MOHAMED OMARI and MUSTAPHA OMARI v FATMA OMARI
[2012] ACTSC 33 (9 March 2012)

PROBATE and ADMINISTRATION – testamentary capacity – whether deceased had testamentary capacity when she executed her will – whether will valid – deceased lacked testamentary capacity – deceased died intestate – dispute between surviving children – administration should be granted to Public Trustee.

Court Procedures Rules 2006, r 3069
Guardianship and Management of Property Act 1991, ss 7, 8
Administration and Probate Act 192, ss 12, 38A

Banks v Goodfellow (1870) 5 QB 549.

No. P 671 of 2009

Judge: Master Harper
Supreme Court of the ACT
Date: 9 March 2012

IN THE SUPREME COURT OF THE)
) No. P 671 of 2009
AUSTRALIAN CAPITAL TERRITORY)

BETWEEN: **MOHAMED OMARI and MUSTAPHA OMARI**

Plaintiffs

AND: **FATAMA OMARI**

Defendant

O R D E R

Judge: Master Harper

Date: 9 March 2012

Place: Canberra

THE COURT DECLARES THAT:

the deceased Mariem Omari died intestate.

THE COURT ORDERS THAT:

1. a copy of these reasons be provided to the Public Trustee.

2. the parties and the Public Trustee have liberty to apply on two days' notice.

Introduction

1. On 13 January 2002 Mariem Omari (the deceased) executed a will in which she appointed two of her sons, Mohamed Omari and Mustapha Omari, the present plaintiffs, as executors. She was illiterate, and executed the will by making a thumbprint on each page.

2. She died on 7 September 2009, aged eighty-one. She was survived by three sons and five daughters. One of the daughters, the present defendant, has lodged a caveat against any grant of probate to the plaintiffs, on the ground that at the time she executed the will the deceased lacked testamentary capacity.

3. The deceased was born in eastern Turkey on 20 February 1928. Her family moved to Lebanon in the mid-1930s. She married a cousin when she was about fifteen years old. Her family spoke Kurdish. Her first child, the first plaintiff, was born in 1944. The other children were born at intervals of three years or so, the youngest in 1966.

4. The first plaintiff moved to Australia in 1968 and became an Australian citizen in 1972. He made arrangements for his parents and brothers and sisters to move to Australia. At the time there was a civil war in progress in Lebanon. The family moved to Australia between 1976 and 1978.

5. The deceased was divorced from her husband in 1986. He married again but died before the deceased.

6. The deceased lived in the suburbs of Canberra from her arrival in Australia in 1978 until her death. She never learned to read or write in any language. Although she lived in Australia for thirty years, her spoken English was limited to the few words needed to make a purchase at a shop. She spoke a little French (what is now Lebanon was part of French-occupied Syria during her early years there). The main language spoken in Lebanon was Arabic, and the plaintiff spoke some Arabic, although there is

a dispute between the parties as to her level of proficiency. She worked as an office and house cleaner in Lebanon.

7. The will followed a precedent available for adherents of the Muslim faith. It was prepared by the second plaintiff from a precedent provided by a former Imam. On the day it was executed, the plaintiffs took their mother by arrangement to a cafe at Curtin, where they met the proprietor, Mohamed Haydar. Mr Haydar and an employed chef at the restaurant, Mr Said Bouzid, acted as witnesses to the execution of the will. Also present was a Justice of the Peace, Mr K.K. Haque. The testator executed the will by making a thumbprint on each page. The will was executed in triplicate. The three documents are not identical because the witnesses did not sign in the same order each time.

8. The will provided that three of the children were to give credit for earlier financial benefits they had received, and left the estate to the eight children so that each son was to get a full share and each daughter a half share. The effect was that the estate would be divided into eleven equal shares, with each son to get two elevenths and each daughter one eleventh.

9. The executors instructed solicitors to apply for probate of the will. Before an application for probate was lodged, the defendant lodged a caveat requiring proof in solemn form before distribution. The basis for the caveat was expressed to be the fact that the will was made at a time when the testator was suffering from dementia, and that it did not express her wishes.

10. The executors made application for an order setting the caveat aside. Initially both the plaintiffs and the defendant were represented by solicitors. Attempts at mediation which I ordered at an interlocutory stage were unsuccessful. By the time of the final attempt at mediation neither side was legally represented, although at the hearing a

solicitor had been instructed to act for the plaintiffs, and appeared as counsel. The defendant was not represented on hearing.

11. Rule 3069 of the *Court Procedures Rules 2006* provides that a person who intends to apply for probate may apply to the court for an order setting aside a caveat. Subrule (4) gives the court a discretion to set aside a caveat if it considers that the evidence does not raise doubt about whether the grant of representation should be made. By subrule (6), the court, if it does not set the caveat aside, may give appropriate directions, on application by a party or on its own initiative. Subrule (8) provides that if the court gives a direction for the caveator to start a proceeding within a stated time and the caveator fails to do so, the caveat is taken to have been withdrawn.

12. On 1 October 2010 I made an order that the matter proceed as an application by the plaintiffs for probate of the will of the deceased in solemn form. Having regard to the state the proceeding had reached, it seemed to me unnecessary to require the defendant to start a formal proceeding. I said that it appeared to me that the onus should lie upon the caveator to establish her objection, rather than upon the plaintiff to satisfy the court that the caveat should be set aside. The essence of the dispute is as to the testamentary capacity of the deceased at the time she made her will. The will appears valid on its face, and the defendant should bear the onus of establishing lack of testamentary capacity, which would lead to a declaration that the will was invalid. There is no evidence that the deceased had ever made any earlier will, and such a declaration would leave her intestate. Accordingly, I made directions for the service of witness statements, and the action came before me for hearing on 8 and 14 September 2011.

The Evidence

13. Oral evidence in the plaintiffs' case was given by each of the plaintiffs, one of their sisters, the witness to the will Mohammed Haydar, and Imam Adama Konda of the Canberra Islamic Centre. The defendant gave oral evidence, and I admitted some documentary evidence.

14. I allowed into evidence, as though read by the defendant, without objection an affidavit by Theresa Ann Miskle, a solicitor who was acting for the defendant at the time she swore her affidavit in February 2010. Ms Miskle deposed to the fact that the present plaintiffs had commenced proceedings during 2001 in the Guardianship and Management of Property Tribunal of the Australian Capital Territory. On 22 July 2002 the plaintiffs were appointed joint plenary guardians of their mother. That order is not available to me, but there is in evidence a copy of an order made by the Tribunal in September 2004 on review of the earlier order, extending the appointment of the plaintiffs. The Tribunal, before making such an order, must be satisfied that the person in respect of whom the order is sought is suffering from an impaired decision-making ability in relating to her health or welfare and property: *Guardianship and Management of Property Act 1991*, ss 7,8 (as then in force).

15. Ms Miskle's affidavit also annexed, and thus brought into evidence, a number of medical reports. Dr Peter Rea wrote a short report to the Guardianship and Management of Property Tribunal on 13 December 2001, which I infer was part of the material on which the Tribunal was persuaded to make the guardianship order. Dr Rea said:

> Re Mrs Mariem Omari d/b 7/2/28
>
> I looked after the above, as her general practitioner, from the 3/2/79 – 3/9/98.

> At the consultation on the 3/9/98 I noted that she had symptoms of either Depression or early Dementia.
>
> Two weeks ago she returned and it is obvious that she has dementia probably Alzheimer's Disease. This diagnosis has been supported by a CT scan, which shows marked shrinkage of the Brain especially the temporal lobes. She also has Mild thyrotoxicosis and will need treatment for this.
>
> Mrs Omari has severe cognitive impairment, is forgetful and in my opinion will have difficulty in managing her affairs.
>
> ACT Community Care have tried to do an ACAT assessment but were frustrated by one of her daughters who refused an interpreter and answered the questions for her mother. Other members of the family are concerned about her finances and properties.
>
> It is my considered opinion that Mrs Omari's interests would be best served by the appointment of an independent guardian.

16. Dr Rea referred the deceased to Dr Sue Richardson, a consultant physician in geriatric medicine. Dr Richardson saw the deceased on 18 February 2002. It is evident from her report that she had already seen the deceased during 2001 but no earlier report is in evidence. Dr Richardson's report to Dr Rea dealt principally with the deceased's physical ailments. Relevantly for the present proceedings, her report included:

> I am sorry Mrs Omari was put through further cerebral imaging, again this was all arranged by myself last year. There was nothing on those films to suggest unusual entities such as hydrocephalus. The film did however show periventricular lucency associated with small vessel white matter ischaemia. There was also a suggestion on ceretec brain scan of a possible left occipital infarct. We cannot address Mrs Omari's cerebrovascular disease until we are sure that we have any GI [gastro-intestinal] problems under control.
>
> Last year Mrs Omari's ECG did show anterior ST-T wave changes and I suspect she does have coronary artery disease. Of course given the extent of her dementing illness it is impossible to determine at present if this lady is suffering intermittently from angina.
>
> . . . . . .

> There are now three different family members involved in Mrs Omari's day to day care. This is certainly a 24 hour a day very stressful task which is being shared as well as possible between the three family members. Of course this is not ideal in terms of constant change re Mrs Omari's dementing illness. However I believe it is certainly better support than she was being given last year.
>
> She still has a major urge/drive to return to her home. She has no idea where her home is. She does become extremely vocal and agitated when her family members will not let her go looking for her home. They have had to resort to walking the streets with her.
>
> . . . . . .
>
> I have also advised Mrs Omari's eldest son that I believe that his mother needs very specific locked dementia care. This is very difficult to obtain for patients from non-English speaking backgrounds. Once in a locked dementia ward she will very much so become somewhat violent, agitated and very vocal. I would like her placed in a unit that knows how to deal with this and does not resort to antipsychotic medication. Unfortunately we do not have access to many such units here in the ACT.

17. Dr Richardson wrote to Dr Rae again on 22 March 2002, having seen the deceased a few days earlier. Again her report dealt primarily with her physical condition. She mentioned that she was impressed with some of the initiatives put in place by her children. She said that for example, they had given her a set of keys so that she could attempt to unlock the doors and go home: she did not get too frustrated when the keys did not work. She had discussed with the first plaintiff a placement for the deceased at a residential aged care facility, Villaggio Sant' Antonio, to which the deceased was admitted on 24 April 2002.

18. Dr S. Lo of Florey Medical Centre noted in a report of March 2003 that the deceased had attended the centre intermittently since 1998. He said that she had had 'cognitive deterioration in the last few years' and that Dr Richardson had made a formal diagnosis of Alzheimer's disease in 2002. Dr Lo noted that the mental state of the

deceased had deteriorated significantly near the end of 2002, and that he expected that she would need eventually to be placed in a dementia-specific facility.

19. Dr Rea wrote a further short report in October 2003. He confirmed the accuracy of his report to the Tribunal in December 2001. He said that the deceased had not visited his practice between September 1998 and November 2001. On 26 November 2001 she had seen a doctor at Dr Rea's practice, Dr El Sherif, who had ordered a brain scan which showed marked changes indicative of Alzheimer's type dementia.

20. Dr Rea said that CT scan changes in the brain due to dementia take many years to develop. The clinical features and symptoms predate the structural changes in the brain. Dr Rea expressed the opinion that the deceased would not have understood the meaning of any documents which she signed in January 2000 and that her carers should have recognised this (the reference to signing of documents in January 2000 is to a power of attorney which was later set aside by Connolly J in this court, to which I shall return).

21. In a subsequent recent report, Dr Rea confirmed that the deceased was showing signs of dementia by September 1998. In December 2001, CT scan revealed changes which included minimal thickness of the temporal lobes, a change which occurs late in the development of Alzheimer's disease, confirming that by January 2002 the deceased had well-established dementia. In Dr Rea's opinion she would not have had any understanding of documents she was signing by that time.

22. After the divorce between the deceased and her husband, the first plaintiff negotiated a property settlement between them. A house in Flynn was purchased unencumbered, for the deceased to live in. A residential unit at Belconnen was also purchased unencumbered in her name as an investment. The investment unit gave rise to a major falling out within the family. The deceased executed a power of attorney, presumably

in early 1995, in favour of another of her sons, Youssef Omari, for the purpose of buying the unit.

23. On 6 January 2000 the deceased executed an enduring power of attorney in favour of one of her daughters, Sabah. Subsequently a transfer of the Belconnen unit was registered, executed by Sabah under power of attorney for her mother, to another daughter Mona Omari.

24. The plaintiffs became aware in late 2001 of the transfer. In an affidavit affirmed in June 2003 in proceedings in this court for declaratory and other relief, the first plaintiff said that he learned in late 2001 that his brother Youssef had collected rent from the unit on behalf of the deceased but had not paid the rent into her account. The first plaintiff believed that his brother had misappropriated the rent, and had moved into the unit in late 2001 or early 2002 having sold his own house to pay gambling debts. In that affidavit, the first plaintiff said that in early 1999 he observed his mother's mental and physical state to be deteriorating. He observed initially that she was having increasing difficulty in remembering things. Sometimes she could not recall what had been said to her a short time before. He had observed her becoming confused at times during the latter part of 1999.

25. He expressed the view in the affidavit that by January 2000, when she executed the power of attorney in favour of Sabah by thumbprint, she was exhibiting signs of dementia, and was often forgetful and sometimes confused. He said that he did not believe that, assuming that the thumbprint was his mother's, she had placed it on the document voluntarily or knowingly, or appreciating what she was doing. He said that it would have been completely out of character, custom and habit for her to have done such a thing without first discussing it with him.

26. The proceedings in relation to the power of attorney and transfer were brought in the name of the deceased by the present plaintiffs as her guardians and next friends, against their sisters Mona and Sabah Omari. The Registrar-General and the Australian Capital Territory were also defendants. The action came before Connolly J for hearing in August 2006. On 4 September 2006 his Honour made orders. His Honour declared that the power of attorney and transfer were void *ab initio*. The orders included an acknowledgement by Mona Omari that she was indebted to the deceased in an amount required to discharge a mortgage over the property to National Australia Bank, then approximately $114,000.00. Orders were made that Sabah Omari was to guarantee that indebtedness to a limit of $20,000.00, and that Youssef Omari was to guarantee the indebtedness to a limit of $40,000.00. All of the parties to the action were represented by counsel, and it appears to me that the orders were probably ultimately made by agreement.

27. The first plaintiff said in an affidavit in the present proceedings in December 2009 that the orders as to payment of money by Mona, Sabah and Youssef Omari had not been complied with by that date. Nothing was said to the contrary during the hearing before me, and I assume that the money remains owing. The present defendant was not a party to those proceedings and there is no suggestion that the orders create any estoppel for present purposes, or more specifically that there was any finding by Connolly J that the deceased lacked the capacity to grant a power of attorney in January 2000.

28. In his oral evidence, the first plaintiff said that his mother had been living by herself in the house at Flynn in early 2002. He had visited her five or six times per week to check and see if she was alright. She was able to go across the road to the Melba shops, where she was well known. She was able to buy milk and bread. She was able

to prepare her own meals, although usually her two elder daughters cooked her meals and brought them to her. Asked how his mother spent a typical day at the beginning of 2002, the first plaintiff said that she used to mow the lawn, the block being a large one. She was very pious, and never failed to say her prayers five times per day. She would sometimes walk to her son Youseff's house at Florey for a meal. She sometimes used to travel by bus to Belconnen.

29. Specifically asked about her mental state at the beginning of 2002, the first plaintiff said that his mother was alert, knew who her children were, and asked what was happening to her properties. There was no doubt in his mind that she knew what she was signing when she made her will. He and his brother (the second plaintiff) had in no way sought to influence her.

30. On the day the will was signed, the plaintiffs collected their mother from her home soon after lunch, and drove her to the restaurant at Curtin. The first plaintiff knew Mr Haydar. He did not know the other witness Mr Bouzid, who was employed by Mr Haydar at the restaurant. He and his brother had arranged for Mr Haque, a justice of the peace, to be present. He said that Mr Haydar asked his mother whether she knew what she was there for and that she replied "Yes, I'm coming here for my will. But please, sons, make sure that applied in accordance, I fear God, I am a Muslim woman, make sure you apply to do the right thing here". Mr Haydar then asked "Do you understand what the will says? Islamic will, as far as the way it's been established according to the Islamic faith?" His mother replied "I understand but I don't read or write". Mr Haydar had then said that he and Mr Bouzid would go through the will and explain it to her. The conversation took place in Arabic.

31. Also during the discussions at the restaurant, the first plaintiff said that his mother said "Okay, I'm more than satisfied but please make sure that doesn't happen to me

what happened to my property in Totterdell Street". He said that Mr Haydar and Mr Bouzid read through the will and explained it to his mother in Arabic, and that she understood the explanation. She then executed the will with a thumbprint from an ink pad provided by Mr Haque.

32. It is recorded on the will that the original is to be deposited with Mr Kevin Hardy. I asked the first plaintiff who Mr Hardy was. He said that Mr Hardy was in charge of his mother's file at the Public Trustee's office. I was unaware until that answer of any involvement by the Public Trustee. Counsel for the plaintiffs had not opened or led anything about the proceedings in the Guardianship and Maintenance of Property Tribunal. It was at this point that the copy of the order of the Tribunal annexed to Ms Miskle's affidavit came to light. The first plaintiff's recollection was that the guardianship proceedings were commenced in about December 2000. I found his evidence as to how this came about unsatisfactory and had the impression that if it had not been for Ms Miskle's affidavit being on file, the first plaintiff would not have volunteered anything about the guardianship proceedings or orders.

33. I asked the first plaintiff to read the affidavit he had affirmed in June 2003 in the proceedings to set aside the power of attorney and the transfer of the Belconnen unit. After doing so, he said that there were a couple of items he would like to shed some light on. He said that harsh words had been used and that the affidavit could have been worded differently. He appeared to blame the solicitor who had drafted the affidavit. His counsel put to him that the affidavit had been prepared because of concerns that the Belconnen unit had been transferred pursuant to a power of attorney apparently executed by his mother in January 2000. The first plaintiff confirmed this, and added that his mother had been "without understanding what she was signing at the time". He was asked how this was different from the execution of her will in

January 2002. He said that there was a big difference, namely the presence of outside witnesses and a justice of the peace when the will was executed.

34. When cross-examined by the defendant, the first plaintiff agreed that there were times before she executed the will when the deceased went to stay with one or other of her children for as long as a few weeks at a time.

35. The defendant asked the first plaintiff who initiated the preparation and signing of the will. His answer was that it was the obligation and responsibility of the children to remind their parents of their obligation to make a will. He said that he and the second plaintiff and two of their sisters were involved in reminding their mother that she needed to make a will. He said that his mother had always said "what pleases almighty according to Islamic faith, my belief and my wishes". The family had talked to their mother for a period of four to six years about the importance of making a will, prior to the date it was executed.

36. The defendant asked the first plaintiff whether it was not inconsistent with their mother's testamentary capacity that she had been admitted to a nursing home about six weeks after executing the will. His response was that from his observation his mother was of sound mind, though he had not been "in a position to assess her dementia or her sort of frail, how frail she [was] getting, because she's getting on with the age".

37. The defendant asked the first plaintiff whether, prior to being admitted to the nursing home, their mother had ever been found by the police wandering miles from her home. His answer was that she used to go for a walk, and a couple of times she had been walking down the street to her son's place at Florey.

38. The second plaintiff also gave oral evidence. He is a researcher and analyst at the Embassy for the United Arab Emirates in Canberra. He said that on a number of

occasions he discussed the question of making a will with his mother. He saw it as an obligation on Muslims to discuss these issues regularly with their parents. His mother told him that she wanted to have her will in accordance with her Muslim beliefs. He and his brother (the first plaintiff) decided that they should have a formal will made to avoid the problems which had arisen about the power of attorney, and to protect their mother's assets. He obtained the will form from a former Imam at the Canberra Islamic Centre who he said was an expert in Muslim wills. On the day of execution, he and his brother took his mother to the restaurant in Curtin where they had made an appointment with a justice of the peace and two witnesses to finalise the will. His recollection was that any lunch customers had left by the time they got there, and that there was no one else in the restaurant. The discussion was in Arabic. All present except for the justice of the peace spoke Arabic. The witnesses had a discussion with his mother to explain the contents of the will. She was aware that it was a Muslim will, and she said that she was fully in agreement, and accepted all the contents of the will. He remembered her saying "I want the law of the creator, Allah, God, to be applied in the division or distribution of my assets and all my wealth". He thought that the will was executed in triplicate. One was handed to the Public Trustee's office, one was left with him and one with his brother (the first plaintiff). He did not say, and there is no other evidence, that his mother was given a copy of the will. After the formalities were concluded, he and his brother drove their mother home.

39. At about that time he was seeing his mother three or four times a week. He visited her after work. Sometimes she stayed at his home, sometimes at his brother's home and sometimes at the home of one of his sisters. Asked about her mental state at the time, he said that "she was a little bit forgetful about certain things." It was becoming difficult for her to manage her affairs at home and the family started thinking

seriously about moving her into a nursing home. He said that she was not happy to stay with any of her children, and preferred to be independent. At the time she executed the will she was generally still living at Flynn by herself and looking after herself.

40. In cross-examination, the second plaintiff said that the will was translated at the time of execution to his mother by the witnesses and by him. He described himself as a professional translator. He agreed that his mother could not read or write but said that she could understand the spoken Arabic language. When he translated the Arabic text of the will he put it into simple language for her to understand.

41. He said that the Muslim faith required an adult with assets to make a will as soon as practicable, and not to delay this until old age. The family were conscious of the fact that their mother had not made a will, and conscious in particular of the fraudulent activities of two of their sisters and one of their brothers about the Belconnen unit, and they decided that the time had come to take the question seriously and to prepare the will so that there would be no complications later on, and so that none of the siblings could take advantage of their mother's wealth.

42. He went on to say that if a will was not made by a Muslim, this did not excuse them from applying the Islamic inheritance system. He said that if a Muslim died without a will, his or her sons and daughters were obliged to distribute the estate according to the Muslim faith. The defendant put to him that this applied in Muslim countries but not in Australia. His response was that this was not necessarily the case. The principle applied everywhere, except in countries with specific laws prohibiting Muslims from practising their faith. Thankfully, he said, Australia had no such law and allowed freedom of worship to people of various faiths.

43. The defendant asked the second plaintiff the reason the deceased moved to Villaggio (the nursing home). His answer was that this was because she wanted to live independently. The family had arrived at the view that they could not leave her at her home at Flynn by herself, fearing for her physical wellbeing, and thought that the safest place for her was a nursing home. Although she had become forgetful, she had still been able to manage living at home alone. Her children realised that she was getting old and needed more care.

44. The defendant asked the second plaintiff why the will was executed at the restaurant at Curtin, rather than at a solicitor's office. He said that Mr Haydar, the proprietor of the restaurant, was his friend. The other witness had been a chef at the restaurant. The two witnesses had been prepared to offer their services in that capacity. Asked whether their mother had understood every word, the second plaintiff replied that his mother had passed away and that such questions should be directed to her. He assumed that she understood. He said that she had not needed to understand every word but she had understood the gist of what it was all about. She had known that the discussion was not about an overseas holiday, but rather that it was about her will. She had said that the siblings who owed money to her must pay it back to her estate, and therefore he had put wording in the will to that effect. He and his brother (the first plaintiff) knew that their sisters Sabah and Mona and their brother Youssef had taken her apartment at Belconnen and borrowed $120,000.00 against it, that he and his brother had had to pay it back to get the apartment back into her name, and that the money was still owing to the estate.

45. The defendant cross-examined the second plaintiff about different Arabic dialects, putting to him that people from different parts of the Arab world might have difficulty understanding others speaking Arabic from other regions. The second plaintiff

responded that his mother would understand, if not 100%, at least 85% to 90%. At the time of execution of will he said that he had told his mother, if she had any difficulty understanding, to ask him to explain the will further to her.

46. In re-examination the second plaintiff reiterated that a practising Muslim was obliged to make a will according to Muslim guidelines. Accordingly he very much doubted that his mother would have made a will dividing her estate in any other way. She had had a religious duty, clearly stated in the Koran, to make a will leaving her estate in accordance with the Muslim tradition, a law which had applied for 1400 years.

47. One of the witnesses to the will, Mohammed Haydar, gave oral evidence. He confirmed that he was the proprietor of the Jasmine Lounge restaurant at Curtin in 2002. He said that the deceased had come to the restaurant with her two sons and a justice of the peace, to sign her will. They had asked him to explain to her what the document meant in Arabic. He had sat down with her and read the will paragraph by paragraph, translating it to her. She repeatedly said "yes, yes". On a number of occasions she used the expression "As Allah wants, as God wants". She seemed to know about the will beforehand. Mr Haydar had seen her before but had not met her. He knew one of the sons (the second plaintiff). As he read each paragraph to her she expressed her agreement. When the time came to execute the will, the second plaintiff held his mother's hand and showed her where to place her thumbprint on each page of the will.

48. Mr Haydar said that the plaintiffs had made the arrangement to come to the restaurant with their mother to execute the will about two days earlier. He said that he was originally from Syria but had lived in Australia for twenty-five years. His dialect as a Syrian was slightly different to the dialect spoken by the Omari family, but he was satisfied that the mother had understood him. He agreed that he was not an accredited

translator. He added that it was well known in the Middle East that a daughter is to take half the share of a son, and that otherwise sons and daughters are to be treated equally. He said that his mother had made a will in exactly such terms. The deceased had made it clear that her will was to be made strictly in accordance with Islamic inheritance law.

49. Imam Adama Konda gave oral evidence. He is the Imam of the Canberra Islamic Centre. He originally comes from Burkina Faso (the former French colony of Upper Volta) and his native language is Mossi. He also speaks French, English and Arabic. He studied Islamic law at Medina University in Saudi Arabia, a four-year course. He confirmed that the standard expectation is that a Muslim will leave full shares to sons and half shares to daughters. He said that one boy is equal to two girls. Imam Konda has lived in Australia for seventeen years, the first fifteen years in Darwin and the last two years in Canberra. He explained that a Muslim man in making a will was obliged not to go beyond the limit of Islam, by which he made it clear that he meant that shares to the children of the testator were to be left in the proportions he had explained. He said that a Muslim person with assets was expected to make a will at a relatively early age, and in any event prior to travelling on a haj to Mecca. He conceded that if a Muslim person died not having made a will, the division of their estate would be based on the law of the country where they had been living.

50. One of the daughters of the deceased, Halima Jabal, also gave oral evidence in the case for the plaintiffs. Ms Jabal is the third child of the deceased, six years younger than the first plaintiff, nine years older than the second plaintiff and eleven years older than the defendant. Her evidence was that at the end of 2001 her mother was “all right”. Her mother was living at Flynn and she would visit her or call her by telephone every day. At one point her mother stayed at her house with her family for

eight months. It was unclear as to precisely when this was. The reason the deceased moved to live with Ms Jabal was that she had taken to leaving the house and going wandering, sometimes getting lost. It seems from Ms Jabal's evidence that her mother moved straight from her house to Villagio and did not go back to Flynn. If this is correct, it would mean that the deceased was living with Ms Jabal at the time she executed the will, but I cannot be certain about this.

51. She was asked whether she had ever talked to her mother about a will. She said that they had had such conversations during 2001 and also after her mother had moved to Villagio and that her mother had always said "I wish like Islamic way".

52. Ms Jabal conceded in cross-examination that there had been an occasion when her mother had left the stove on at Flynn and gone out, but she said that her mother still remembered everything. She had first noticed signs of dementia only after her mother had moved to Villagio in 2002. Prior to that she had been all right and had remembered everything.

53. The defendant then gave evidence. She had lived out of Australia and had not seen a great deal of her mother during the years leading up to the execution of the will. During 2001 she had visited her mother in Canberra. Her mother did not remember her name, or remember that the defendant was her daughter. She would forget what she had said and repeat herself. The defendant did not believe that her mother was capable of making a will in January 2002, or generally capable of understanding what she was doing. In addition to her dementia, she was not particularly fluent in Arabic. Arabic was her second language, Kurdish being her first, and she had not been required during her years in Lebanon to communicate a great deal in Arabic. After moving to Australia in 1978, the family had always spoken Kurdish at home. Kurdish is a completely different language to Arabic, with a different alphabet. The

defendant's belief was that before her mother moved into Villagio, she had been living with her daughter Halima for most of the time and had not been living at her own home. She also said that her mother had been found by police on several occasions wandering miles from home. She had heard this from her sister Halima.

Submissions

54. In written submissions, counsel for the plaintiffs set out as the test for testamentary capacity the statement by Cockburn CJ in *Banks v Goodfellow* (1870) 5 QB 549:

> *It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right or prevent the exercise of his natural faculties - that no insane delusions shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.*

55. Counsel for the plaintiffs submitted that the onus was on the defendant to satisfy the court that the deceased did not have testamentary capacity at the time she made her will on 13 February 2002. It does not seem to me that this is correct. If the only proceeding before the court was the application by the plaintiffs to have the defendant's caveat removed, I accept that the onus would lie on the defendant. However, having regard to the directions I made earlier in the proceeding that it proceed as an application for probate in solemn form, it seems to me that to the extent that there is an onus of proof, it lies upon the plaintiffs to establish the validity of the will. Having said that, it does not seem to me that this is a case which will turn on whether or not the onus of proof has been satisfied.

56. Counsel for the plaintiffs submits that I should be satisfied on the evidence of Mr Haydar that the plaintiff knew what she was doing when she executed the will, and

understood its effect. This was in contrast to what had happened two years earlier when the deceased had executed a power of attorney after (apparently) being told that it was a Centrelink document.

57. Counsel for the plaintiffs submitted that there was no inconsistency between the deceased satisfying the requirements for a guardianship order and retaining testamentary capacity. It was, counsel said, understandable that a person might no longer be able to make everyday decisions, but could still be aware of the extent of their assets and the claims of their family members and others on their bounty. The diagnosis of dementia by the doctors should be seen in the context of the illiteracy of the deceased and the fact that the doctors did not speak her language nor she theirs. The admission of the deceased to a nursing home within two months or so of the making of the will was not enough of itself to establish mental incapacity at the time of execution. It was also clear from the evidence that the mental condition of the deceased had deteriorated rapidly after she moved into the nursing home.

Consideration

58. I accept the contemporaneous written evidence of the treating doctors, who I see as entirely independent.

59. I accept the evidence of Mr Haydar, but I take into account the fact that he was a restaurateur with no particular qualifications or experience in assessing the mental state of an elderly lady he had not previously met. I take account of the fact that he knew the first plaintiff, and had been asked to assist the family in the somewhat unusual task of explaining and witnessing the will. It was not suggested to him at the time of execution that there was any doubt about the testamentary capacity of the deceased, and I accept that nothing occurred during the meeting at the restaurant which might have caused him to suspect that she did not understand what she was

doing, what was happening, or precisely what was the effect of the will she was executing.

60. I accept the evidence of Imam Konda as to the expectations within the Muslim faith as to the disposition of an estate by will where the testator has children.

61. I generally accept the evidence of the defendant, whilst acknowledging that she was somewhat emotional about issues within the family. I do not find it necessary to rely on her evidence on the issue of her mother's testamentary capacity at the time the will was made.

62. Whilst I accept much of the evidence of the first plaintiff, I cannot accept his evidence about his mother's intellectual capacity during the period from 2000 to 2002. I am satisfied that the evidence he gave in his affidavit in the proceedings before Connolly J was generally true. He made that affidavit in June 2003, some eighteen months after his mother had executed her will. It was in his interest, and in the interest of other members of the family, that the power of attorney his mother had signed in January 2000 be set aside as a necessary precondition to the setting aside of the transfer of the Belconnen unit to his sister Mona. It was clearly in his interest to satisfy the court that his mother had not known what she was doing when she signed the power of attorney. Nevertheless I am inclined to accept what he said in his affidavit in those proceedings, particularly having regard to its consistency with the opinions of the doctors. I accept his evidence that by January 2000 his mother was exhibiting signs of dementia, and I accept his expression of belief in June 2003 that she did not know or appreciate what she was doing when she executed the power of attorney.

63. By January 2002 it was to the forefront of the minds of the plaintiffs that their mother had not made a will. I have come to the view that they arranged for their mother to execute the will which she executed, either well knowing that she did not understand

what she was doing or what the effect of her execution of the will would be, or alternatively with indifference to whether or not she understood those matters. I accept that both of the plaintiffs generally believed that it was their mother's duty under Islam to make a will generally leaving full shares to her sons and half shares to her daughters. I accept that they generally believed that if their mother had been asked to make a will at an earlier time in her life, when she knew and understood what she was doing, that she would have made a will generally consistent with those Muslim expectations. I think that the plaintiffs in having the will prepared and arranging for their mother to execute it thought that they were doing the right thing. I do not think that either of them acted out of greed or any intention to obtain a personal benefit at the expense of anyone else.

64. However, I am satisfied that by January 2002 the plaintiff was suffering from advanced dementia causing severe cognitive impairment. I am satisfied that her dementia had been present for a number of years and had been progressing. I accept the opinion of Dr Rea that by January 2002 the dementia was well-established and the plaintiff would not have had any understanding of any document she might have been asked to have sign by that time.

65. I am satisfied, to adopt the words of Cockburn CJ in *Banks v Goodfellow*, that the deceased did not understand the nature of her act or its effects, did not understand the extent of the property of which she was disposing, and was not able to comprehend and appreciate the claims to which she ought to have been giving effect. This is so notwithstanding that if it had not been for her dementia, she might well have decided to make a will in the same or similar terms.

Conclusion

66. At the time of the execution of the will on 13 January 2002, the deceased Mariem Omari lacked testamentary capacity. The will is accordingly of no effect. There is no evidence that she had made any previous will, and on the evidence I think it more likely than not that she had never done so. There should accordingly be a declaration that she died intestate.

67. Section 38A of the *Administration and Probate Act 1929* provides that on the death of a person the real and personal property of the deceased person vests in the Public Trustee until the court makes a grant of probate or administration. Section 12 of the Act provides that this court may grant administration of an intestate estate to, *inter alia*, one more more of the next of kin of the intestate, or any other person the court considers appropriate. The court must not go beyond the prescribed categories of persons if there is anyone within those categories to whom administration may be granted who in the courts' opinion can be trusted with administration of the estate and applies to be granted administration.

68. There is a rift, or perhaps more than one rift, between the children of the deceased. I cannot assume that the plaintiffs would administer the estate and distribute it as required by the Act without the likelihood of further disputes within the family. In the absence of any other eligible person, I have come to the view that administration of the estate should be granted, on application, to the Public Trustee, in whom the assets of the estate are already notionally vested, and who has previously been involved in the affairs of the deceased. I direct that a copy of these reasons be provided to the Public Trustee for that purpose. I grant liberty to apply in case that should be necessary in relation to any aspect of the costs of these proceedings or the administration of the estate.

I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment herein of Master Harper.

Associate:

Date: 9 March 2012

Counsel for the plaintiffs:	Mr P. Christensen
Solicitor for the plaintiffs:	Hansteins Lawyers
Defendant:	In person
Date of hearing:	8, 14 September 2011
Date of judgment:	9 March 2012