IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
TRUSTS, EQUITY AND PROBATE LIST

Not Restricted

S PRB 2018 17121

DAVID BRETT RUDEBECK — Plaintiff

v

BRIAN ANTHONY RUDEBECK — Defendant

JUDGE:	MOORE J
WHERE HELD:	Melbourne
DATE OF HEARING:	On the papers
DATE OF JUDGMENT:	6 December 2019
CASE MAY BE CITED AS:	Re Rudebeck
MEDIUM NEUTRAL CITATION:	[2019] VSC 804

WILLS AND ESTATES – Application for revocation of probate – Whether particulars established prima facie case – Whether the testator lacked testamentary capacity at the time of making the will – Whether testator knew and approved of the contents of the will – Whether testator was subject to undue influence at the time of making the will – Whether there were suspicious circumstances at the time of making the will – Prima facie case established – *Gardiner v Hughes (No 2)* [2019] VSCA 198 – *Veall v Veall* (2015) 46 VR 123.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	J D Catlin	JP Legal
For the Defendant	J W McCoy	Rose Lawyers

HIS HONOUR:

1 The issue of controversy in this proceeding is whether David Rudebeck has established a prima facie case of invalidity of a will made by his mother, Leonie Margaret Rudebeck (the **deceased**), on 4 March 2013. The proceeding is however procedurally novel.

2 The deceased died on 6 May 2018, aged 79 years. On 8 November 2018, a grant of letters of administration upon intestacy in her estate was made to her son David Rudebeck.

3 On 23 January 2019, another of the deceased's sons, Brian Rudebeck, filed a summons seeking revocation of the grant made to David, on the basis that their mother did not die intestate, but with the will dated 4 March 2013. Brian subsequently lodged an application for probate of that will. The will was executed by the deceased in the presence of a lawyer and a person from State Trustees Limited (**State Trustees**).

4 David subsequently filed an affidavit which annexed a document setting out various grounds upon which he opposed the revocation of the letters of administration. In this way, David in effect assumed the role of caveator in objecting to Brian's application for probate of the will. The matter has proceeded on that basis, with the parties directing themselves to the question of whether David has established a prima facie case of invalidity in the will. To that end, on 31 May 2019, David filed revised grounds for opposing revocation of letters of administration. The parties have also filed various affidavits in the proceeding and a number of rounds of written submissions.

Background

5 Before addressing the grounds on which David challenges the validity of the will, it is necessary to refer to the following aspects of the factual background to this proceeding.

(a) The deceased was rendered blind and disabled due to medical complications resulting from an attempt on her own life in 1997–1998. Brian then became the

deceased's full-time carer and resided with her at her home in Heidelberg West.[1] The deceased was sole proprietor of that property.

(b) The title of the Heidelberg West property was transferred into joint proprietorship with Brian on 22 January 2016. Upon the deceased's death, the property passed to Brian by way of survivorship.

(c) The deceased's only significant asset was the property in Heidelberg West. Given that the title of that property passed to Brian on the deceased's death, it would appear that the deceased's estate is essentially insolvent.

(d) On 4 July 2017, David commenced an application in the Victorian Civil and Administrative Tribunal (**VCAT**) in which he sought to challenge the transfer of the title of the property on the basis that it was procured by Brian's undue influence. Allegations of physical abuse of the deceased by Brain were also made (and denied).

(e) In the proceedings in VCAT, orders were made appointing State Trustees as the deceased's administrator and the Office of the Public Advocate as her guardian. Brian did not object to those orders being made.

(f) On 8 December 2017, State Trustees provided a letter to VCAT which stated that it had investigated the circumstances surrounding the transfer of the deceased's property to joint ownership with Brian. State Trustees stated that 'we have received medical evidence that unequivocally states that Mrs Rudebeck had capacity at the time of the transfer of the property and fully understood the implications of the transfer including the implications of joint proprietorship.' State Trustees recorded its view that it had 'no concerns about the transfer of the property'.

(g) In his capacity as administrator of the deceased's estate, David commenced proceedings in the County Court of Victoria in about December 2018 seeking

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1 The deceased moved into full time nursing care on about 24 May 2018.

that the property be restored to the estate and then divided on the basis of intestacy.

(h) In light of Brian's application to revoke the grant of letters of administration made to David, on 24 January 2019, orders were made by consent adjourning the County Court proceeding.

Grounds for opposing revocation

6 It is necessary to set out in full David's revised grounds for opposing revocation of letters of administration. Those grounds are as follows:[2]

> **Part A: The testator lacked testamentary capacity during the period shortly before and at the time of execution of the will.**
> **Part B: The Testator did not know and approve the contents of the will**
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> 1. The Deceased was a paranoid schizophrenic from the 1960's and experienced extreme symptoms such as hearing voices and acute seizures. These symptoms manifested for extended periods or episodes extending for months at a time resulting in long term residence in psychiatric care facilities including a five month period which terminated only two weeks before the 4 March 2013 will was executed.
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> **Particulars**
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> The Deceased was an inpatient from 18 September, 2012 to 20 February, 2013 and from 1 July, 2015 to 30 December, 2015. She was an inpatient on five other occasions.
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> 2. The deceased had attempted suicide numerous times and spent time in Mont Park until improved medications became available in the 1980s.
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> 3. The deceased's mental illness was exacerbated by psychological difficulties and suicidal ideation following the train suicide of her daughter Michelle in 1995.
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> 4. The Deceased attempted suicide in 1997 which placed her in a coma and destroyed her eye sight rendering her legally blind.
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> 4A. The medical conditions and circumstances set out in paragraphs 1-4 were effecting the capacity of the Deceased at the time of her instructions for and execution of the 2013 will.
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> 5. The deceased had been diagnosed with cerebella ataxia and had severe balance problems.

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[2] Omitting mark ups identifying the changes to the original grounds filed and identifying for convenience David as the plaintiff and Brian as the defendant.

6. By 2013 the deceased was often dazed and confused.

7. The will disinherited the sons Michael Rudebeck and David Rudebeck despite those sons having largely paid for the house by paying $90 a week which was applied to the mortgage until it was cleared and all bills from the date when the deceased's husband abandoned her in 1987 following which her only income was the pension.

Part C Undue Influence

8. The Deceased was able to be coerced by [Brian] by reason of:

   (a) The Deceased's mental health and medical conditions set out in paragraphs 1-4 and 5-6 herein;

   (b) [Brian] having lived with her virtually all his life;

   (c) The deceased having lived with [Brian] alone from around 1995;

   (d) [Brian] having created an atmosphere of likely violence if he didn't get his way by manifesting an explosive temper in damage to the residential property on the land at 121 Ramu Parade, Heidelberg West (the **"House"**, the **"Land"**), and in particular punching holes in walls and doors;

   (e) [Brian] having conducted himself with other family members in a manner which would and did isolate the deceased from them;

   (f) [Brian's] control of the Deceased's finances by reason of her eyesight, age and him being co-signatory of her bank passbook.

9. [Brian's] creation of an atmosphere of violence placed pressure on the deceased to do as [Brian] wished.

10. The will was executed at [Brian's] behest to meet his requirements.

11. The Deceased declared on 25 November, 2017 at a nursing home in front of witnesses and later at Heidelberg Magistrates' Court that she had transferred the land and associated House to [Brian] and executed the 2013 will because [Brian] had threatened to kill her. In the circumstances the will was obtained by coercion.

Particulars

[David] refers to the Intervention Order heard at Heidelberg Magistrates' Court 24 February, 2017 which necessitated the deceased stating to a Magistrate that the grounds for said application which included the words "*the respondent has coerced me into signing documents for him. I believe this includes a will.*

Part D Suspicious Circumstances

12. [David] refers to and repeats paragraph [7]–[11] herein.

13. The disposition of the whole estate to [Brian] was suspicious as he had not provided care to the Deceased meriting reward and had in fact belaboured the Deceased's finances throughout his adult life.

Particulars

The Deceased received substantial care from the Municipal Council and later programs provided by the Austin Hospital and other agencies. The Deceased was cared for by the psychiatric facility in which she resided for a total period of approximately 22 months between 2009 and 2017 following which she went into aged care. [Brian] used the Deceased's monies to attend to flying school at Essendon Airport for three year and buy expensive telescopes; one for $16,000 and another for $23,000. He also engaged in sham lay-by transactions to extract monies from the Deceased for purchases that never eventuated namely three lawn mowers. The deceased's care workers had attempted to limit his access to the Deceased's money in response to this and like conduct.

14. For long periods the Deceased was in a psychiatric facility including periods contemporaneous with the execution of the will.

15. The land transfer was executed when the Deceased was in a psychiatric facility and secured the land for [Brian] where otherwise it would have been part of a contestable estate, in continuation of a pattern of conduct by [Brian] to transfer the Deceased's wealth to him.

Legal principles

7 I recently observed in *Re Gao*[3] that the Court of Appeal in *Gardiner v Hughes (No 2)*[4] had restated and clarified the correct approach for determining whether an applicant for revocation of a grant of probate has established a prima facie case. '[T]he task for the party seeking to have a grant of probate revoked is … to show that there is a "case for investigation" or "something to go on"'.[5] Mere speculation will not be sufficient.[6] The Court continued:[7]

> … There may be a case for investigation even if all the facts needed to justify the inference in question are not yet known or alleged, but there is enough to 'go on' to call for a trial. That will be the case if there is a reasonable explanation for the facts relied upon which, if shown to be correct, would justify revoking probate. Each case will of course

3 [2019] VSC 735, [10]–[12].
4 [2019] VSCA 198.
5 Ibid [41], referring to the statement by Herring CJ in *Re Egan* (1963) VR 318, 320.
6 Ibid.
7 Ibid [42]–[43] (citations omitted).

> depend on its particular facts. But in every case the onus rests on the party raising the doubt as to validity.
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> Next, the power to revoke a grant of probate is discretionary, involving a consideration of all the circumstances and not just the merits of the case. Those discretionary considerations are apt to be considered along with the prima facie case question, at a preliminary stage. In that context, a failure adequately to explain delay, for example, may in some circumstances be a basis for refusing relief despite the existence of a prima facie case. … However, the fact that matters of discretion may arise does not mean that the evaluation of the prima facie case is itself an exercise of discretion. It is instead the application of a legal test to alleged facts. Although minds may differ as to the correct outcome of that process, in law there is only one correct answer. There is either a prima facie case or there is not.

8 Where a lack of testamentary capacity was alleged, the Court of Appeal stated that the application of the prima facie test '… did not require a determination whether or not the particulars, in isolation or taken together, justified an inference of testamentary incapacity' but, '[i]nstead, the question was whether the allegations, assuming them to be true, called for further investigation ...'.[8]

9 The Court of Appeal determined that the trial judge erred because, having considered each of the particulars for revocation, the judge 'did not return to the question whether the particulars as a whole constituted a narrative warranting further investigation'.[9] '[O]nce it was accepted that individual particulars could, depending on other facts, point towards testamentary incapacity it was incumbent on the judge to view the case as a whole to see whether it called for further investigation'.[10]

10 In this matter, no issue arises about David's standing to object to the revocation of the grant of letters of administration made to him. Nor does any question of delay arise.

11 As counsel for Brian correctly submitted, there must be a causal connection between the facts asserted and the grounds of objection those facts are said to support.[11] Generally speaking, the grounds of objection should be properly particularised to demonstrate this connection, and where the particulars are ambiguous, obscure or

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8 Ibid [79]–[80].
9 Ibid [82].
10 Ibid.
11 *Re Gardiner (No 3)* [2018] VSC 414, [17].

inadequate, they may be struck out.[12] Where the particulars are struck out and the grounds of objection are left without a sufficient factual basis, the objections will ultimately be dismissed. However, as the Court of Appeal stated in *Gardiner v Hughes (No 2)*, 'even if all the facts needed to justify the inference in question are not yet known or alleged', there may still be 'enough to "go on" to call for a trial.'[13]

Lack of testamentary capacity/testator did not know and approve the contents of the will

12 Consistent with the approach adopted by David, it is convenient to deal with these grounds together.

13 It is apparent that the will is rational on its face and was duly executed. A presumption therefore arises that the deceased possessed testamentary capacity when she executed it.[14] In these circumstances and where the presumption of testamentary capacity has not been rebutted, there is also a presumption that the testator knew and approved the contents of the will.[15]

14 Considered in isolation, most of the particulars relied upon by David are problematic and do not establish a prima facie case for invalidity on the basis of lack of testamentary capacity or knowledge and approval of the contents of the will. Save for paragraph 4A, no connection is drawn between the various features of the deceased's psychological and physical condition and her testamentary capacity at the time of the making of the will and her knowledge and approval of its contents. For example, the deceased's suicide attempts are alleged to have occurred many years ago and no fact is identified which links those events with the circumstances in which the deceased made the will.

15 These deficiencies are not remedied by paragraph 4A. That paragraph is merely an assertion that certain of the conditions and circumstances referred to in the particulars were affecting the deceased's capacity when she made the will. No factual basis for

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12 *Re Gardiner (No 3)* [2018] VSC 414, [19], citing *In re Smith (dec'd)* [1951] VLR 368, 377.
13 *Gardiner v Hughes (No 2)* [2019] VSCA 198, [42].
14 *Veall v Veall* (2015) 46 VR 123, 174 [168] (Santamaria JA, Beach and Kyrou JJA agreeing), citing *Tobin v Ezekiel* (2012) 83 NSWLR 757, 771 [45] (Meagher JA).
15 Ibid [169].

this claim is advanced so as to establish the relevant causal connection with testamentary capacity and/or knowledge and approval of the contents of the will.

16 Likewise, no connection is made between the making of the will and the deceased's diagnosis as suffering cerebella ataxia and having severe balance problems. The claim that the deceased was 'often dazed and confused ...by 2013' is embarrassingly vague.

17 As to the claim that the deceased 'disinherited' her sons David and Michael Rudebeck despite the fact that they contributed to the deceased's estate by paying $90 a week towards the payment of bills and the mortgage on the property, no particulars connecting those allegations to the making of the will have been provided. The will is rational on its face. Save for what is considered below, David has not demonstrated any reason why the deceased was not capable of considering his and Michael's claims to the deceased's testamentary bounty when she made the will.

18 Paragraph 1 of the grounds is in a different category. Of most significance is the claim that the deceased had experienced 'long term residence in psychiatric care facilities including a five month period which terminated only two weeks before' the will was executed. Although it is not alleged that the deceased was resident in a psychiatric care facility when she made the will, in the circumstances of this case, I consider the proximity in time between when she was a psychiatric inpatient and when she made the will to be of real significance. Two circumstances are particularly relevant in that regard: (a) the allegation that the deceased suffered, albeit episodically, a serious psychiatric condition, paranoid schizophrenia, for more than 40 years; and (b) the absence of any information about the circumstances in which the deceased was discharged from the period of psychiatric care two weeks before she made the will.

19 It is also necessary to consider paragraph 1 of the grounds in the overall narrative of the deceased's psychological history constituted by the other paragraphs to which I have already referred. Although, considered in isolation they gave the deficiencies to which I have referred, they provide important context to paragraph 1 of the grounds. The overall picture which emerges from Parts A and B of the grounds is that the

deceased was a legally blind paranoid schizophrenic who had suffered episodes of psychiatric disturbance for many years to such a degree that they warranted treatment as an inpatient on some seven occasions, including for five months shortly before she made the will.

20 In these circumstances, it is problematic that there is no indication that the deceased was medically assessed when she made the will. In *Veall v Veall*, Santamaria JA made the following observations on the approach which the Court should adopt to that issue:[16]

> A solicitor who prepares a will comes under professional duties to exercise proper care and attention. In the United Kingdom, there are several decisions that inform the duty of a solicitor when taking instructions from an infirm testator. In *Kenward v Adams*, and *Re Simpson*, Templeman J said that, where a solicitor is making a will for an old or infirm testator, the solicitor should ensure that the making of the will is witnessed by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and findings. Needless to say, this is a counsel of prudence that must be subject to the circumstances of the case. The exigencies of the situation may make it impracticable; nor would it need to be followed where, despite the age of the testator, he is obviously well and is proposing to make a will that distributes his estate in a manner which is uncontroversial. Where it is evident that a will may be controversial and a solicitor does not take elementary precautions, the court will have to look elsewhere if it is asked to determine capacity and knowledge and approval. In *Ashkettle v Gwinnett*, Christopher Pymont QC, sitting as a Deputy Judge in the Chancery Division, referred to the judgments of Mummery LJ and Sir Scott Baker in *Hawes v Burgess* to the effect that "it is 'a very strong thing' for a judge to find lack of testamentary capacity when the will has been prepared by an experienced and independent solicitor following a meeting with the testator, when it had been read through and explained to her and when the solicitor had formed the view that the testator was capable of understanding the will, the terms of which were not, on their face, inexplicable or irrational". Nonetheless, he said:
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> > I accept the wisdom of these comments though I observe that they do not go so far as to suggest that, in every case, the evidence of an experienced and independent solicitor will, without more, be conclusive. Any view the solicitor may have formed as to the testator's capacity must be shown to be based on a proper assessment and accurate information or it is worthless; and (as Mummery LJ acknowledges) the terms of the will may themselves suggest that the solicitor's assessment was not soundly based.

21 This is not a trial to determine definitively whether or not the deceased had testamentary capacity when she made the will. The question is whether the grounds

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16 *Veall v Veall* (2015) 46 VR 123, 174 [192] (emphasis added and omitting citations).

advanced by David establish a case for investigation about whether or not she had such capacity and whether she knew and approved the contents of the will. In my assessment, such a case is made out because the deceased had a long history of serious psychiatric illness, was blind and suffered other health problems, and the will was made very shortly after a five month period as a psychiatric inpatient. In those circumstances, the absence of any medical assessment of the deceased's capacity when she made the will is sufficient to raise a case for investigation, despite the fact that the will is rational on its face and was duly executed.

Undue influence

22 It was accepted between the parties that an objection based on undue influence essentially amounts to an allegation of coercion and that actual coercion is required.

23 As with the ground based on a lack of testamentary capacity/lack of knowledge and approval, the particulars of undue influence were, with one exception, problematic when considered in isolation. The claim that the deceased was 'able to be coerced' by reason of a number of matters[17] does not properly engage with the requirement for there to have been actual coercion. Similarly, the claims that Brian created an 'atmosphere of violence' which placed pressure on the deceased to do as he wished[18] and that the will was executed at Brian's 'behest to meet his requirements' are advanced without any particulars and are unduly vague and uncertain.

24 However, paragraph 11 of the grounds contains a most serious and specific allegation. It is alleged that, on 25 November 2017, the deceased declared at a nursing home in front of witnesses and at the Heidelberg Magistrates' Court that she had transferred the property to Brian and executed the Will 'because the defendant [Brian] had threatened to kill her'. The particulars make reference to an intervention order heard at Heidelberg Magistrates' Court on 24 February 2017 which necessitated the deceased stating to a Magistrate that the grounds for her application included the words 'The

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17 Paragraph 8 of the particulars.
18 Paragraph 9 of the grounds.

respondent has coerced me into signing documents for him. I believe this includes a will'.

25 It is not possible to dismiss this most serious allegation. David has sworn an affidavit which refers to the version of this paragraph of the grounds which appeared in the first version of the grounds filed with the Court. It is apparent from that affidavit that David deposes that he was a witness to his mother's declaration she made at the Regis nursing home.

26 Counsel for Brian advances various criticisms of this paragraph including the absence of particulars identifying the claimed witnesses to the deceased's declaration and the absence of any attempt by David to explain various matters. I have already referred to the evidence before the Court which identifies David as one of the witnesses. I do not consider that the identification of each and every witness in grounds of objection is a necessary pre-condition for the Court to be satisfied that there is a case to investigate.

27 Moreover, Brian does not have to demonstrate that the alleged facts justify an inference of undue influence. Rather, he must show that, assuming the alleged facts to be true, they call for further investigation of whether there was, in fact, undue influence. On that approach, the seriousness of the specific allegation here made clearly warrants further investigation as to whether the will was signed as a result of undue influence. The other complaints made by counsel for Brian about David's alleged failure to explain various matters are more appropriately matters for trial and do not alter my view that a prima facie case has been established.

28 Although paragraphs 8–10 of the grounds are deficient when considered in isolation for the reasons I have indicated, they have a relevant contextual significance when regard is had to the specific and serious allegation contained in paragraph 11.

29 For the above reasons, I consider that David has established a case for investigation that the deceased was subject to undue influence, namely coercion, by Brian in the making of the will.

Suspicious circumstances

30 Given the matters relied upon to advance this claim[19] and my conclusion that David has established a prima facie case in relation to testamentary capacity, knowledge and approval of the will and undue influence, it is unnecessary for me to further consider this claim. The overlap between the grounds and the specific matters relied upon in relation to this ground make it appropriate that this claim proceed to trial together with the other grounds in relation to which a prima facie case has been established.

Conclusion

31 For the above reasons, David has established a prima facie case of invalidity in the will on the basis of his revised grounds filed on 31 May 2019.

32 The parties are to confer and submit proposed orders giving effect to these reasons for judgment and the progress of the matter to trial.

CERTIFICATE

I certify that this and the 11 preceding pages are a true copy of the reasons for Judgment of Moore J of the Supreme Court of Victoria delivered on 6 December 2019.

DATED this sixth day of December 2019.

.....
Associate

[19] In the grounds alleging that the will was made in suspicious circumstances, David relies upon paragraphs advanced in relation to the undue influence ground in respect of which I have found there to be a prima facie case.