SUPREME COURT OF QUEENSLAND

CITATION:	*Re Nichol; Nichol v Nichol & Anor* [2017] QSC 220
PARTIES:	**JULIE ELLEN NICHOL** (applicant) **v** **DAVID ALLAN NICHOL AND JACK DAVID NICHOL** (respondents)
FILE NO/S:	BS 219 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	9 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	16 June 2017
JUDGE:	Brown J
ORDER:	**The order of the court is that:** **1. Pursuant to s 18 of the *Succession Act* 1981 (Qld) the execution requirements of the purported testamentary document of the deceased, being an unsent text (SMS) message as exhibited to the affidavit of Julie Ellen Nichol filed 13 January 2017 and marked exhibit "A", ("the will") be dispensed with;** **2. Subject to the formal requirements of the Registrar, the will be admitted to probate in a solemn form in favour of the respondents;** **3. The letters of administration be granted to the respondents as administrators of the will;** **4. The costs of Julie Ellen Nichol, David Allan Nichol and Jack David Nichol of this proceeding on an indemnity basis be paid out of the deceased's estate, save that Julie Ellen Nichol bear her own costs in relation to the appearance on 31 January 2017.**
CATCHWORDS:	SUCCESSION – MAKING OF A WILL – TESTAMENTARY INSTRUMENTS – EXECUTION – INFORMAL DOCUMENT INTENDED TO BE WILL – GENERALLY – application pursuant to s 18 *Succession Act* 1981 (Qld) that the Court dispense with execution requirements for a will – where the deceased took his own life – where the deceased created a text message on his mobile phone shortly before he died – where text message not sent – whether unsent text message on deceased's mobile phone

stated testamentary intention – whether the deceased had testamentary capacity at the time of creating the message – whether deceased intended unsent text message to operate as his will – where the deceased otherwise intestate

Acts Interpretation Act 1954 (Qld)
Succession Act 1981 (Qld)

Banks v Goodfellow (1870) LR 5 QB 549
Briginshaw v Briginshaw (1938) 60 CLR 336
Fast v Rockman [2013] VSC 18
Frizzo v Anor v Frizzo & Ors [2011] QCA 308
Frizzo v Anor v Frizzo & Ors [2011] QSC 107
Hatsatouris v Hatsatouris [2001] NSWCA 408
Konui v Tasi & Anor [2015] QSC 74
Lindsay v McGrath [2016] 2 Qd R 160
Mellino v Wilkins [2013] QSC 336
Re Estate of Hodges: Shorter v Hodges (1998) 14 NSWLR 698
Re Kelsall [2016] VSC 724
Re Masters (deceased) (1994) 33 NSWLR 446
Re Yu [2013] QSC 322

COUNSEL: R D Williams for the applicant
J K Meredith for the respondent

SOLICITORS: MLDG Lawyers for the applicant
Lewis & McNamara Solicitors for the respondent

[1] **BROWN J**: I have two competing applications before me in relation to this matter. One application is for a grant of letters of administration on intestacy, the other is an application that an unsent text message on the mobile phone of Mark Nichol, the deceased, be treated as a will pursuant to s 18 of the *Succession Act* 1981 (Qld) and the execution requirements be dispensed with.

[2] The application for a grant of letters of administration on intestacy is brought on behalf of the deceased's widow. She and the deceased had been married for one year and had been in a relationship for three years and seven months. It is uncontroversial that the relationship had problems and that the applicant had left the deceased on at least three occasions, the final time being some two days prior to his death. It should be said, notwithstanding that the applicant had moved out, she still made arrangements to take the deceased to his mental health appointments and that they spent the weekend prior to his death together, cleaning garden clippings and boxing books for Lifeline. The deceased had a son Anthony who supports the application.

[3] The other application for a declaration pursuant to s 18 of the *Succession Act* 1981 (Qld) in respect of the unsent text message left on the mobile phone of the deceased is brought on behalf of the respondents, the deceased's brother David Nichol and nephew Jack Nichol. The unsent text message was made, it appears, some time prior to 11 October 2016. The mobile phone with the message was found with the deceased when he was discovered by the applicant on 10 October 2016. Tragically the deceased took his own life.

[4] The deceased is survived by,inter alia, his brother Bradley Nichol and his mother, both of whom support the respondents' application.

The law

[5] Section 18 of the *Succession Act* 1981 (Qld) provides:

> "(1) This section applies to a document, or a part of a document, that -
> (a) purports to state the testamentary intentions of a deceased person; and
> (b) has not been executed under this part.
> (2) The document or the part forms a will, an alteration of a will, or a full or partial revocation of a will, of the deceased person if the court is satisfied that the person intended the document or part to form the person's will, an alteration to the person's will or a full or partial revocation of the person's 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 way in which the document or part was executed; and
> (b) any evidence of the person's testamentary intentions, including evidence of statements made by the person.
> (4) Subsection (3) does not limit the matters a court may have regard to in making a decision under subsection (2).
> (5) This section applies to a document, or a part of a document, whether the document came into existence within or outside the State."

[6] In *Lindsay v McGrath*[1] the Queensland Court of Appeal adopted the three conditions for the execution requirements of a will to be dispensed with, as outlined by Powell JA in *Hatsatouris v Hatsatouris*.[2] Those requirements are:

> "(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?"

[7] Boddice J in *Lindsay v McGrath* said:[3]

> "[60] Great care is to be taken in the evaluation of the relevant evidence. To satisfy the onus, the evidence must show more than that the particular document sets out the deceased's testamentary intentions or that it is consistent with other statements the deceased made about what he or she wanted to happen to the property upon death. The evidence must establish on the balance of probabilities that the deceased wanted the particular document to be his or her final Will, and did not want to make any changes to that document.
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> …

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1 [2016] 2 Qd R 160 at [55] per Boddice J with whom Gotterson JA agreed.
2 [2001] NSWCA 408 at [56].
3 [2016] 2 Qd R 160 at [60],[62].

> [62] Documents which contain only preliminary, tentative or incomplete expressions of a deceased's testamentary intentions, or which on the evidence are demonstrated to have been prepared for consideration, further thought, deliberation or possible provision, will not suffice for the purposes of s 18 as the evidence will not establish the document in question embodied the settled testamentary intentions of the deceased."

[8] The court must also be satisfied that the deceased had testamentary capacity at the time of creating the document. In determining whether the deceased had testamentary capacity at the time he created the unsent text message, the onus is on the respondent. Boddice J in *Konui v Tasi & Anor* stated:[4]

> "A presumption of testamentary capacity does not exist in the absence of a formally executed Will. The onus of proving testamentary capacity where there is an informal Will lies on the party seeking to convince the court the deceased intended the informal document to constitute his or her Will."

[9] In examining the evidence, the court must have regard to the fact that the evidence is to be evaluated in accordance with the principle in *Briginshaw*.[5] When an informal document is to be admitted to probate, *Briginshaw* dictates that reasonable satisfaction should not be obtained by "inexact proofs, indefinite testament, or indirect inferences."[6]

[10] The classic statement of what constitutes testamentary capacity was set out by Cockburn CJ in *Banks v Goodfellow*.[7] Applegarth J in *Frizzo & Anor v Frizzo & Ors* stated that:[8]

> "The classic test for testamentary capacity was enunciated in *Banks v Goodfellow*. The relevant principles were restated by Powell JA in *Read v Carmody*:
>
> 1. The testatrix must be aware, and appreciate the significance, of the act in the law upon which she is about to embark;
> 2. The testatrix must be aware, at least in general terms, of the nature, extent and value of the estate over which she has a disposing power;
> 3. The testatrix must be aware of those who may reasonably be thought to have a claim upon her testamentary bounty, and the basis for, and nature of, the claims of such persons;
> 4. The testatrix must have the ability to evaluate, and discriminate between, the respective strengths of the claims of such persons.
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> In this last respect, in the words of *Banks v Goodfellow*, no disorder of the mind should poison her affections or pervert her sense of right, nor any insane delusion influence her will, nor anything else prevent the exercise of her natural faculties.

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4 [2015] QSC 74 at [43].
5 *Briginshaw v Briginshaw* (1938) 60 CLR 336, 342.
6 *Re Kelsall* [2016] VSC 724 at [19]-[21] per McMillan J.
7 (1870) LR 5 QB 549 at 565 confirmed by the Court of Appeal in *Frizzo v Anor v Frizzo & Ors* [2011] QCA 308.
8 [2011] QSC 107 at [21]-[22] confirmed by the Court of Appeal in *Frizzo v Anor v Frizzo & Ors* [2011] QCA 308 at [24].

> The *Banks v Goodfellow* test does not require perfect mental balance and clarity; rather, it is a question of degree. As Cockburn CJ put it in that case, 'the mental power may be reduced below the ordinary standard' provided the testatrix retains 'sufficient intelligence to understand and appreciate the testamentary act in its different bearings'." (footnotes omitted)

[11] In the present case there is no presumption of validity which arises given there is no duly executed will that is rational on its face. The onus is on the party propounding the informal will, in this case the respondents, to prove that the deceased had testamentary capacity at the time he made the will.

Text message

[12] The deceased's mobile phone was found by the applicant on a work bench in the shed where the deceased's body was found. The following day, Alicia McDonald, a friend of the applicant, at the request of the applicant accessed the mobile phone to look through the contact list to determine who should be informed of the deceased's death. She informed the applicant she had found an unsent text message. The applicant informed Bradley Nichol and Jack Nichol, who took a screen shot of it.[9]

[13] A copy of the text message is exhibit A of the applicant's affidavit.[10] It reads:

> "Dave Nic you and Jack keep all that I have house and superannuation, put my ashes in the back garden with Trish Julie will take her stuff only she's ok gone back to her ex AGAIN I'm beaten . A bit of cash behind TV and a bit in the bank Cash card pin 3636
>
> MRN190162Q
>
> 10/10/2016
>
> My will"

[14] The abbreviation "MRN190162Q" matches the deceased's initials and date of birth, 19 January 1962. There is a paperclip symbol on the left hand side of "My will" and a smiley face on the other side.

[15] There is no dispute that the text message was addressed to the deceased's brother, David Nichol, whose contact details were stored in the deceased's mobile phone under the abbreviated name "Dave Nic".

[16] While the applicant accepts that the text is testamentary in nature, the applicant contends that the court cannot be satisfied on the balance of probabilities applying *Briginshaw* that:

(a) The deceased by some act or words, demonstrated that it was his then intention that the text message, should, without more on his part, operate as his will; or that,

(b) The deceased had testamentary capacity at the time he created the text message.

[17] In support of the first matter, the applicant particularly attaches significance to the fact that the deceased did not send the text message, which she contends is consistent

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9 Affidavit of J E Nichol CFI3 at [21]-[23].

10 Affidavit of J E Nichol CFI6.

with the deceased not having made up his mind. The applicant also relies on the fact that the deceased and the applicant had a difficult relationship and the deceased had not made a will despite an earlier suicide attempt.

[18] Conversely, the respondents submit that the document on the mobile phone was described as "my will" and contained details reflecting that it operate as a will, as well as extrinsic evidence supporting the deceased's testamentary intentions.

[19] Further, the respondents contend that the message on its face shows it was to have effect upon death, with directions given as to where the deceased's wallet was located and his pin number with respect to his bank account. Those specifics indicated a premediated intention when drafting the will.

[20] The respondents submit that the fact the text message was not sent does not indicate that the text message was not intended to have effect. They submit that the likely intent of the deceased was that the text message be found after he had killed himself. If he had sent that message before he took his life then David Nichol or Jack Nichol would have invariably attempted to take steps to try to stop the deceased.

[21] The respondents contend that there is no indication that the deceased lacked testamentary capacity. The applicant disputes that the evidence is sufficient for the Court to determine that the deceased had testamentary capacity at the time, given that the deceased had a history of depression, and apparently had previously attempted suicide.

The Evidence

[22] There is no evidence of any other will. Although the deceased told the applicant he had made a will using a 'Will Kit' following the death of his wife Patricia, that has not been found.[11] According to the deceased's mother,[12] the deceased told her in January 2015 that he did not have a will and that he had written something out and put it behind the china cabinet and he was sharing the house between the boys. No such document was found after the deceased's death. She also stated that in January 2015 the deceased had told her that the applicant had left him.

[23] Expert evidence was presented on behalf of the respondents following a forensic examination of the deceased's mobile phone by Dr Bradley Schatz. That report confirmed, inter alia:

(a) The text message had not been sent;
(b) That its content indicated that it was created on 10 October 2016 but the time which it was created could not be pinpointed other than that it was created at some time prior to 4:25pm on 11 October 2016;[13]
(c) That the unsent text message was likely to be saved by someone pressing the back arrow in the message editing views; and,
(d) When the draft message is opened for editing, a paperclip symbol is visible which, when pressed, enables the attachment of a picture or other to the message.[14]

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11 Affidavit of J E Nichol CFI3 at [25]. Even if such a will existed it would have been revoked by the deceased's marriage to the applicant.
12 Affidavit of P A Cran CFI14 at [8].
13 Affidavit of B Schatz CFI29 ex BS1 at [29] and [30].
14 Affidavit of B Schatz CFI29 ex BS1 at [32].

[24] The evidence of Dr Schatz confirmed what was evident on the face of the message as well as the fact that there was no other document on the mobile phone that might be relevant to the deceased's testamentary intention in the days immediately prior to and including 10 October 2016.[15]

[25] The assets of the deceased when he died are identified as:
(a) A house at 23 Bottomley Street, Brassall, which is not the subject of a mortgage;
(b) An AMP account which is a superannuation account;
(c) An Australian Super account;
(d) Household effects;
(e) Possible membership of a class action.[16]

[26] The superannuation of the deceased may not form part of the deceased's estate and a beneficiary of it may have been nominated separately. I note the applicant has applied to the trustee seeking that the death benefits be paid to her as the deceased's spouse.[17]

[27] If the intestacy rules apply, the deceased's estate will be divided between his wife, the applicant and his son, Anthony.

[28] There has been a lot of affidavit material provided to this Court regarding this matter. Some of that material is unnecessarily inflammatory and unhelpful. There is obvious antagonism between the applicant and the respondents. No cross-examination of any of the witnesses occurred.

[29] Evidence was given by David Nichol.[18] He deposes to the deceased having some conversations with him prior to his death. On or about Easter 2016 he apparently told David that if anything was to happen, he wanted all his possessions including his house and his superannuation to go to David and Jack. David responded "don't be stupid". The deceased then apparently continued "Julie is to have nothing. You, David are only in the family not established".[19]

[30] Evidence was also given of various statements by the deceased to his siblings, a very close friend of his, Sarah Hawkins, and a former close friend of the applicant, Julie Soares, which referred to the ups and downs of the relationship between the deceased and the applicant and criticisms made by the deceased of the applicant. Ms Soares stated that the applicant had left the deceased on a number of occasions. The applicant agreed that there were three such occasions, but disputed the other occasions. .

[31] The applicant does not dispute that she and the deceased had had disagreements. She deposes that the deceased on occasions became abusive, particularly after he had been drinking. They had however reconciled after the times she had left prior to the last occasion; whether that would have again been the case after the last separation can never be known.

[32] There was a suggestion that the applicant had left the deceased to return to her first husband. The applicant states that she is only friends with her ex-husband, who is the father of her two sons. It is not a matter upon which I need to make a finding, however

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15 Affidavit of B Schatz CFI29 ex BS1 at [33].
16 Affidavit of J E Nichol CFI9 at [1]-[2].
17 Affidavit of J E Nichol CFI9 at [2].
18 Affidavit of D A Nichol CFI13.
19 Affidavit of D A Nichol CFI13 at [8]-[9].

I should say that the evidence before me does not establish that the applicant had any relationship with her first husband after leaving the deceased other than one of friendship. That is not to say the deceased was not jealous about the applicant's relationship with her ex-husband. The applicant's own evidence is that on occasion when the deceased was drunk he did say things which showed he was jealous but when he was sober he seemed to accept they were just friends.[20]

[33] While there is evidence that the applicant and the deceased had a fairly rocky relationship, they were observed to have had happier times. For instance, the evidence of Jack Nichol is that they spent an evening with him and his friends on or about 2 October 2016 without any incident.[21] The respondents have presented evidence which seeks to cast the applicant and her relationship with the deceased in a very negative light. That evidence has been significantly disputed by the applicant. I find on the basis of the evidence that is not in dispute, that the deceased and the applicant had difficulties in their relationship and had separated on a number of occasions for short periods of time, the most recent occasion being just days before the deceased took his own life.

[34] As to the deceased's relationship with his son, Anthony, the respondents contend that the two did not have any real relationship. The deceased's mother gave evidence that she and the deceased had limited contact with Anthony after Anthony's mother and the deceased had broken up. She stated the deceased was reluctant to talk about Anthony. Anthony did however attend his father's funeral.[22] Bradley Nichol gave evidence that the deceased had indicated to him on an unidentified occasion that he did not talk to Anthony.[23]

[35] The applicant[24] and the deceased's first long term partner, Ms Maras,[25] depose as to the fact the deceased did have a relationship with his son Anthony, although Ms Maras acknowledges that there were difficulties in their relationship and that there were significant periods when the deceased and Anthony did not communicate. Anthony did not give evidence.

[36] No medical evidence was placed before me in relation to the deceased's mental state and particularly of the effects of his apparent depression. It does appear he attempted to commit suicide in June 2016 by driving into a pole, which is deposed to by the applicant and is supported by statements he made to his friend, Sarah Hawkins.[26]

[37] According to the applicant, the deceased had engaged in counselling after the apparent suicide attempt in June 2016.[27]

[38] There is evidence that the deceased was edgy when he was at Hervey Bay and saw his mother in or about September 2016.[28] He appeared anxious and depressed when

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20 Affidavit of J E Nichol CFI29 at [26].
21 Affidavit of J D Nichol CFI27 at [9]-[14].
22 Affidavit of P A Cran CFI25 at [4], [6] and [7].
23 Affidavit of B C Nichol CFI26 at [7].
24 Affidavit of J E Nichol CFI29 at [19] and [21].
25 Affidavit of T Maras CFI30.
26 Affidavit of S Hawkins CFI15 at [10].
27 Affidavit of J E Nichol CFI3 [14].
28 Affidavit of P A Cran CFI25 at [4], [6] and [7].

he saw his brother at Hervey Bay in September 2016.[29] None of this evidence suggests he was not acting rationally.

[39] The applicant and the deceased had an altercation while in Hervey Bay which resulted in the applicant calling the police because according to the applicant, the deceased had punched the window of the caravan. She states on 3 October 2016 she told the deceased she could no longer live with him.[30]

Consideration

Is section 18 of the Succession Act satisfied?

[40] In terms of the first requirement that needs to be established in order for the court to dispense with the execution requirements for a will under s 18 of the *Succession Act* 1981 (Qld), neither party disputed that the text message could constitute a document. Although not precisely on point, the case of *Re Yu*[31] held that documents that had been created on an iPhone constituted a document for the purposes of s 5 of the *Succession Act*. Section 5 of the *Succession Act* refers to s 36 of the *Acts Interpretation Act* 1954 (Qld) which defines a document to include:

> "…any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device)."

[41] I am satisfied that the text message is an electronic document and the text message does satisfy the definition of document.

[42] The second requirement is that the document purports to state the testamentary intentions of the deceased. Testamentary intentions are the intentions about what is to be done with a person's property upon the person's death.[32] In *Re Masters (deceased)*[33] Mahoney JA observed:

> "… the document must state the deceased's 'testamentary intentions', that is, his wishes or intentions as to how, voluntarily, his property is to pass or be disposed of after his death."

[43] There are a number of matters which suggest the text message does state his testamentary intentions;

(a) The text message says at the bottom it is "my will";
(b) The message identifies the house and superannuation which are his principal assets about which he also says "keep all that I have";
(c) He refers to "Julie will take her stuff only she's ok gone back to her ex AGAIN I'm beaten";
(d) He identifies that he has cash in the bank and provides the pin number; and,
(e) He identified where he wanted his ashes placed.

[44] There is no evidence that the deceased had any significant assets beyond the house and possibly the superannuation. While the deceased does not provide any description

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29 Affidavit of B C Nichol CFI26 at [12], [22].
30 Affidavit of J E Nichol CFI3 at [15]-[16].
31 [2013] QSC 322 at [4]-[5].
32 *Lindsay v McGrath* [2016] 2 Qd R 160 at [45] per Boddice J with whom Gotterson JA agreed.
33 (1994) 33 NSWLR 446, 455.

of personal household effects, they are arguably encompassed within "keep all that I have" before "house and superannuation". There is an omission of his membership of a class action but given its uncertain status, since it had not been determined or resolved, that is unsurprising.

[45] The informal nature of the text does not exclude it from being sufficient to represent the deceased's testamentary intentions. In the case of *Mellino* the testator had written "my will" on a DVD, had discussed his intentions to suicide in the DVD and then was at pains to define what property he owned. Although very informal, the court accepted that the document purported to dispose of that property after his death and made a declaration under s 18 of the *Succession Act*.

[46] I consider that the terms of the text message were intended by the deceased to represent how he wished his property to be distributed upon his death and that the second requirement is satisfied on the basis that the text does state the deceased's testamentary intentions.

[47] The third requirement that the court must be satisfied of on the evidence is that the deceased either at the time of drafting the document, or subsequently, formed the intention that the particular document operate as his or her will. That requirement does not involve establishing that the deceased consciously set his or her mind to the legal formalities of making a testamentary document. However it is not enough that the document set out the deceased's testamentary intentions. What must be established by the evidence is that the deceased intended the document to operate to dispose of the deceased's property upon death.[34] As set out above, it must also be shown by the respondents that the deceased had testamentary capacity.

[48] The applicant contends that there are features and circumstances that indicate the deceased did not intend the text message "without more on his part" to operate as his will and further contends that the deceased did not have testamentary capacity at the time of creating it. In this regard, the applicant relies on the fact that:

(a) The text message was not sent. If the deceased had intended it to take effect, he could have sent it to indicate his adoption or authentication of the message as representing his settled testamentary intentions.
(b) The deceased and the applicant had a difficult relationship and on various occasions the applicant had moved out of their home and then returned;
(c) The deceased had for some time been depressed and had apparently attempted to commit suicide some four months before his death and was engaged in counselling; and,
(d) The deceased despite the earlier suicide attempt had not made a formal will.

[49] The applicant contends that the Court cannot be satisfied on the balance of probabilities that the third requirement is met and that the deceased had testamentary capacity at the time of creating the text message.

[50] The respondents however submit that the third requirement is satisfied on the basis that:

(a) There is no medical evidence to indicate that the deceased did not have capacity;
(b) The deceased referred to the text message as "my will". The document clearly states that his estate is to pass to the respondents. Given that the text message

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34 *Lindsay v McGrath* at [59] per Boddice J.

was created at some time prior to 4:25pm on 11 October 2016 when the deceased was contemplating his death, the circumstances were such that he was aware of the significance of the unsent text message when he was creating it;

(c) It is likely on the balance of probabilities that the deceased would have known the nature, extent and value of his estate, given it was a small one with a house and superannuation policies being the main assets. The deceased and applicant had a short marriage which had been punctuated by at least three occasions of separation;
(d) His son Anthony was estranged from him;
(e) The respondents both swear to being close to the deceased; and,
(f) The deceased was level-headed enough on 9 October 2016 to ask the applicant to attend at his house the following day to feed the dogs.

[51] The fact that the proposed testator has committed suicide does not raise a presumption against testamentary capacity.[35]

[52] Evidence has been given by the deceased's siblings, his mother and the applicant describing the deceased's conduct in the period leading up to his death. While the deceased appeared to be down and receiving counselling, the evidence of his interactions with his siblings and the applicant demonstrates that he was able to function and think normally. He had been working with his brother in late September and the day before he committed suicide he and the applicant were cleaning out garden clippings and boxing books to go to Lifeline. No-one including the applicant describes the deceased as acting erratically, irrationally or being so afflicted by depression that it was affecting his ability to think or function.

[53] The terms of the text message and his specification that it was "my will" and that it addressed the disposition of his assets shows that the deceased appreciated the significance of what he was doing by creating the text message. The reference to his house and superannuation and his specification that the applicant was to take her own things indicates he was aware of the nature and extent of his estate, which was relatively small. While he decided to leave his estate to his brother and nephew and not to the applicant, his express reference to the applicant shows that he did appreciate those who had a claim upon his testamentary bounty and determined to discriminate between them. Though he did not refer to his son in the text message, that was consistent with the fact that he had not had constant contact with his son and that they had periods of estrangement, even though his son could make a family provision application.

[54] His interaction with the applicant, his brother Bradley and nephew Jack prior to his death demonstrates that he was acting and thinking in a rational manner and was not afflicted by some condition which prevented the ordinary exercise of his faculties. That is supported by the terms of the text message itself which on its face shows the deceased was cognisant of the need to have a will and had thought about the disposition of his assets and who should benefit and who should not.

[55] The conduct of the deceased did not betray to the applicant that the deceased was going to take his own life. On the day when the deceased ended his own life, there is no evidence that he spoke to anyone. He had last spoken to the applicant when she

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35 *Re Estate of Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 at 707 (*Re Estate of Hodges*); see also *Re Yu* [2013] QSC 322 (*Re Yu*) and *Mellino v Wilkins* [2013] QSC 336 (*Mellino*).

was leaving the house the day before. He had asked her to stay with him until he obtained employment. She refused. She told him she would visit him the next day but not stay overnight. He then indicated that she should come over the following day to feed the dogs because he would not be there.

[56] The matters referred to by the applicant to suggest he may have lacked testamentary capacity indicate that the deceased was unhappy and that there were difficulties in his relationship with the applicant but no more. The fact he was jealous of the applicant's relationship with her ex-husband does not indicate a lack of capacity but accords with normal human emotions. Similarly the lack of making a formal will after he had previously attempted suicide is consistent with the fact that he was receiving counselling and controlling his suicidal thoughts, rather than suggesting he lacked the testamentary capacity to make a will or that he did not intend the text message to operate as a will.

[57] Notwithstanding the absence of medical evidence in the circumstances, I find that on the balance of probabilities the respondents have established that the deceased had testamentary capacity at the time of creating the text message.

[58] That leaves the question of whether the evidence is sufficient to satisfy the Court that it was the deceased's intention that the unsent text message should, without more on his behalf, operate as his will. The evidence must be scrutinised carefully and the Court must be satisfied that, on the balance of probabilities, the deceased wanted that particular draft to be his final will and did not want to make any changes to the document.[36]

[59] The following circumstances satisfy me to the requisite standard that the deceased did intend the text message, without more, to operate as his final will on his death at the time he completed it on or about 10 October 2016:

(a) The fact that the text message was created on or about the time that the deceased was contemplating death such that he even indicated where he wanted his ashes to be placed;[37]
(b) That the deceased's mobile phone was with him in the shed where he died;
(c) That the deceased addressed how he wished to dispose of his assets and expressly provided that he did not wish to leave the applicant anything;
(d) The level of detail in the message including the direction as to where there was cash to be found, that there was money in the bank and the card pin number, as well as the deceased's initials with his date of birth and ending the document with the words "my will"; and,
(e) He had not expressed any contrary wishes or intentions in relation to his estate and its disposition from that contained in the text message.

[60] Even though the message did not refer to the appointment of an executor that does not dissuade me from concluding he intended the text message to operate as his will upon his death. The text message addressed the disposition of his assets (although he may have misunderstood the position with respect to his superannuation) and was specifically identified as his will. The terms of the text message reflect that the

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36 *Lindsay v McGrath* [2016] 2 Qd R 160 at [60]; *Fast v Rockman* [2013] VSC 18 at [48].

37 The fact he wished his ashes to be placed with his second wife is consistent with his mother's evidence that he had never got over her death from cancer and that he was estranged from the applicant at the time.

deceased wished the document to be his final will and was not merely an emotional expression of wishes.

[61] I do not consider the fact that the message was saved as a draft message[38] and that he did not send it, is evidence that he did not wish the text message to be operative as his will. Rather, I find that having the mobile phone with him at the place he took his life so it was found with him and not sending the message, is consistent with the fact that he did not want to alert his brother to the fact that he was about to commit suicide, but did intend the text message to be discovered when he was found.

[62] The surrounding circumstances also support the terms of the text as representing his testamentary intentions and that he intended it to be operative as his will, without more on his part.

[63] I accept the evidence that the deceased maintained a relationship with the respondents. I consider that at least at the time of his death the deceased regarded his relationship with the applicant as at an end, given that she had moved out and that he had asked her to stay with him until he was employed which she had rejected. Their relationship was relatively short. Thus her exclusion in those circumstances is explicable and does not indicate that he did not intend the message to be operative on his death as a will. His message makes it clear he contemplated her claim on his assets at the time he typed it.

[64] The deceased and Anthony had not maintained consistent contact and there were considerable periods where they did not communicate at all. According to the evidence of Ms Maras, the last contact between them was some three or four months prior to the deceased's death. The lack of a constant relationship between the deceased and Anthony provides a rational explanation as to why Anthony was not referred to in the text message and the subject of his father's testamentary intentions.

[65] There is no evidence that the deceased had stated to anyone that he intended to leave either the applicant or Anthony anything in his will, even though both could make a family provision application.

[66] The evidence that the deceased had spent time with his brother David and his nephew Jack and maintained close relationships with them is not the subject of dispute.[39] Statements are said to have been made to David and his mother which are consistent with his desire to leave his assets to his brothers. He had recently spent time with his nephew Jack in early October. However, since the respondents stand to benefit if the text message is treated as a will, I have treated their evidence with caution and weighed it against all of the evidence.

[67] In all of the circumstances I consider that the text message was intended by the deceased to operate as his will upon his death.

Costs

[68] The respondents submit that they should be entitled to their costs on an indemnity basis to be paid from the estate and that the applicant should not be entitled to any

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38 Affidavit of B Schatz CFI29 ex BS1 at [25]-[27].

39 Affidavit of D A Nichol CFI13 at [2] and [10]; Affidavit of J D Nichol CFI20 at [3]; CFI27 at [4]; Affidavit of J E Nichol CFI29 at [17].

costs on her application. They claim the relief sought by the applicant, being an application for letters of administration on intestacy with alternatively a declaration that the text should be declared to be a will under s 18 of the *Succession Act*, is flawed. They contend the applicant should have reasonably accepted, prior to filing her application, that the proposed application for a s 18 will on the basis of the text message should first be made by the respondents. They further contend that the applicant should not be entitled to any costs in relation to the adjourned hearing on 31 January 2017 which they say was unnecessary given the applicant knew the respondents were intending to apply for the statutory will and obtain expert evidence. They accept that the applicant would be otherwise be entitled to the costs on an indemnity basis of responding to their application.

[69] I appreciate that the respondents had foreshadowed to the applicant that it was their intention to make an application that the text message be declared to be an informal will. However, I do accept that the applicant was not unjustified in bringing her application first or in doing so acted unreasonably. She is the deceased's wife. Her behaviour in bringing the application is consistent with attempting to resolve the matter. She is entitled to bring a family provision application, notwithstanding the declaration that the text message is the deceased's will.

[70] It is clear that the relationship between the parties is unfortunately presently acrimonious and as such the subject of the making of the application is unlikely to have been a matter upon which agreement could have been reached. The application was necessary to determine whether the text message constitutes a will of the deceased. I do not consider the costs would have altered significantly (save for a filing fee) if the application had been brought by the respondents. The applicant would have been a proper party and the evidence presented on behalf of the applicant would still have been relevant. I reject the respondents' contention that the applicant should not be paid her costs of the application on an indemnity basis out of the estate.

[71] There are matters which must be considered separately in terms of the hearing of 31 January 2017 which was adjourned so that the respondents could obtain the report of Dr Schatz. The applicant did not dispute the terms of the message or the date on which it was made.[40] However, the respondents bore the onus to satisfy the Court that the text message satisfied the requirements of s 18 of the *Succession Act* and sought to identify through Dr Schatz, inter alia, whether there was any extrinsic evidence from other material on the mobile phone relevant to the deceased's testamentary intentions and whether there was any significance with respect to the paperclip symbol in the text message.[41] Although the evidence of Dr Schatz confirmed what was already evident on the face of the message, I do not consider they were unreasonable in seeking to obtain the report. As the respondents were successful in obtaining an adjournment of the hearing of 31 January 2017 and had indicated they wished to obtain the report of Dr Schatz prior to the hearing, I do not consider the applicant should be entitled to be paid the costs of the appearance on that day out of the estate.

Conclusion

[72] I therefore order as follows:

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[40] T1-3/43-46; T1-6/9-14; T1-5/33-35.
[41] T1-4/12-13; T1-4/20-22.

1. That pursuant to s 18 of the *Succession Act* 1981 (Qld) the execution requirements of the purported testamentary document of the deceased, being an unsent text (SMS) message as exhibited to the affidavit of Julie Ellen Nichol filed 13 January 2017 and marked exhibit "A", ("the will") be dispensed with;

2. That subject to the formal requirements of the Registrar, the will be admitted to probate in a solemn form in favour of the respondents;

3. That the letters of administration be granted to the respondents as administrators of the will;

4. That the costs of Julie Ellen Nichol, David Allan Nichol and Jack David Nichol of this proceeding on an indemnity basis be paid out of the deceased's estate, save that Julie Ellen Nichol bear her own costs in relation to the appearance on 31 January 2017.