103, paragraphs 112-113):

> "112 Nikki said to me, "I suspect Ric could be over medicating Col."
>
> 113. I said to Nikki, "I suspect Col may have been neglected, particularly after or around the time of my visits on 21 October 2014 and 24 October 2015, when she was so heavily bruised, as though she had either fallen or being malnourished, or been neglected and left alone for days, or for too many hours without essential care.""

114 In relation to [113(13)], I have earlier referred to the fact that Ms Coleman sought, in her evidence, to promote the theory that Colleen was not being well looked after by Ms Jackson in October 2014. In fact, as I have already noted, Ms Wright was the carer in that period (see Exhibit 3), although in Ms Coleman's version of her conversation with Ms Wright (see CB1-103), Ms Wright did not point that out to Ms Coleman.

115 Ms Coleman says that she and Ms Wright left Out Yenna together on 17 January 2015 and that Colleen "appeared agitated and exhausted": CB1-251, paragraph 82. She did not say that Ms Wright had put Colleen to bed.

116 Ms Wright says in her first affidavit that, on 17 January 2015, Ric "rushed up to [her] in an absolute panic" and asked, "Are they doing the will first?", to which she replied, "No, they're doing the power of attorney first", which she says made Ric "very angry" (see CB1-307). She says that she heard and saw nothing in connection with any will signing, and that Colleen was fatigued and hungry (CB1-307). She said that, at hospital, Colleen was found to be hydrated, but Exhibit O does not establish that was so. In a later affidavit, she said she put Colleen to bed before she left Out Yenna on 17 January 2015 (see CB1-352, paragraph 55, but only in her second affidavit: cf CB1-308, paragraphs 22-23 of her first affidavit), and she also recounted the conversation with Ric in different terms, as I have previously noted.

117 Ric's version of the events of these days (omitting the matters previously recounted) is:

(1) On 8 January 2015, Ms Coleman came to Out Yenna and Ric believes that was at Colleen's request. Colleen said to Ms Coleman in his presence that she wanted to make a new will. Colleen said:

> "I want it to be simple. I just want to make sure that I have left everything to Ric".

Ms Coleman replied (at CB2-19, paragraph 25):

> "We can use your previous will, remove the existing front page and replace it with a new front page, rule through or destroy the original front page and execute the new front page."

(2) Ric asked Mr Brown to draft new wills for Colleen and himself, as well as an agreement "that neither of us will change them" (CB2-19, paragraph 29).

(3) In his email of 10 January 2015, Ric wrote that he agreed with Ms Coleman that it would be wise to have a doctor assess Colleen, and he arranged for Dr Challender to attend Out Yenna on 14 January 2015.

(4) On 17 January 2015, Ms Coleman came to Out Yenna. Ric says Ms Jackson was there at the time. He says Ms Coleman asked him if he had obtained a medical certificate for Colleen and that he handed it to Ms Coleman (CB2-110, paragraph 27(1)) and that Ms Coleman asked him to leave the room whilst she spoke "privately" to Colleen and that he did leave the room (CB2-20, paragraph 34).

(5) He then says (at CB2-20, paragraph 35):

> "35 Later Miss Coleman asked me to the effect to come into the room. She asked Helen Jackson to do the same. Miss Coleman then put a document of three or four pages in front of Colleen. I do not recall whether there was a cover page, but I recall that there were three typed pages. I did not read the document at the time. Miss Coleman did not give me an opportunity to do so. Miss Coleman asked Colleen words to the effect that she sign the first typed page of the document. I saw Colleen do so, and I saw that her signature extended off the page, and onto each of the following two pages. The three pages were partly fanned out, with the result that Colleen's signature continued as lines at the bottom right hand corners of pages two and three of the document.
>
> 36 Miss Coleman did not ask Colleen to sign the remaining pages of the document. Miss Coleman said words to the effect "That is good. Colleen has put her mark on each page, and that is sufficient execution of the will". Helen Jackson then initialled the front page which Colleen had signed. After this Miss Coleman said " I will take the will to Lew Quintal and get him to initial it too". Miss Coleman then left our home, taking the document with her.
>
> 37 Soon after Miss Coleman left our home I began helping Colleen to bed. While I was doing that Colleen said to me words to the effect

> "Love, can you take me to the Hospital please. I can't take the pain any longer".
>
> 38 I then took Colleen to our car, to drive her to the hospital. When I was helping Colleen into our car, I received a telephone call from Miss Coleman, who spoke for quite a few minutes. While I was speaking with Miss Coleman, Colleen said loudly enough for Miss Coleman to hear her words to the effect "Just give the will to Ric"."

(6) Ric says that, on 18 January 2015, Ms Coleman rang him and said:

> "I will be driving past your house in about 10 minute's (sic) time. Can we meet at your gate so **I can give you the will which Colleen signed yesterday**."
>
> (Emphasis added)

118 Ms Coleman denied this account. In relation to [117(6)], Ms Coleman denied that she had said what Ric claims she did. However, Mr Morrissey accepted that Ms Coleman had used the words ascribed to her by Ric: see T524.5.

119 There are a number of questions that arise surrounding the evidence of both Ms Coleman and Ric as to what occurred during the period between 9 and 18 January 2015:

(1) It seems as though Ric thought that there already was a will giving him the entire estate but by which he was not made the executor. What he was given on 18 January 2015 was the Exhibit 5 Will which did not appoint him as executor. Mr Murr described this as "an unresolved puzzle": T525.20.

(2) If Ms Coleman was not organising a new will on 17 January 2015, why did she ask to see a fresh medical certificate on that day as she says (and Ric agrees) she did?

(3) Ms Coleman sought in her first affidavit to impugn the certificate from Dr Challender quoting only the last paragraph of it and saying that she found it (at CB1-103, paragraph 109):

> "…difficult to interpret given my observations of Col in the 6 months leading up to this doctor's personalised and subjective assessment of his new patient."

but cross-examination of Ms Coleman revealed that the balance of that medical certificate was entirely clear. It is, if anything, a more detailed certificate than the one she had been given from Dr Metcalfe: see CB1-182.

(4) Ms Coleman claimed that she had stapled the cover sheet and three pages that she gave to Ric on 18 January 2015 to lessen Ric's suspicions about Colleen's instructions.

(5) Why did Ms Coleman approach Mr Quintal only on 17 January 2015? On her evidence, Colleen had placed her signature on Exhibit 5, and or her initials on Exhibit 6, on 24 October 2014 and Ms Jackson had witnessed it on 24 October 2014.

(6) The form of Exhibit 5 and Exhibit 6 are different. One has printed lines and descriptors of the persons signing, which appears consistent with Ric's claim that Exhibit 5 and Exhibit 6 were not signed or initialled on the same day. Ms Coleman, however, gave an explanation for why one copy has the descriptors: see CB1-124, paragraph 61.

(7) Ms Jackson was present at Out Yenna on 17 January 2015 and her signature appears on Exhibit 5 and also on the power of attorney dated 17 January 2015. It is Ms Coleman's evidence that Ms Jackson signed on 24 October 2014 and there is no corroboration that Ms Jackson was working at Out Yenna on 24 October 2014. Ms Coleman's evidence that Ms Wright was in New Zealand in late October 2014 is not correct.

(8) If there was to be no will signed on 17 January 2015, why did Ms Wright respond to Ric's question, "Are they doing the will first?", by saying, "No, they're doing the power of attorney first".

(9) How was it that Ms Coleman felt she could obtain instructions from Colleen about the power of attorney but not about the will as she claims, and why did Ms Coleman not say in her emails to Ric and Mr Brown that the prospect of fresh wills was "out of the question": see [113(3)] above.

120 I think it is likely that the conversation in which Colleen instructed Ms Colman to give Ric the will (on Ric's case) or give Ric "what he wants" (on Ms Coleman's case) was not the same conversation about delivery of the documents to Ric. She had not at that stage seen Mr Quintal. Ric's version that the conversation about delivery of the will occurred shortly before Ms Coleman arrived at Out Yenna is more likely because Ms Coleman was indicating a time for delivery on the day that she did in fact deliver the envelope. If Ms Coleman did say that she would give Ric "the will which Colleen signed yesterday", it would put that beyond doubt.

121 I have made reference to Exhibit D bearing the date 14 January 2015 and the evidence which Ms Wright gave concerning it. Exhibit D is a curious document, and not only because of the change in the content of what Colleen is supposed to have said leading to its formation:

(1) On Ms Wright's evidence, it was signed on 14 January 2015, the same day that she says Dr Challender could not rouse Colleen.

(2) On Ms Wright and Ms Coleman's' evidence, Colleen, three days later, was so weak she could not sign the power of attorney (see CB1-102,

paragraph 98) or even, says Ms Coleman, initial it (see CB1-128, paragraph 91), but on Ms Wright's evidence on 14 January 2015, Colleen placed a "fairly emphatic mark", as described by Mr Morrissey (at T499.38) on Exhibit D, and with the obviously frail signature on Exhibit 5 signed in October 2014 on Ms Coleman's evidence. Ms Wright attested to Colleen's signature on that date but Ms Hayes, whose signature as witness also appears, did not give evidence, although available to the Plaintiff: see T204.20-25.

(3) Exhibit D refers to "a will you drafted in private with your solicitor Piria Coleman". This is ambiguous in itself (as Mr Morrissey conceded: see T12.2), and it does not refer to a will signed by Colleen, but only to one drafted in private with Ms Coleman.

(4) If "the will you drafted in private with your solicitor" means the Oklahoma Will, Exhibit D presents a conundrum. If Colleen had not made a will revoking the Oklahoma Will, she did not need to make any declaration of her intention that it, rather than another will, should be regarded as what she wanted. If she had made a will in October, this undermines the Plaintiff's case that there was no will made in October. On the other hand, why would Colleen need to state on 14 January 2015 that the Exhibit 5 Will, the latest in time, was the one she wanted, unless, as is at least a possibility, she did not want to remove the Plaintiff and Mr Merlino as executors?

(5) Ms Wright does not state that she gave Exhibit D to Ms Coleman at any time, nor in her affidavit did she refer to any conversation with Ms Coleman about Exhibit D. It seems that Ms Wright kept Exhibit D to herself and sent it to Ms Paton in August 2015. It is extraordinary that Ms Wright would go to the trouble of preparing Exhibit D and having Colleen's mark witnessed and not provide it to Ms Coleman, Colleen's solicitor, on either of Ms Coleman's subsequent visits (on 16 and 17 January 2015) This is even more surprising, having regard to Ms Coleman's evidence that Ms Wright handed over to her Colleen's unsigned letters on 16 January 2015. I asked Ms Wright about whether she had told Ms Coleman about it (at T202.5-10) and her answer was entirely vague:

> "HIS HONOUR
>
> Q. Did you tell Piria Coleman at about the time that you prepared that document which is the question and answer that you had done that?
>
> A. I think it may have - it probably came up, no. It would have come up in conversation when - I don't recall."

122 Mr Murr took the position that Exhibit D supported Ric's case because his case is that Colleen did make a will in 'private' in October, and that Ms Wright, when she later asserted that Colleen had said to her that she wanted the will in Sydney to be the will, was fabricating that answer. He did not otherwise challenge the authenticity of the document. Mr Morrissey relied on Exhibit D as

a codicil (an issue I shall deal with separately below) but also as evidence of Colleen's intentions, since on the basis of Ms Wright's second version of the conversation, Colleen was confirming the Oklahoma Will represented her wishes. On the basis of the first conversation, and as recorded in the document, it was opaque, as Mr Morrissey conceded at T11.50-12.4. Having regard to its form and my rejection of Ms Wright's evidence about what was said by or to Colleen, I find it difficult to place any confidence in Exhibit D as a document that supports either side's version of events. I shall deal with the codicil issue separately, later in these reasons.

123 In relation to the Exhibit 5 Will, as advanced by Ric, there are the following matters in support:

(1) Ric's evidence that he saw Colleen sign it on 17 January 2015.

(2) The fact that, in her affidavit, Ms Jackson said that she witnessed Colleen's signature on 17 January 2015. For reasons I have explained earlier, I put little weight on that evidence on its own.

(3) Notwithstanding my concern about Ms Jackson's evidence, there is clear evidence that she was present at Out Yenna on 17 January 2015 because:

  (a) Ric says Ms Jackson was present;

  (b) Ms Wright says Ms Jackson was present; and

  (c) Ms Jackson is a signatory to Colleen's execution (albeit with a stamp) of the power of attorney to Ms Martinez said to have been executed on 17 January 2015: see CB1-237.

(4) On 17 January 2015, Ms Coleman did take Exhibit 5 (with another page of what became the will given to Ric on 18 January 2015) to Mr Quintal. Her denial that she had said to Ric that she would have Mr Quintal witness Colleen's signature is at odds with the fact that that is exactly what she, on her own evidence, did do.

(5) Ms Coleman delivered the Exhibit 5 Will to Ric on 18 January 2015.

(6) The emails from Ms Coleman to Ric and Mr Brown between 9 and 17 January 2015 are cooperative and friendly. Whilst the email of 9 January 2015 (see [10(31)(b)] above) did raise an issue about the power of attorney and the identity of the executors, it did not raise any other concern. The email of 10 January 2015 referred to Colleen's fairly "recent instructions", but cross-examination demonstrated that she did not have any recent instructions from Colleen, inconsistent with a new will.

(7) On 17 January 2015, Ms Coleman asked Ric for (and obtained from him) a medical certificate. Ms Coleman said that she asked for it in

connection with the proposed mutual wills in contemplation that then she could obtain instructions from Colleen. The request for the medical certificate on 17 January 2015 supports the proposition that Ms Coleman was intending to do something that day, subject to receipt of a more recent medical certificate than Dr Metcalfe's certificate of 2 July 2014. She had raised the need for such a medical certificate in her conference on 9 January 2015: CB1-202.

(8) Ms Wright says (in her first affidavit) that, on 17 January 2015 at Out Yenna, she said to Ric, "No, they are doing the power of attorney first", in answer to his question about the will. That response implies that Ms Wright was aware that there was to be a signing of a will and she could only have known the order of things from Ms Coleman. That problem seems to have been recognised by Ms Wright because in her second affidavit (see CB1-351, paragraph 50), she deposes to a different version of the conversation with Ric in which "first" has been excised.

(9) Ms Coleman's evidence is that wills were simply not on the agenda and were not discussed at Out Yenna on 17 January 2015, yet on the undisputed evidence, she asked for the medical certificate and rang and met with Mr Quintal on that date, rang Ric in the afternoon, and delivered the will to Ric on 18 January 2015.

(10) According to Ric, Ms Coleman said to Ric on 18 January 2015 (CB2-20-21):

> "I will be driving past your house in about 10 minute's time. Can we meet at your gate, so I can give you the will which Colleen signed yesterday."

Mr Morrissey accepted that Ms Coleman did say those words. If said, they support Ric's claim that Exhibit 5 was signed on 17 January 2015.

(11) Ms Coleman does not give a version of what occurred at Out Yenna on 17 January 2015 or of what was said on either 17 or 18 January 2015 that would explain her phoning Mr Quintal on 17 January 2015 and visiting him that day and then dropping off a will the following day, such as saying to Ric, for example, "I have the will signed by Colleen in October and I have now had Lew witness it."

(12) It is Ms Coleman's evidence that Colleen was just too weak on 17 January to sign anything and the incident with the power of attorney is given as an example of that (CB1-104), but we have, on Ms Coleman's evidence, Colleen shouting out "Give him what he wants" so loud that Ms Coleman perceived it as almost a shriek through the phone even though she was speaking with Ric. She described this as Col "finding her voice".

124 In support of the contention of the Plaintiff that Exhibit 5 was signed by Colleen on 24 October 2014 are the following matters:

(1) Ms Coleman's evidence.

(2) The evidence of Ms Wright and Ms Coleman that Colleen could not sign the power of attorney in her own hand on 17 January 2015.

(3) That it would have made sense to have Colleen sign Exhibit 5 in October 2014 when Ms Coleman first prepared it, at the same time as Exhibit 6.

(4) Ms Wright's belated evidence that she had put Colleen to bed before she left Out Yenna, and both her and Ms Coleman's evidence that Colleen was just too weak and or agitated to do anything like sign a will.

(5) Ms Coleman says she left Out Yenna shortly after Ms Wright and Ms Martinez had left, and Ms Wright says in her second affidavit that she and Ms Martinez made their way to Ms Martinez's house and that Ms Coleman joined them then a few minutes later, leaving only a very narrow opportunity for Colleen to have signed Exhibit 5.

(6) That Ms Coleman's letter, email and invoice of 25 October 2014 say that she had prepared a will for Colleen then, and that the will so prepared had been executed, which fits Exhibit 5 more than Exhibit 6.

(7) That Exhibit 5 and Exhibit 6 are identical in content so there was no need to create a new document.

(8) Ms Coleman's diary notes, taken alone, support Ms Coleman's claim that nothing was signed by Colleen on either day (including the power of attorney).

125 Another question which arises is this: if Colleen had in fact, contrary to Ms Coleman's evidence, made a will in October 2014, why would she need to make another will in January that is in identical terms to Exhibit 6 made in October? One possible answer is that Ms Coleman wanted to have a more formal document with a signature, rather than initials, and to have Colleen's signature witnessed.

126 One other matter relates to the power of attorney. It could be said that it did not make sense for Colleen to give Ms Martinez the power of attorney, rather than Ric, if she had (or was going to) bequeath her entire estate to him. The answer, however, is that Ms Coleman had recommended that Colleen appoint someone other than Ric, and given Colleen's concerns about Ric's approach to money and her concern to ensure that there would be sufficient funds to meet her health and care costs, I think it made sense that, whilst she was alive, she maintained independence of Ric in relation to real estate owned by her.

Findings Regarding October 2014 and January 2015

127 I have set out the competing contentions as to the date Exhibit 5 was signed and the questions surrounding the issue. There are a number of matters which I regard as of particular importance and they are these:

(1) Ms Coleman and Ms Wright gave evidence that was unchallenged that Colleen was unable to sign the power of attorney on 17 January 2015 and hence Ms Wright applied Colleen's stamp. Ms Jackson is shown as having witnessed the purported execution of the power of attorney on 17 January 2015, but gave no evidence about it at all, either in her affidavits or orally. Ric says nothing about having observed the signing of the power of attorney. If Colleen could not summon the strength to sign the power of attorney on 17 January 2015 (the day she went to hospital), whilst not impossible, it seems unlikely that she could sign Exhibit 5 a short while later.

(2) I have discussed Ms Coleman's evidence as to her two meetings with Colleen on 21 and 24 October 2014 and her claim that Ms Wright was in New Zealand. Whilst it follows that, because Ms Wright was in fact working at Out Yenna, Ms Jackson was not working there, it does not follow that Ms Jackson was not present at Out Yenna. Ms Jackson never addressed the question of whether she had been asked to attend Out Yenna to witness Colleen's signature on 24 October 2014 and it may not have suited anybody's case to so assert, although paragraph 56 of Ms Coleman's second affidavit (CB1-123, paragraph 56) is consistent with Ric having arranged it. Ric did not respond to that affidavit of Ms Coleman, which was served after his latest affidavit filed of 12 November 2016, and it was not put to him that he had arranged for Ms Jackson to be present.

(3) One incontrovertible fact is that the mutual wills prepared by Mr Brown (and which Ms Coleman had asked him to convert into a word document) were not signed by Colleen or Ric on 17 January 2015. This links back to the question of why Ms Coleman would ask Colleen to sign Exhibit 5 on 17 January 2015 given that it did not meet Ric's requirements and given that she already had Exhibit 6 initialled by Colleen in her possession.

(4) I have identified the issues of credibility of Ms Coleman and Ms Wright as witnesses, but I have also made reference to the difficulties with Ric and Ms Jackson.

(5) Some of the matters tending to support execution on 17 January 2015 (i.e. [123(4)] – [123(8)] above) are supportive of an intention on the part of Ms Coleman that there would be an execution of the mutual wills on that day but not inconsistent with there being in fact, as matters transpired, no execution of Exhibit 5 on that date.

(6) The letter and invoice of Ms Coleman sent to Colleen is supportive of a document appropriately organised and validly executed on 24 October

2014, as is Ms Paton's note of what Ms Coleman told her in their conversation.

128 There is then, in relation to the date of execution of Exhibit 5, a welter of contradictory evidence which is productive of much uncertainty. No conclusion sits coherently with the established and agreed facts and could only be drawn if I had strong confidence in the veracity of one or more of the key witnesses which, for reasons I have identified, I do not.

129 The onus of establishing that Exhibit 5 was executed on 17 January 2015 rests on Ric. Whilst there is material which supports his claim that it was, I am not satisfied, on the balance of probabilities, that it was signed on that date.

130 Since I am not persuaded that Exhibit 5 was signed on 17 January 2015, it follows, having regard to the fact that there is no dispute that Exhibit 6 was initialled on 24 October 2014, the letter invoice and email of Ms Coleman of 25 October 2014, and the way in which the case was fought, that Exhibit 5 was signed on 24 October 2014.

131 I find as a fact, therefore, that Exhibit 5 and Exhibit 6 were signed on 24 October 2014. The fact that Exhibit 6 was initialled and Exhibit 5 was signed at the same time has not been adequately explained. One possibility is that Ms Coleman thought initially that it might be better to have only Colleen's initials on the dispositive page to match the Oklahoma Will dispositive page.

132 The events of 17 and 18 January 2015 are still important, even if Exhibit 5 was signed on 24 October 2014. The following matters are established:

(1) On 17 January 2015, Ms Coleman asked Ric for a medical certificate and Ric gave her Dr Challender's certificate.

(2) On 17 January 2015, Ms Coleman rang Ric, after she had left Out Yenna and as Ric was about to take Colleen to hospital, and in the course of the conversation, she heard from Colleen.

(3) On 17 January 2015, Ms Coleman rang Mr Quintal and arranged to meet him and have him add his initials to Exhibit 5.

(4) That on 17 or 18 January 2015, she put together the Exhibit 5 Will.

(5) That she arranged to deliver the Exhibit 5 Will to Ric (either in the afternoon of 17 January 2015, on her evidence, or on 18 January 2015, on Ric's evidence).

(6) That Ric then took to Mr Brown's office the envelope Ms Coleman had given him which contained the Exhibit 5 Will where it was opened.

133 Ms Coleman deposed (at CB1-104, paragraph 114):

> "114 On 17 January 2015, in the afternoon, I called Ric to arrange to deliver a package of documents to him the next day. I was flying out from Norfolk on Monday 19 January 2015. He answered his mobile phone, huffing and puffing. He said, "I'm taking Col to hospital. She's not feeling well."
>
> 115 Col found her voice, and bellowed at me, over Ric and I speaking to each other on the mobile phone, "Give him what he wants!"
>
> 116 I understood from our earlier discussions at the Hilton in Sydney in July 2014 that Col's intention was to placate Ric by doing what he wanted."

134 Ms Coleman does not, on her evidence, tell Ric what the package of documents was, however, at paragraph 126, Ms Coleman tells us that she handed to Ric the sealed package which "contained a series of documents Col requested I provide to Ric."

135 The importance of this is that Ms Coleman, in effect, says she is ringing Ric to arrange the delivery of the Exhibit 5 Will, and yet her last conversation with Ric, on her evidence, prior to that was at Out Yenna earlier that day when she told him that there could be no signing of mutual wills on that day.

136 There is no explanation by Ms Coleman of how she came to be ringing Ric to make arrangement for the delivery of the package and the impetus for that call could not have been the shouted command from Colleen during the call. Ms Coleman's version of the instruction she received from Colleen on 17 January 2015 is identical to the instructions she says she received from Colleen on 9 January 2015. Ric's version of what Colleen said to Ms Coleman on 17 January 2015 is that Colleen said, "Give Ric the will', which, whilst similar, is not the same. Given that Ric had wanted a new will with himself as executor, and given that what Ms Coleman provided was the Exhibit 5 Will, I think Ric's version is more likely correct.

137 Whichever version is correct, the inference I draw from what occurred is that Ms Coleman must have understood that her instructions were to give Ric the Exhibit 5 Will, and that she decided to complete the witnessing of Exhibit 5 by having Mr Quintal initial Exhibit 5. I think that would explain why she told Ric (on Ric's evidence) that she would have Lew witness Exhibit 5.

138 Ms Coleman's visit to Mr Quintal was, she says (at CB1-104, paragraph 119):

> "…to attempt to carry out Col's dual instructions. The visit obfuscated the deeper layer of instructions I had been given by Col in relation to her will of 12 July 2014."

(1) The reference to "dual instructions", carries the clear implication that Ms Coleman understood that Colleen had given her instructions to prepare a will leaving her entire estate to Ric (and her admission concerning that, although framed principally as conveyed to her by Ric, is found at T55-58 and T92-93 and in her first affidavit at CB1-66), and what she said in the transcript (T116.5-117) set out above.

(2) The reference to "dual instructions" and a "deeper layer of instructions", particularly when coupled with the oral evidence, provides a possible explanation for Ms Coleman's behaviour. Ms Coleman had received instructions from Colleen in July which fully supported the Oklahoma Will and the accompanying documents upon which instructions Ms Coleman had duly acted. If she later received instructions which reversed what had been achieved in July, she may have come to feel that Colleen was unwise or Ric not deserving enough for Colleen's change of heart or both. The conflict, on this analysis, was one, not of instructions, but between what Ms Coleman understood Colleen wanted and what she, Ms Coleman, thought or came to think (before or even after 18 January 2015) was appropriate, namely, the retention of the Foundation as the beneficiary of Colleen's estate. It is possible that, in this thinking, she was influenced by Ms Wright who supplied her (on 16 January 2015) with the letters (other than the LBOM Letter) dictated by Colleen in June and July 2014, and with whom Ms Coleman conferred on 16 and 17 January 2015: see T112.45-113.37 set out above. This links to Ms Coleman's assertion that (as Mr Morrissey put it) she saw herself as Colleen's protector.

(3) Ms Coleman (and Ms Wright), it would seem, became embroiled in a turbulent domestic environment caused, or exacerbated by, Colleen and Ric's financial difficulties and Colleen's physical deterioration. Ms Wright (at T150, paragraphs 28-36) and Ms Coleman (at T190.16-21) both admitted to a negative view concerning Ric. It is not unheard of that a relative or close friend of a married person holds strong views about the spouse's unsuitability and the viability of the marriage which views, even if made known, are not accepted or acted upon by the married person.

139 Of course, "the Exhibit 5 Will" was an anomaly – it comprised of a powers page and execution page from the Oklahoma Will, Exhibit 5 and a new cover sheet, which Ms Coleman had prepared, and on Ms Coleman's evidence, she also provided to Ric, with the Exhibit 5 Will, the original medical certificate from Dr Metcalfe of 2 July 2014. The impression that the Exhibit 5 Will would give to the outside world was that it had been executed on 12 July 2014. From that evidence, and reinforced by the correspondence from Ms Coleman to Colleen

on 25 October 2014, I infer that, Ms Coleman must have thought that she could replace the Oklahoma dispositive page with Exhibit 5 and that this would still be a valid 'will'. Mr Brown must have thought so too because he caused a notice to be published in respect of the Exhibit 5 Will in the Norfolk Island Gazette on 20 February 2015: see CB1-114.

Testamentary Intention, Form and Volition

140 It is clear that Exhibit 5 and Exhibit 6 are not wills that comply with the formal requirements of s 6 of the Act. The first question, therefore, is whether either document meets the requirements of s 8 of the Act (see [18(3)(h)] above). The Plaintiff did not contend that the presence of initials on Exhibit 6 (rather than a full signature) would render it invalid as a testamentary document and such a contention would have been inconsistent with authority. In ***Re Application of Brown; Estate of Springfield*** (1991) 23 NSWLR 535, Powell J (as his Honour then was) said at p 540:

> "It will, I think, be apparent from what I have said — and, as well, from the declarations which I have already made in similar matters which have been referred to me since my appointment as Probate Judge — that, in cases where the subject document is either wholly written out, or, being on a will form, has been filled in, in the handwriting of the relevant deceased, and in cases where the subject **document bears the signature of, or some mark made by, the relevant deceased indicating his intention to adopt it as his own, I would have little difficulty in finding myself satisfied that it was intended by the relevant deceased that the subject document should constitute his will**."
>
> (emphasis added)

141 In ***Hatsatouris & Ors v Hatsatouris*** [2001] NSWCA 408 at [56], Powell JA (with whom Priestley JA and Stein JA agreed), set out the questions relating to documents of this kind for the purposes of s 8 of the Act:

> "(a) was there a document,
>
> (b) did that document purport to embody the testamentary intentions of the relevant Deceased?
>
> (c) did the evidence satisfy the Court that, either, at the time of the subject document being brought into being, or, at some later time, the relevant Deceased, by some act or words, demonstrated that it was her, or his, then intention that the subject document should, without more on her, or his, part operate as her, or his, Will?"

142 The PCS also rely, at paragraph 11(h)(3), on ***Stojic v Stojic*** [2018] NSWCA 28 for the proposition that the Court must be satisfied that the testator knew and approved of the contents of the will.

143 In ***Oreski v Ikac*** [2008] WASCA 220, the Western Australia Court of Appeal (per Newnes AJA, with whom Martin CJ and McLure JA agreed) commented on the equivalent section in Western Australia (held to be materially the same as s 8 of the Act) and said:

> "[54] It is, however, important always to bear in mind that while it is necessary that the document in question sets out the deceased's testamentary intentions, that is not of itself sufficient. Section 34 does not enable any document which expresses the deceased's testamentary wishes to be admitted to probate. The document must be intended to be the legally operative act which disposes of the deceased's property upon their death; that is, it must have been intended by the deceased to have present operation as his or her will. A person may have set down in writing their testamentary intentions but not intend that the document be operative as a will. Thus, for example, it will not be sufficient if it is a document intended to record gifts or intended gifts during the deceased's lifetime, or to be a note of instructions, or a draft will or a 'trial run': In *the Estate of Masters (Dec), Hill v Plummer* (1994) 33 NSWLR 446 at 455; *Equity Trustees Ltd v Levin* [2004] VSC 203. As Young CJ in Eq pointed out in *Macey v Finch* [2002] NSWSC 933 [23], even where a draft will has been prepared in accordance with the deceased's instructions, it is quite common for testators to change their mind after giving instructions or on seeing the draft will."

144 The PCS made reference to ***Lindsay v McGrath*** [2016] 2 Qd R 160; [2015] QCA 206, which is a case where the handwritten document in question had not been signed by the deceased and had the appearance of a draft will under consideration.

145 In my view, the answers to the three questions identified in ***Hatsatouris*** (supra) are:

(a) The document is Exhibit 5, or alternatively, Exhibit 6;

(b) The document purported to embody the testamentary intentions of Colleen; and

(c) I am satisfied that, by signing Exhibit 5 and initialling Exhibit 6, Colleen did so as an expression of her testamentary intentions at that point in time.

146 In coming to this view, I take into account Ms Coleman's evidence at CB1-97, paragraph 66-67, and at T55-63, and in particular, T55.47-56.47, the matters referred to at [110] and [111], and the aspects of Ms Coleman's credibility to which I have referred earlier in these reasons, I am satisfied that the documents were prepared on the instructions of Colleen, given to Ms Coleman as her solicitor to prepare a new will revoking the bequest to the Foundation and leaving her entire estate to Ric, even if they were conveyed on Ms

Coleman's evidence principally, but not solely, by Ric in the presence of Colleen and with her approval.

147 Ms Coleman did not say that she had not read or made clear to Colleen the contents of the document she was providing to her to sign, a matter very much within her knowledge if it were true and likely to be advanced in a case in which it is said by Ms Coleman that Colleen did not have any testamentary intention. Indeed, the Plaintiff's claim that Ric coerced Colleen into signing the document bequeathing her estate to him is inconsistent with such a contention. I do not accept the Plaintiff's contentions (in PCS, paragraph 11) that Colleen did not provide Ms Coleman with instructions to make a new will. I find that Colleen did sign Exhibit 5 and initial Exhibit 6, and that she was aware of their very plain and straightforward terms, and I reject the assertion in the PCS that Colleen was not able to sign those documents.

148 It is Ms Coleman's evidence that her own perception was that Colleen did not really want to execute the document. I am unable to accept Ms Coleman's evidence that she believed that Colleen did not want to sign the document which Ms Coleman had prepared on Colleen's instructions given the matters to which I have referred above, or her evidence that she had to take steps to 'protect' Colleen, and that is why she went ahead with the execution of the documents and had Ms Jackson witness Colleen's signature. I do not accept that by signing with a weak hand Colleen was "abandoning" the testamentary document which Ms Coleman had prepared for her.

149 The PCS sought to contend, as a quite discrete matter, that because Ric witnessed the execution of Exhibit 5, he was precluded from obtaining a benefit under it. There was no pleading to the effect that Ric's presence would invalidate the bequest and the point was abandoned in oral submissions (see T538.45). In any event, Ric did not sign either document as a witness.

150 The cases upon which the Plaintiff relies are quite different to the situation here. In ***Oreski*** (supra), the appellant claimed that a typed document in the form of a will said to have been found in the back of the deceased's vehicle was that of the deceased but it was not established to be a document that represented the testator's intentions; not only was it not signed, there was no

evidence that it was prepared by the deceased or on the instructions of the deceased, and there was forensic evidence that the typewriter on which the document had been typed was not that of the deceased and not another typewriter identified by the appellant as a possibility with no other typewriter connected with the deceased identified as the source. Nor is there really any similarity with the 'trial run' cases, of which ***Lindsay*** (supra), is an example.

151 The suggestion in the PCS (at paragraph 8(ii)(1)-(2)) that Colleen knew what was required to make a valid will is not established because she was "a highly intelligent woman" or had typed a will in 2005, but in any event, in 2014 and 2015 she had a qualified lawyer preparing documentation for her and she would not have had any reason to think that Ms Coleman did not know the correct way to effect her intentions.

152 At PCS, paragraph 8(l), it is asserted that for the Oklahoma Will, there was an Attestation document and a Bequest letter but there are no such documents in relation to Exhibit 5 and Exhibit 6 as a matter pointing to a lack of finality with Exhibit 5 and Exhibit 6. The point is misconceived because there could be no call for such documents in circumstances where Colleen was leaving her estate to her husband.

153 Mr Morrissey, in the PCS and his oral submissions, submitted that the absence of any evidence from Mr Brown was of significance in relation to the issue of what occurred on 17 and 18 January 2015 (T506.26). Apart from the fact that Mr Brown was acting for Ric in this litigation presenting a difficulty (that Mr Morrissey had himself raised in relation to Ms Paton during the hearing), it is difficult to see what evidence Mr Brown could have given that was not privileged yet admissible concerning Ric's visit to him on 18 January 2015. There was no dispute that Ms Brown had been asked by Ms Paton to hand over to Ms Coleman what Ric had been told by Ms Coleman was the will and which was given to Ric on 18 January 2015, and that he had done so. The only matter on which Mr Brown might have given evidence was as to what was in the security packet handed to him by Ric on 18 January 2015. In that regard, there was no dispute that what Ric handed over was was what Ms Coleman had given him. The only matter in doubt was whether the medical certificate

that was handed over by Ms Coleman was that of Dr Metcalfe of 2 July 2014 or that of Dr Challender of 14 January 2015.

154 I set out a passage of the PCS (at 8(f)):

> "(f) Ms Coleman, on 24 October 2014, did not see Dr McCullough privately to get instructions to ascertain her testamentary intention; she [**T57:21-30; CB 1-126, para 68; CB 1-98, para73**]. And because of this, Ms Coleman did the right thing and did not continue with the plan to execute a will on that day as she was concerned about Col. So concerned, that she wrote a letter on 25 October 2014 indicating she did a new will when she hadn't to in her words 'protect Col' [**T60:36-50; T61:1-35**]."

155 This submission asserts that the Court should not accept that Colleen's signature (or initials) amounted to an indication of Colleen's testamentary wishes because:

(1) Ms Coleman did not see Colleen privately; and

(2) Ms Coleman was so concerned about Colleen that she wrote the letter of 25 October 2014 to protect Colleen, writing that she had prepared a new will when she (on her evidence) had not.

156 I am unable to accept these contentions because:

(1) I am not persuaded that, on the balance of probabilities, Ric was present the entire time on 21 and 24 October 2014 and that Ms Coleman had no opportunity to see Colleen alone.

(2) Even if Ric was present the entire time on 21 and 24 October 2014, his presence does not, on its own, amount to a bar to the validity of the will. His presence would be relevant in the consideration of whether Colleen's free will was overborne but Ms Coleman gave no evidence of Ric pressuring Colleen to sign on either date. Indeed she said that, at the conference on 21 October 2014, Colleen and Ric were "affectionate with each other" (T57.45), and that Ric was, on 24 October 2014, very attentive to Colleen.

(3) I do not accept that Ms Coleman's letter of 24 October 2014 and invoice of 25 October 2014 contained the falsehoods which Ms Coleman asserts they contain, or that what she did was done to protect Colleen or keep her safe.

(4) The "no chance to speak to Colleen alone" contention seems to amount to a claim of Colleen's will being overborne on 21 and 24 October 2014. There is no clear evidence of that occurring and a few indications contrary to it, namely, the apparent discussion on 21 October 2014 between Colleen and Ms Coleman about a proposed letter to be sent to Ric, presumably setting clear ground rules for Ric's expenditure to ensure adequate funds for their needs, and in particular, Colleen's care costs, and I accept Mr Murr's submission that it is unlikely that Ric would have been present during that discussion and Ms Coleman's

notes do not establish that he was. There were later very firm instructions given by Colleen on 17 January 2015 to give Ric the will which Ms Coleman took to mean the Exhibit 5 Will that she had prepared previously. If Ms Coleman believed on either occasion that Colleen did not want her will changed or had a doubt about Colleen's wishes or volition, she had not just the option, but the duty, to refuse to do anything further to promote a new will.

(5) Ms Coleman's understanding expressed in the letter of 24 October 2014 was that there was in place a "harmonious" approach to estate planning.

157 I accept that Colleen's health was very poor in October 2014, but it was not so poor as to affect her mental capacity or her ability to make a will. Even in January 2015, when she was seriously ill, she was able to give Ms Coleman instructions to prepare a power of attorney, to confer with Ms Coleman and on 17 January 2015 to shout at Ms Coleman to give the will to Ric.

158 I am unable to accept Ms Coleman's evidence that she only did what she did, or wrote what she did, to placate Ric and protect Colleen for reasons to which I have earlier referred. In this connection, I have already noted that she sent the letter and invoice to Ms Wright on 25 October 2014 and there is no evidence that Ric would have seen the letter. Not only does Ms Coleman not say that she said to Ms Wright, "make sure that Ric sees this letter", or "tell Ric that everything is now in order concerning Colleen's will", but more significantly, she does not assert that she discussed with Ms Wright letting Colleen know that she had only done what she had done to make Colleen safe. She sent an email to Ms Wright in which she said nothing about the "protect Colleen" plan, nor did she at that point provide a copy of the Exhibit 5 Will to Ric. The cross-examination established that Ms Coleman really did not have instructions from Colleen to pretend anything.

159 The PCS (at pp 11-16) set out a number of passages from Ms Coleman's affidavits, although no transcript references to Ms Coleman's cross-examination are mentioned. I have had regard to each of those paragraphs (one of which contains Ms Coleman's assertion that Colleen lacked testamentary capacity, which is not even advanced by the Plaintiff) and I have explained why I am not able to accept her evidence on the matters advanced in those paragraphs.

160 I have found as a fact that Colleen signed Exhibit 5 and initialled Exhibit 6, believing each of those documents to produce the result that she thereby revoked the Oklahoma Will, bequeathing her entire estate to Ric. Whether she did so because she genuinely felt that her previous action, in depriving Ric of the benefit of her estate, had been too harsh, or because Ric had ingratiated himself back into her favour, or because she believed that this would ensure that Ric stayed committed to caring for her, is not clear. In ***Nock v Austin*** (1918) 25 CLR 519 at 527, Isaacs J said:

> "So long as there is freedom to dispose of one's property by will, a testator is not bound to expose to the world the delicate and perhaps indefinable relations that exist within his family circle. It may be that Nock felt quite justified from his own standpoint in limiting his family benefit, and for reasons which sufficiently appealed to him but which no one else could mentally measure or appreciate. Nor are the terms of the will of such a nature as to cast doubt on the ability of Nock to properly understand them: they are short, simple and clearly expressed."

161 As the passage just cited makes plain, the Court is not called upon to assess whether Colleen's decision to reinstate her husband as sole beneficiary was a wise one or justified in all the circumstances, but none of the possible reasons I have mentioned are irrational and each would, alone or together, support a return to the position that had pertained from at least 2005 to 2014, namely, that Ric would obtain Colleen's entire estate.

162 What the Court is called on to answer, however, is whether it has been established that, in giving the instructions she did give and in signing Exhibit 5 and Exhibit 6, she did sign (having, as I have found, testamentary effect), these actions were a result not of her own volition, but because she was coerced to do so as a result of undue influence of Ric. Coercion in this context, clearly, can mean coercion by means other than physical violence or abuse, but as ***Wingrove*** (infra) establishes, persuasion by arguments or contentions accepted by a testator is not sufficient. I have referred to the dramatic events of June 2014 and the countervailing material in respect of the domestic relationship. Although the Plaintiff sought to present through Ms Coleman a case of actual coercion, not only of Colleen, but of herself, there is no direct evidence of coercion, physical or non-physical, towards Colleen or Ms Coleman in relation to the execution of Exhibit 5 and Exhibit 6, and so the question therefore becomes, is there sufficient material presented to support

the inference that Colleen was not acting of her own free will – that is a circumstantial case.

163 On the issue of volition, in ***Winter v Crichton; Estate of Galieh*** (1991) 23 NSWLR 116 at 121-122 (referred to in the Defendant's earlier outline of submissions), Powell J (as his Honour then was) cited passages from the address to the jury in ***Wingrove v Wingrove*** (1885) 11 PD 81 at 82-83 by Sir James Hannen P to the effect that, to set aside a will on the basis of undue influence, the party seeking to do so must establish that what brought about the will was force or coercion destroying free agency, saying to the jury:

> "To be undue influence in the eye of the law there must be — to sum it up in a word — coercion. It must not be a case in which a person has been induced by means such as I have suggested to you to come to a conclusion that he or she will make a will in a particular person's favour, because if the testator has only been persuaded or induced by considerations which you may condemn, really and truly to intend to give his property to another, though you may disapprove of the act, yet it is strictly legitimate in the sense of its being legal. It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence.
>
> The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage of illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness sake, to do anything. This would equally be coercion, though not actual violence.
>
> These illustrations will sufficiently bring home to your minds that even very immoral considerations either on the part of the testator, or of someone else offering them, do not amount to undue influence unless the testator is in such a condition, that if he could speak his wishes to the last, he would say, 'this is not my wish, but I must do it'.
>
> If therefore the act is shewn to be the result of the wish and will of the testator at the time, then, however it has been brought about — for we are not dealing with a case of fraud — though you may condemn any person who has endeavoured to persuade and has succeeded in persuading the testator to adopt that view — still it is not undue influence;"

an approach approved in ***Boyse v Rossborough*** (1857) 6 HL Cas 1; (1857) 10 ER 1192, ***Parfitt v Lawless*** (1872) LR 2 P & D 462 at 469-471, ***Baudains & Ors v Richardson & Anor*** [1906] AC 169 at 184-185 and ***Craig v Lamoureux*** [1920] AC 349. In the latter case at 357, Viscount Haldane, for the Privy Council, said:

> "…There is no reason why a husband or a parent, on whose part it is natural that he should do so, may not put his claims before a wife or a child and ask for their recognition, provided the person making the will knows what is being done. The persuasion must of course stop short of coercion, and the testamentary disposition must be made with comprehension of what is being done."

164 In this context, the question of onus becomes significant because there are matters which could be relevant to a circumstantial case, such as Ric's presence at the conference with Ms Coleman, Colleen's ill health and vulnerability, and the fact that Ric was providing care to her for significant periods of time. Mr Murr referred, in his outline of submissions, to ***Winter*** (supra) on the issue of onus, and returned to this theme in his oral submissions (at T518). In that case, Powell J, relying on ***Wingrove***, ***Boyse***, ***Parfitt*** (supra) and other authorities, held that the onus lies on the party who asserts undue influence to establish that the will of the testator was overborne. His Honour also said at p 122D:

> "3. where what is relied upon is a purely circumstantial case, such as is illustrated by the particulars in this case, the duty of the defendant goes further than merely establishing the circumstances from which it is sought to have the inference drawn. Thus, in *Wingrove v Wingrove* (at 83) Sir James
>
> Hannen P concluded his charge to the jury with the following:
>
>> "There remains another general observation that I must make, and it is this, that it is not sufficient to establish that a person has the power unduly to overbear the will of the testator. It is necessary also to prove that in the particular case that power was exercised, and that it was by means of the exercise of that power, that the will such as it is, has been produced.""

Consistently with ***Winter,*** in ***Ridge v Rowden & Anor*** (Supreme Court of NSW, 10 April 1996, unreported), Santow J (as his Honour then was) said:

> "14. The onus of establishing undue influence rests upon the party alleging it at all times: Boyse v Rossborough (supra)."

165 The Plaintiff did not challenge the correctness of ***Winter*** (supra), and those cases upon which the conclusion is based, or contend that the principle was not applicable in this case.

166 Mr Murr described the onus as an "extremely high bar" (which Mr Morrissey I think accepted: see T518.11 and the absence of any submissions in reply on that point) and he contended that the Plaintiff had fallen "so far short of what would be required for that extremely entire serious issue in the case".

167 In my view, the Plaintiff has failed to discharge the onus on this point. I say that, not only because the Plaintiff's circumstantial case on coercion in the PCS seems to place much weight on motive, opportunity and suspicion, but also because:

(1) It is agreed that Colleen was not mentally impaired in October 2014 or at all.

(2) The Plaintiff's claim that she was neglected in October 2014 was not made out.

(3) Ms Coleman gave no evidence of her discussion with Colleen concerning the LBOM Letter referred to in her invoice.

(4) Ms Coleman did not provide an explanation for why she rang Ric on 17 January 2015, and therefore, the context in which she was given the instruction that she was given.

(5) I have referred to the absence of cross-examination of Ric in relation to the matters identified in [73] above, but even more generally, there was no attempt in cross-examination to explore or challenge his denials (CB2-106-108, paragraphs 10, 12, 15-16).

(6) Colleen was represented by her solicitor and the documents were drawn by her solicitor and not Ric.

(7) Even on Ms Coleman's evidence, it is clear that Ric arranged for Colleen to see her and did not endeavour to procure Colleen's execution of a will without her having representation in October 2014 or January 2015.

(8) Ms Coleman gave no details of her conversation with Colleen about the LBOM Letter.

(9) Ms Wright, who described herself, not only as Colleen's nurse and carer, but also "her personal assistant, secretary and confidant (see CB1-442, paragraph 7), gave no evidence of anything said to her by Colleen concerning the events of 21-24 October 2014 generally, and no evidence of what discussions, if any, she had with Colleen about the LBOM Letter or the letter that Colleen was typing. The absence of evidence from Ms Wright on these topics in a case in which it is asserted that Colleen's will was overborne when she signed Exhibit 5 and initialled Exhibit 6, and gave instructions for a will in those terms, is very significant.

168 It follows, therefore, that the Plaintiff has not established that Colleen was coerced by Ric into signing Exhibit 5.

169 The PCS, at paragraph 11(h), addresses the issue of 'suspicious circumstances'. As is pointed out in the PCS, the degree of suspicion "will vary with the circumstances" and it is "simply a question of circumstances giving rise

to a suspicion that the testator may not have known of and approved the contents of his will": see ***Burns v Burns*** [2016] EWCA Civ 37 at [52] per McCombe LJ (with whom Longmore LJ and Treacy LJ concurred). One of the matters asserted is that Ric was pushing for a new will and wanted to be the sole beneficiary of that new will. In this regard, the PCS makes reference to ***Nock*** (supra). In that case, a will was prepared for the deceased by Mr Austin and Mr Morgan which will gave a large portion of the estate to them. Mr Austin was a solicitor. The deceased was survived by a wife and an adopted son who challenged the validity of the will on various grounds. The trial judge gave full consideration to the suspicious circumstances and with the necessary "vigilance and jealousy" was "judicially satisfied that the paper propounded" did "express the true will of the deceased" (see 524D-J, per Barton J and Gavan Duffy J), and the appeal was rejected. The third member of the Court, Isaacs J, agreed that the appeal should be dismissed and in his judgment he set out some propositions of law which he described (at 528) as "not doubtful" and which I shall recite (omitting footnotes):

> "(1) In general, where there appears no circumstance exciting suspicion that the provisions of the instrument may not have been fully known to and approved by the testator, the mere proof of his capacity and of the fact of due execution of the instrument creates an assumption that he knew of and assented to its contents (*Barry v. Butlin* [2 Moo. P.C.C., at p. 484]; *Fulton v. Andrew* [L.R. 7 H.L., 448]). (2) Where any such suspicious circumstances exist, the assumption does not arise, and the proponents have the burden of removing the suspicion by proving affirmatively by clear and satisfactory proof that the testator knew and approved of the contents of the document (*Baker v. Batt* [2 Moo. P.C.C., 317, at p. 321]; *Tyrrell v. Painton* [(1894) P., 151]; *Shama Churn Kundu v. Khettromoni Dasi* [L.R. 27 Ind. App., 10, at p. 16]). (3) If in such a case the conscience of the tribunal, whose function it is to determine the fact upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied that the document does contain the real intention of the testator, the Court is bound to pronounce its opinion that the instrument is not entitled to probate (*Baker v. Batt* [2 Moo. P.C.C., at p. 320]; *Fulton v. Andrew* [L.R. 7 H.L., 448]). (4) The circumstance that a party who takes a benefit wrote or prepared the will is one which should generally arouse suspicion and call for the vigilant and anxious examination by the Court of the evidence as to the testator's appreciation and approval of the contents of the will (*Barry v. Butlin* [2 Moo. P.C.C., 480] and *Fulton v. Andrew* [L.R. 7 H.L., 448]; per Lord Shaw in *Low v. Guthrie* [(1909) A.C., 278, at p. 284]). (5) But the rule does not go further than requiring vigilance in seeing that the case is fully proved. It does not introduce a disqualification (per Lord James in *Low v. Guthrie* [(1909) A.C., at pp. 282-283]). (6) Nor does the rule require as a matter of law any particular species of proof to satisfy the onus (*Barry v. Butlin* [2 Moo. P.C.C., at p. 484]). (7) The doctrine that suspicion must be cleared away does not create "a screen" behind which fraud or dishonesty may be

> relied on without distinctly charging it (Lord Loreburn L.C. in *Low v. Guthrie* [(1909) A.C., at pp. 281-282])."

170 The following proposition is put in the PCS, at paragraph 11(9):

> "[Ric] knew in October 2014 that if he didn't get a new will executed he would no longer be the sole beneficiary. It is submitted that it is open to the Court to find that his motive for pursuing the October document amounts to suspicious circumstances."

I have no doubt that Ric wanted to be the sole beneficiary of Colleen's will and would have been very pleased to hear that Colleen wanted to, or had agreed to, reinstate him as such, but I do not accept that any wish, or even request, on his part to be reinstated as the sole beneficiary itself amounts to "intermeddling" as the PCS described it or a suspicious circumstance.

171 Also, whilst I accept that Ric (and Mr Brown on his behalf) was keen to see a will which gave Colleen's estate to Ric, appointed him as executor, and to obtain Colleen's agreement that she not change her will to disinherit him, I do not accept that, as seems to be suggested in the PCS, by speaking to Ms Coleman and corresponding with Ms Coleman, he or Mr Brown was pressuring Ms Coleman to do something inconsistent with her instructions. On Ms Coleman's evidence, she did not do anything inconsistent with her instructions on 17 or 18 January 2015. The Plaintiff's case is that not only did Ric coerce Colleen, but that he coerced Ms Coleman as well. It is Ms Coleman who, in her email of 9 January 2015, tells Ric that for him to be made executor would run the risk of him being seen as coercive: see [10(31)(b)] above. Not only, as I have already said, is there no evidence from Ms Coleman that Ric pressured Colleen to sign Exhibit 5 or Exhibit 6, but there is also no evidence that Ric pressured or coerced Ms Coleman to do anything either. There is evidence from Ms Wright which, if accepted, would support the claim that Ric was in January 2015 pressuring Colleen to make a will appointing him executor, but leaving to one side the question of Ms Wright's credibility, Colleen in any event did not execute a will making Ric executor in January 2015, or, on my earlier conclusion, Exhibit 5. If Ric did raise mutual wills in October as Ms Coleman asserts, he left it until January to pursue his appointment as executor. That was a quite legitimate concern given that he understood that he was to receive the

estate and he could not see a good reason for him not to be appointed executor.

172 Unlike the situation in ***Nock***, Ric did not prepare the document which Colleen signed. It was prepared by Ms Coleman, Colleen's own solicitor. Thus, that asserted basis for finding suspicious circumstances in the present case is not made out. Not only was it prepared by Ms Coleman, but one thing that is clear is that it was Ms Coleman alone who developed the idea of changing the disposition page in October 2014 and created the Exhibit 5 Will (then or in January 2015), and gave it to Ric. The second point, however, is that, although the Plaintiff does not contend that Colleen did not have capacity, and although Colleen did sign Exhibit 5 and initial Exhibit 6, and although Exhibit 5 and Exhibit 6 were prepared by Ms Coleman, I think that the circumstances are such as to require detailed consideration of the evidence presented to reach a conclusion as to whether Colleen did know and approve of the contents of the documents, and intend them to have testamentary effect, and whether it has been established that Colleen's instructions and actions were a result of a lack of volition because of Ric's conduct. That is what I have endeavoured to do and I will admit to it being no easy task, given the unusual circumstances of the case and the contradictory and confusing evidence.

Is Exhibit D Effective to Revoke any Previous Will?

173 The Defendant's closing submissions ("**DCS**") contended that Exhibit D was not a 'codicil' as the Plaintiff contends. Section 15 of the Wills Act**,** which the Plaintiff relies on, and which Ric accepts is the relevant legislative provision, is in the following terms:

> **15. Can a revoked will be revived?**
>
> (1) A will or part of a will which has been revoked is revived by re-execution or by execution of a codicil which shows an intention to revive the will or part.
>
> (2) A revival of a will which was partly revoked and later revoked as to the balance only revives that part of the will most recently revoked.
>
> (3) Subsection (2) does not apply if a contrary intention appears in the document which revives the will.
>
> (4) A will which has been revoked and later revived, either wholly or partly, is to be taken to have been executed on the date on which the will is revived.

Sections 6 and 8 of that same Act are also relevant:

6. How should a will be executed?

(1) A will is not valid unless—

(a) it is in writing, and signed by the testator or by some other person, in the presence of, and at the direction of the testator; and

(b) the signature is made with the testator's intention of executing a will, whether or not the signature appears at the foot of the will; and

(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(d) at least two of the witnesses attest and sign the will in the presence of the testator but not necessarily in the presence of each other.

(2) A statement in a will that the will has been executed in accordance with this section is not necessary for the will to be valid.

(3) Where a testator purports to make an appointment by his or her will in the exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this section.

(4) Where a power is conferred on a person to make an appointment by a will that is to be executed in some particular manner or with some particular solemnity, the person may exercise the power by a will that is executed in accordance with this section, but is not executed in that manner or with that solemnity.

(5) This section does not apply to a will made under section 17.

8. When may the Court dispense with requirements for execution or revocation?

(1) This section applies to a document, or part of a document, that-

(a) purports to state the testamentary intentions of a deceased person, and

(b) has not been executed in accordance with this Part.

(2) The document, or part of the document, forms-

(a) the deceased person's will-if the Court is satisfied that the person intended it to form his or her will, or

(b) an alteration to the deceased person's will-if the Court is satisfied that the person intended it to form an alteration to his or her will, or

(c) a full or partial revocation of the deceased person's will-if the Court is satisfied that the person intended it to be a full or partial revocation of his or her will.

(3) In making a decision under subsection (2), the Court may, in addition to the document or part, have regard to-

(a) any evidence relating to the manner in which the document or part was executed, and

(b) any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person.

(4) Subsection (3) does not limit the matters that the Court may have regard to in making a decision under subsection (2).

(5) This section applies to a document whether it came into existence within or outside Norfolk Island.

(6) For the purposes of this section-

document means any record of information, and includes-

(a) anything on which there is writing, or

(b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them, or

(c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else, or

(d) a map, plan, drawing or photograph.

174 There was agreement between the parties that the Wills Act governed this issue.

175 The DCS accept that Exhibit D bears Colleen’s mark and that the document bears the date 14 January 2015, although they do not expressly accept the Plaintiff’s contention that Colleen signed it, or that she signed it on that date. Since the Plaintiff was propounding Exhibit D as having effect as a codicil and had access to Ms Hayes (T204.20-26), Ric contends that her failure to call Ms Hayes leads to the conclusion that Ms Hayes could not assist the Plaintiff’s case: ***Jones v Dunkel*** (1959) 101 CLR 298, a submission I accept. The Defendants contend that the requirements of s 6 are not met because Colleen’s signature was not placed on Exhibit D with the intention of executing it as her will, but rather, with her answering “yes” to the question it posed, namely, did she want another document to be her will?

176 For reasons which I have earlier expressed, I have difficulties accepting Exhibit D as a true and clear expression of Colleen’s wishes, but I shall, for the purposes of considering this issue, proceed on the basis that the will to which it is referring is the Oklahoma Will. Exhibit D was drafted by Ms Wright who says she did not know that Colleen had made another will after the Oklahoma Will. Exhibit D is not framed as an intention to revive a revoked will.

177 Mr Morrissey did not make any submissions in response to the DCS dealing with the codicil issue. By the DCS, Ric submits that the Norfolk Island legislation simply does not provide for a document that informally revives a

revoked will. The DCS refer to ***In the Estate of Horne*** (1920) 20 SR 531 at 533 per Harvey J, for the proposition that there must appear, "within the four corners of the codicil", an intention to revive an earlier revoked will. This accords with the very clear and strong rule that whoever asserts that some subsequent instrument precludes an earlier testamentary document from its effect must "show that the intention to revoke is as clear and free from doubt as the original intention to give": see ***In Re Resch's Will Trusts*** [1969] 1 AC 514 at 547 per Lord Wilberforce.

178 In ***Horne***, Harvey J was able to deduce that intention because the document said, "I appoint Joseph Edward Bradbury executor trustee instead of Charles Page". There is nothing of that kind here. In my view, Exhibit D is not a codicil at all and I think the document cannot be constituted as a testamentary instruction that the Oklahoma Will be revived, but rather, as an indication that Colleen wanted a will that she had made to be treated as her will.

179 The Plaintiff relies on s 8 of the Wills Act to support the contention that Exhibit D is nevertheless a codicil. To comply with s 8, which provides for dispensing with the requirements of formal execution, alteration and revocation of a will, there are requirements which must be met. It is not immediately apparent that the section applies to a codicil at all, but s 8(1)(a) does refer to a document that purports to state the testamentary intentions of a deceased. Section 8(2) specifies the documents to which s 8 applies (there is no specified operative part but I shall assume that the heading supplies the answer to that – it that the Court can dispense with the formal requirements). Those documents are:

> "(a) the deceased person's will-if the Court is satisfied that the person intended it to form his or her will, or
>
> (b) an alteration to the deceased person's will-if the Court is satisfied that the person intended it to form an alteration to his or her will, or
>
> (c) a full or partial revocation of the deceased person's will-if the Court is satisfied that the person intended it to be a full or partial revocation of his or her will."

180 Of the above, (a) cannot apply because Colleen could not have intended Exhibit D to be her will. Similarly, (b) cannot apply because there is no alteration of a will. In relation to (c), there is no express revocation of a will contained in Exhibit D – but rather, a statement that a will signed at an earlier

time is to be the will she intends to be her will. It might be said that Exhibit D is intended implicitly to revoke an existing will, but the document itself does not do so. In my view, it is s 15 of the Wills Act which deals with the revival of revoked wills, and if its conditions are not met, I do not think that there is scope for some additional implicit revocation which does not meet the criteria laid down by s 15.

Conclusion

181 It follows that Ric has established that Colleen initialled Exhibit 6 and signed Exhibit 5, albeit on 24 October 2014, intending those documents to replace the dispositive page of the Oklahoma Will and also that Exhibit D is not effective as a codicil reviving the revoked Oklahoma Will.

Costs

182 Ms Morrissey submitted that, should the Plaintiff be successful in obtaining a grant of probate of the Oklahoma Will, both the Plaintiff's costs and Ric's costs should be paid out of the estate. The Plaintiff contended that if she was unsuccessful, her costs should be borne by the estate on the basis of ***Re Hodges; Shorter v Hodges*** (1988) 14 NSWLR 698, a decision of Powell J (as his Honour then was). Mr Murr made clear that his client would not accept that the Plaintiff's costs should be paid out of the estate if Ric was successful in these proceedings.

183 The estate, by all accounts, is not extensive (approximately $2.1 million on the Plaintiff's estimate, but not including future royalties or valuables: T509.50-510.2, and before costs are deducted). I was given to understand by the parties on the first day of the hearing that the costs of both sides, even at that stage, were equally extensive: see T17.36-18.1.

184 In ***Re Hodges*** (at 709E), Powell J noted that in probate litigation the usual rule of "costs follow the event" has been the subject of two recognised exceptions:

> "1. where the testator has, or those interested in residue have, been the cause of the litigation, the costs of unsuccessfully opposing probate may be ordered to be paid out of the estate;
>
> 2. if the circumstances led reasonably to an investigation in regard to the document propounded, the costs may be left to be borne by those who respectively incurred them".

185 These two exceptions have been recently considered in ***Walker v Harwood*** [2017] NSWCA 228 at [52]-[53] per Macfarlan JA (with whom Payne JA agreed at [78]) and to which the DCS makes reference.

186 The DCS made the following points:

(1) The usual costs order in civil litigation is that costs follow the event with the consequence that the unsuccessful party is ordered to pay the successful party's costs.

(2) The ***Civil Procedure Act 2005*** (NSW) and the ***Uniform Civil Procedure Rules 2005*** (NSW) apply to probate actions as they do to other types of proceedings: *Walker* (supra) at [52] per Macfarlan JA (with whom Payne JA at [78] agreed).

(3) There are two exceptions recognised in probate proceedings. First, where it can be said that the testator was the cause of the litigation, and second, where circumstances led reasonably to an investigation. In the former case, the Court may order that the unsuccessful parties' costs be borne by the estate. If the second situation applies, the costs will be left to be borne by those who respectively incurred them: ***Walker*** at [53]-[54] and [78].

187 By the DCS, Ric contends that neither exception applies and he seeks an order, not only that the Plaintiff pay his costs, but that she do so on the indemnity basis. The DCS contend that:

(1) The first exception does not apply because there can be no finding that Colleen brought about this litigation; rather, it is submitted that Ms Coleman "was on a frolic of her own, not attributable to Colleen in any way" (DCS, paragraph 4.6).

(2) That Colleen's mental state was an issue in the case does not mean that the exception applies: ***Walker***.

(3) That the second exception does not apply because the Plaintiff's solicitor, Ms Paton, has had carriage of the matter since February 2015, first, on behalf of the Foundation, and then on behalf of the Plaintiff. Ric contends that acting reasonably, Ms Paton must have appreciated that there was at least one competing instrument prior to June 2015 when she signed and filed a Statement of Claim acknowledging the Oklahoma Will's existence.

(4) The Plaintiff's solicitor acting reasonably would have recognised that the Oklahoma Will was not an apparently regular executed will.

(5) There is a public interest in deterring persons "who take adversarial positions at the expense of their overriding duty to the Court.

(6) The Plaintiff has not acted bona fide or reasonably.

(7) That the onus is on the party asserting that one or the other of the two probate exceptions should apply: see ***Glenda Phillips v James Phillips; John Matthew Phillips by his Tutor NSW Trustee & Guardian v James Phillips (No 3)*** [2017] NSWSC 409 at [22] per Kunc J.

(8) The Plaintiff has retained a qualified practitioner for the litigation and "if the practitioner's conduct has resulted in the party making less than reasonable investigations or disclosure, the exceptions cannot apply.

188 In support of the claim for indemnity costs, the DCS assert that until the eve of the hearing, the Defendant had been provided no explanation as to how the Oklahoma Will had come into existence. The need for such an explanation was clear from February 2015 and, in any event, from the time that the expert report for Ric was served. The Amended Defence pleaded that the Oklahoma Will was a composite document. An explanation for why it was so was only provided, it was said, on 18 May 2018. The letter of 25 October 2014, and email to Ms Wright which Ms Coleman had apparently provided to Ms Paton in February 2015 as part of her file, was not made known to Ric until 19 May 2018, notwithstanding the service of a Notice to Produce issued on behalf of Ric to the Plaintiff well before that which required their production.

189 In relation to [187(2)], Colleen's mental state was not an issue in the case. However, her emotional state was an issue in the case.

190 In relation to [187(3)], I accept that the Plaintiff's solicitor must have been aware that there was at least one other competing will or testamentary document from a very early stage. The Foundation's Statement of Claim puts that beyond doubt.

191 Whilst I think it is distinctly possible that had all the details concerning the Oklahoma Will been made known earlier, costs would have been reduced, but that is, not attributable to the Plaintiff or her solicitor. I am not persuaded that had the documents produced a few days before the hearing been produced in a timely fashion (as they most certainly should have been) that it would have had any appreciable impact on the course of the hearing.

192 The Plaintiff instructed her solicitor (and Counsel) to seek to maintain the Oklahoma Will, and on the evidence of Ms Coleman, there was a basis for so doing. The Plaintiff did take an adversarial position but I do not accept that she

breached a duty to the Court because she did not conclude that Ms Coleman's evidence should be rejected.

193 The problem with the DCS on costs, is that they do not take into account the fact that the Plaintiff and her solicitor were provided with a version of events by Ms Coleman, which if accepted, not only supported the validity of the Oklahoma Will, but also would, or at least could, support the conclusion that no later testamentary document was brought into existence or was effective.

194 The evidence of Ms Coleman, the solicitor who had prepared all three documents in question, provided reasons why only the first (i.e. the Oklahoma Will) was the valid will of Colleen of which Probate would be granted. I do not think that the cross-examination of the Plaintiff or Ms Paton demonstrated that they had done anything which they should not have done relevant to the question of costs. It would have been very difficult for the Plaintiff to decide to reject Ms Coleman's version of events and accept, therefore, that Colleen's wishes were reflected in Exhibit 5 and or Exhibit 6. Thus, I am of the view that the circumstances, as they presented themselves to the Plaintiff and those advising her, led reasonably to the need for an investigation as to whether the Oklahoma Will was valid and whether it was the last will of Colleen. The consequence of that conclusion would be that the costs of each party should be borne by each of them, and that there would be no order that the Plaintiff pay Ric's costs on an indemnity basis or otherwise.

195 I have given consideration to whether the first exception is made out and whether, if it is, the costs of both the Plaintiff and Ric should be borne by the estate. I do not think that it can be said that Colleen has been the cause of this litigation. She made a will in July 2014 bequeathing her entire estate to the Foundation as she was fully entitled to do. On the findings I have made, she, by October 2014, had changed her mind and decided to give her estate to Ric, for reasons known only to her but not shown to be irrational, and more importantly, not as a result of any delusion, mental illness or incompetence as ***Carr*** (supra) makes clear would be required. Again, she was fully entitled to do so.

196 The need for this litigation has been caused by Ms Coleman and for two reasons. The first is that she failed to prepare a fresh will in the usual fashion and instead decided that she could substitute one dispositive page for another. The second is that she propounded a version of events by which she sought to justify, in effect, her disassembling of the "will" prepared by her and provided to Ric on her client's instructions and the reassembling of the Oklahoma Will. That is conduct which on my findings was not consistent with the instructions she had received from Colleen and her own actions on 24 and 25 October 2014 and in January 2015. It is this second respect, particularly, which has led to the extensive and unfortunate litigation in this matter. I am not persuaded that the first exception to the normal costs rule has been made out and it follows that the order which should be made is that each party should bear his or her own costs.

Orders

197 I will provide the parties an opportunity to bring in short minutes of order reflecting the outcome in this case consequent upon these reasons.

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Amendments

20 July 2018 - Minor typographical corrections.

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