



NCAT
NSW Civil &
Administrative
Tribunal

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Case number **2019/00110924**

Stanislaus Rydzewski & Andrew John Snopkowski
c/- Darryl Ian Browne
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29 April 2021

Case title	Stanislaus Rydzewski known as 'DVB' & Andrew John Snopkowski known as 'DVC' v NSW Trustee and Guardian & Janina (Jenny) Rydzewski & Krystina Rydzewski Application under NSW Trustee and Guardian Act 2009
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Please find enclosed a copy of the written statement of reasons for the decision of the Tribunal made on 30 March 2021.

Registrar
gcox0



Civil and Administrative Tribunal New South Wales

Case Name: **DVB v NSW Trustee and Guardian**

Medium Neutral Citation: [2021] NSWCATAD 105

Hearing Date(s): 7 – 9 September 2020 and by written submissions dated 22 September 2020

Date of Orders: 30 March 2021

Date of Decision: 30 March 2021

Jurisdiction: Administrative and Equal Opportunity Division

Before: A Britton, Principal Member

Decision: The decision of the NSW Trustee and Guardian to take no further action to have the disputed transfer set aside, made on 11 January 2019 and affirmed on internal review on 12 March 2019, is set aside. In substitution for that decision the NSW Trustee and Guardian is to commence action in the NSW Supreme Court in accordance with these reasons for decision.

Catchwords: ADMINISTRATIVE LAW — review of decision of NSW Trustee and Guardian under NSW Trustee and Guardian Act 2009 (NSW), s 62 — decision not to commence legal action to set aside transfer of protected person’s property — whether decision is the correct and preferable decision

EQUITY — unconscionable conduct — special disadvantage — whether unconscientious advantage taken — undue influence

CONTRACTS — unfair contracts — Contracts Review Act 1980 (NSW) – whether the contract was unjust in the circumstances relating to the contract at the time it was made

Legislation Cited: Administrative Decisions Review Act 1997 (NSW)
NSW Trustee and Guardian Act 2009 (NSW)
Succession Act 2006 (NSW)

Contracts Review Act 1980 (NSW)
Guardianship Act 1987 (NSW)
Legal Profession Uniform Law Application Act 2014
(NSW)

Cases Cited:

Attorney-General v Parnter (1792) 29 ER 632
Atwell v Morgan [2019] WASC 182
Blomley v Ryan (1956) 99 CLR 362; [1956] HCA 81
Bridgewater v Leahy (1998) 194 CLR 457; [1998]
HCA 66
Commercial Bank of Australia Ltd v Amadio (1983)
151 CLR 447; [1983] HCA 14
Croft v Sanders [2019] NSWCA 303
Degiorgio v Dunn (No 2) (2005) 62 NSWLR 284;
[2005] NSWSC 3
Donaghy v The Council of the Law Society of New
South Wales [2013] NSWCA 154
Gibbons v Wright (1954) 91 CLR 423; [1954] HCA 17
Hanna v Raoul [2018] NSWCA 201
Kakavas v Crown Melbourne Ltd (2013) 250 CLR 392;
[2013] HCA 25
McDonald v Guardianship and Administration Board
[1993] 1 VR 521
Mentink v Olsen [2020] NSWCA 182
Murphy v Doman [2003] NSWCA 249
Nicholson v Knaggs [2009] VSC 64
Olsen v Mentink [2019] NSWSC 1299
Olsen v Mentink [2019] NSWSC 1299
Re Estate of Griffith (dec'd); Easter v Griffith (1995)
217 ALR 284
Revie v Druitt [2005] NSWSC 902
Szozda v Szozda [2010] NSWSC 804
Thorne v Kennedy (2017) 263 CLR 85; [2017] HCA 49
Tobin v Ezekiel; Estate of Lily Ezekiel [2011] NSWSC
81
Youssef v NSW Legal Services Commissioner [2020]
NSWCATOD 85

Texts Cited:

Nil

Category:

Principal judgment

Parties:

Stanislaus Rydzewski (First Applicant)
Andrew Snopkowski (Second Applicant)
NSW Trustee and Guardian (First Respondent)
Janina (Jenny) Rydzewski (Second Respondent)
Krystina Rydzewski (Third Respondent)

Representation:

Counsel:
H Bennett (First and Second Applicants)

M Daniels (Second and Third Respondents)

Solicitors:

Browne Linkenbath Legal Services (First and Second Applicants)

NSW Trustee and Guardian (First Respondent)

Laurence & Laurence Commercial Lawyers (Second and Third Respondents)

File Number(s): 2019/00110924

Publication Restriction: N/A

REASONS FOR DECISION

Introduction

- 1 In October 2017, then 92-year-old Maria Rydzewski signed documents transferring three residential properties, two to her daughter-in-law, Jenny Rydzewski, and one to her grand-daughter Krystina Rydzewski, each for consideration of \$1 (the **disputed transfer**). The total value of the properties was estimated to be \$1,840,000 at the date of transfer.
- 2 Maria inherited the properties from her daughter Danuta, with whom she had been living until shortly before Danuta's death in July 2016. As she died intestate, by the operation of the *Succession Act 2006* (NSW), Maria inherited Danuta's entire estate.
- 3 Maria has three surviving children, Kevin Rydzewski, Wieslawa Snopkowski, and Stanislaus (Stan) Rydzewski. Wieslawa has been diagnosed with dementia and since December 2016 has been living in residential aged care. Wieslawa's husband, Andrew Snopkowski, and Stan Rydzewski are the applicants in these proceedings. Jenny Rydzewski, Krystina Rydzewski (daughter of Kevin and Jenny Rydzewski) and the NSW Trustee and Guardian (the **Trustee**) are the respondents in these proceedings.
- 4 In April 2018, the Guardianship Decision of the NSW Civil and Administrative Tribunal (**NCAT**) found that Maria lacked capacity to manage her affairs and made orders committing the management of her estate to the Trustee. In addition, the Tribunal made a guardianship order in respect of Maria, appointing the NSW Public Guardian as Maria's guardian.
- 5 In May 2018, the solicitor acting for Stan and Andrew, Darryl Browne, of the firm Browne Linkenbach Legal Services, wrote to the Trustee requesting that Jenny and Krystina be asked to return the properties the subject of the disputed transfer, and, if they refused, to commence action on behalf of Maria in the NSW Supreme Court "seeking appropriate redress". Mr Browne asserted that the disputed transfer could be set aside on several grounds,

including Maria's alleged lack of mental capacity, unconscionable conduct, undue influence and because the transfer was "unjust" within the meaning of the *Contracts Review Act 1980* (NSW).

- 6 After investigation and referral to external lawyers for advice, the Trustee decided not to commence legal action to set aside the transfers. In March 2019, after conducting an internal review, the Trustee affirmed that decision.
- 7 Dissatisfied with that decision, Stan and Andrew have applied to NCAT for administrative review. They urge the Tribunal to set aside the Trustee's decision and, in substitution for that decision, to make a decision that the Trustee commence legal action to have the disputed transfer set aside. The respondents, on the other hand, urge the Tribunal to affirm the Trustee's decision.
- 8 In making the "correct and preferable" decision, I must give paramount consideration to Maria's welfare and interests. Making that decision requires an assessment of the prospects of success of the proposed set-aside action together with the likely impact on Maria's estate, in particular her ability to fund her future medical treatment, care and support if the proposed actions were to succeed or fail.
- 9 Because most of the lay witnesses share a common surname, for convenience I will refer to them and the person the subject of the Trustee's decision, Mrs Maria Rydzewski, by their first names. In these proceedings the Trustee made brief submissions about the ultimate issue but did not make any substantial submissions about the evidence. Again, for convenience, unless otherwise stated, all references to "the respondents" are to the second and third respondents, Jenny and Krystina.

Administrative review

- 10 In a decision made on 24 April 2018 under s 25E(1) of the *Guardianship Act 1987* (NSW), NCAT committed Maria's estate to the management of the Trustee. As a consequence, the Trustee has, and may exercise, all functions

necessary and incidental to the management and care of Maria's estate: s 56 of the *NSW Trustee and Guardian Act 2009* (NSW) (the **Trustee Act**).

- 11 The decision not to commence legal action to set aside the disputed transfer (the **Trustee's decision**) was a decision made in exercise of the Trustee's functions under Division 1 of Part 4.5 (Management of estates by NSW Trustee) of the Trustee Act and is reviewable by NCAT: s 62. When acting in a "protective capacity" the Trustee may "bring and defend actions, suits and other proceedings ": s 16(1)(s) of the Trustee Act.
- 12 Each applicant is an "affected person" and as a consequence was entitled to apply to NCAT for administrative review of the Trustee's decision: s 62 of the Trustee Act. In determining their application for administrative review, I may affirm or vary the Trustee's decision, set aside that decision and make another decision in substitution for the decision, or set aside the decision and remit the matter for reconsideration by the Trustee: s 63(3) of the *Administrative Decisions Review Act 1997* (NSW).
- 13 The nature of a review under s 63 of the *Administrative Decisions Review Act* was recently considered in *Youssef v NSW Legal Services Commissioner* [2020] NSWCATOD 85 (Youssef). Citing *Donaghy v The Council of the Law Society of New South Wales* [2013] NSWCA 154, the Tribunal (NCAT President, Armstrong J presiding) emphasised at [21] that a review under s 63 is a "review on the merits" and is "not concerned ... whether there was challengeable error in the process or reasoning" by the original decision-maker. Rather, the role of the Tribunal is to "decide what the correct and preferable decision is having regard to the material before it", which includes "any relevant factual material".
- 14 In summary, in reviewing the Trustee's decision, I "stand in the shoes" of the Trustee and am required to make the correct and preferable decision having regard to any "relevant factual material and any applicable written or unwritten law". The review is to be conducted "without any presumption as to the

correctness of the decision”: *McDonald v Guardianship and Administration Board* [1993] 1 VR 521 at 530; *Youssef* at [24].

The role of the Trustee

15 Section 39 of the Trustee Act instructs the Trustee (and the Tribunal on review), when exercising functions under Chapter 4 of that Act (Management functions relating to persons incapable of managing their affairs), to observe the following principles:

- (a) the welfare and interests of such persons should be given paramount consideration,
- (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
- (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
- (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
- (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
- (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
- (g) such persons should be protected from neglect, abuse and exploitation.

Background to the Trustee’s decision

Maria’s living arrangements

16 Maria migrated to Australia in 1950. After her husband’s death in 2008, Maria lived with Danuta in the family home in Rooty Hill. In the early part of 2016, family members observed Danuta’s behaviour becoming increasingly erratic. On 8 May 2016, concerned about Danuta’s capacity to care for Maria, Kevin and Jenny took Maria to live with them and their daughter Krystina. Stan and Kevin agreed that until Danuta recovered, Maria would live with each of them on a rotational basis.

- 17 On 3 June 2016, Maria moved to live with Stan and his family. On 30 June 2016 Maria returned to live with Kevin. In mid-July, Maria returned to live with Stan, where she was living when Danuta's body was found in the family home on 28 July 2016. In early September 2016, Maria returned to live with Kevin where she remained living until late February 2018. Stan did not visit Maria during the last period she was living with Kevin (September 2016 to February 2018).
- 18 There is conflicting evidence about whether during the four months after leaving the family home in June 2016 Maria expressed a preference to live with Kevin or Stan. Each claims Maria said at various times that she preferred living with them. It is agreed however that from time-to-time Maria said she had become tired of moving between their respective homes.
- 19 In late February 2018, Maria was admitted to hospital with sepsis and pneumonia. Following a period of rehabilitation, she returned to live with Stan.

Maria appoints Stan and Kevin as joint enduring attorneys and joint enduring guardians

- 20 On 23 and 25 May 2016, Maria met with solicitor Elizabeth Paine, of Paine Ross & Co, accompanied by Stan and Kevin. At that time she was living with Kevin.
- 21 On 25 May 2016, Maria executed a will giving her estate to her four children in equal shares. On the same day, Maria revoked her appointment of Danuta as attorney, made in 1988, and appointed her sons as her joint enduring attorneys and joint enduring guardians.
- 22 Kevin claims that Stan raised with him the need for Maria to make a new will because Maria had "left everything to Danuta". Stan, on the other hand, claims Kevin and Jenny asked him to urge Maria to meet with a solicitor and make a new will. Each claim the other said Maria must make a new will while she "still has her marbles".

- 23 According to Kevin, shortly before the first meeting with Ms Paine, he informed Stan of Maria's stated intention to give Danuta a "larger share" of her estate. He claims that Stan erupted and demanded that the estate "be split everything four ways". Eventually Maria acquiesced and agreed to divide her estate equally among her children. Stan disputes that account. While he agreed that he counselled Maria against giving a "bigger share" of her estate to Danuta, he said he did so because of his concerns about Danuta's mental state. He claims that he said to Maria, "Danuta is unwell. What happens if she flushed it down the toilet?".

Maria appoints Stan as sole enduring attorney and enduring guardian

- 24 On 8 August 2016, while living with Stan, Maria appointed Stan as her sole enduring attorney and enduring guardian, revoking the joint appointment of her sons made four months earlier. Stan claims that Maria asked him to make the appointment to see a solicitor because she had learnt that Jenny, not Kevin, had been dealing with the banks and Centrelink on her behalf and she did not want Jenny to be involved in her affairs.
- 25 Stan accompanied Maria to meet with solicitor, Scott Johnson, of Bateman Battersby Lawyers. Mr Johnson had previously acted for Stan. Stan claims he was not present when Mr Johnson took instructions from Maria. Stan did not advise Kevin that he was taking his mother to see Mr Johnson.

Maria appoints Kevin as sole enduring attorney

- 26 On 22 September 2016, while living with Kevin, Maria appointed Kevin as her sole enduring attorney revoking her appointment of Stan made six weeks earlier. On the same day Maria made a new will giving her estate to her three surviving children in equal shares. Solicitor David Ireland, of Paine Ross & Co, acted for Maria on that occasion. Kevin and Jenny accompanied Maria to meet with Mr Ireland.

Maria does not attend Danuta's funeral

27 Maria attended Danuta's wake but not her funeral. At the time she was living with Stan.

28 According to Stan, on the morning of Danuta's funeral he woke Maria and encouraged her to get ready. He claims that Maria said she had "sore ribs", refused to get dressed and went back to bed. He said he considered taking her to the doctor but decided not to because there was no signs of bruising or injury.

29 Maria was taken to Danuta's wake by Stan's wife. Stan, who had attended the funeral, claimed that when he met up with his mother at the wake she said:

"Where have you been? When are we going home? I don't want to go back with him (pointing to Kevin)."

30 Kevin, on the other hand, claimed that when he asked his mother at the wake about whether she had had a fall, she denied having had one. He claimed that while Maria arrived at the wake in a wheelchair, she did not appear to have problems walking.

Maria is claimed to ruminate about not attending Danuta's funeral

31 According to Kevin and Jenny, on several occasions Maria raised with them her deep sense of regret at not attending Danuta's funeral. They claim that when they accompanied Maria to the cemetery to organise a funeral plaque for Danuta on 31 August 2016, Maria became emotional, cried and said:

"I can't believe that Stan did not take me to the funeral, but took me to the party [Danuta's wake]. Why go to a party? He should take me to the funeral. It was my daughter. What did people think of me? ... I was hurt and humiliated."

32 Kevin and Jenny claim that when they told Maria that Stan had said she was unable to attend the funeral because she had been injured in a fall, Maria became upset and denied any knowledge of a fall.

33 In addition, Kevin and Jenny claim that, while watching a video of Danuta's funeral together with their family in September 2016, Maria said:

"It was so beautiful. The flowers and the coffin. I am so happy I have been able to see this. I should have been there. Why didn't they take me? People must be talking about me going to the party but not the funeral."

34 According to Kevin and Jenny, over the following year Maria repeatedly asked why Stan had not taken her to the funeral:

"People must think I am horrible. I am so ashamed by what people must think. I cannot forgive Stan for not taking me to the funeral."

Administration of Danuta's estate

35 The legal work for the administration of Danuta's estate was undertaken by Paine Ross & Co, following a request by Kevin.

36 In a letter addressed to Kevin dated 12 October 2016, Mr Ireland provided an estimate of the work involved and the costs of administering Danuta's estate. In evidence, Mr Ireland agreed that the reason he addressed that letter to Kevin was because at that time he considered Kevin to be the client. He said that about a week later, he decided it was more appropriate that Maria apply for administration of Danuta's estate. He disagreed with the proposition that after concluding that it was preferable for Maria to be the administrator, he continued to consider Kevin to be the client. The cost agreement issued on 12 October 2016 was the only costs agreement issued by Paine Ross & Co in respect of the administration of Danuta's estate.

37 Mr Ireland disagreed that addressing most of the correspondence about the administration of Danuta's estate to Kevin evidenced that he considered Kevin, not Maria, to be his client. He conceded, however, that he knew Kevin and Jenny would be "all over" that correspondence and he assumed that they would open, read and explain it to Maria.

Maria allegedly discusses transfer of disputed properties with Kevin, Jenny and Krystina

38 According to Kevin and Jenny, between November 2016 and March 2017 they and other members of their immediate family worked for no payment on the family home at Rooty Hill and the three NSW properties Maria had inherited from Danuta, which were in varying states of disrepair. Kevin claimed that despite approaching Stan for assistance in late 2016, he refused: "Stan, Andrew and their families did nothing". It is agreed that over the years, members of the Rydzewski family helped each other repair and maintain their respective properties.

39 Kevin and Jenny claim that in 2017 Maria raised with them her intention to transfer the disputed properties to Jenny and Krystina.

40 Kevin claims that in July 2017, while he was working on the family home, Maria announced that she wanted to "give him extra":

Maria: "Why are you working so hard? Where is Stan? Why isn't he helping you?"

Kevin: "I don't know. When we went to his place previously, he said he wasn't going to help and that he had done enough."

Maria: "I have had enough of him. He won't help with the houses. He did not take me to the funeral. I am going to give everything to you."

Kevin: "You can't do that. It has to be divided equally. If you want to do something different, that is up to you, but you cannot give it all to me."

Maria: "I want to give you extra."

Kevin: "I cannot take it."

Maria: "He is not getting Danuta's properties. If you won't take them, I will give them to Jenny and Krystina. They look after me. They treat me like a queen. They make me happy.'

Kevin: "What about Wieslawa?"

Maria: "She has a husband to look after her. He got his parents' money. She does not need anything extra from me."

Kevin: "Let's discuss it later, not now."

41 Jenny claims she was present during that conversation and corroborated Kevin's account.

42 Kevin claims that on several occasions after that conversation, Maria raised with him her desire to "give him more" and each time he refused "to accept anything beyond an equal share". He claims that, nonetheless, Maria persisted and ultimately said:

"Well they are not getting the extra. They won't even come and say hello. Stan is just greedy. I will give Danuta's properties to Jenny and Krystina."

43 Jenny gave a similar account, adding that Maria said:

"[Jenny and Krystina] work hard to look after me and do a lot of work on the properties. I am very happy with them."

Jenny claims that Maria then asked her to arrange an appointment with a solicitor, which she did.

44 According to Kevin, the final straw, as his mother saw it, was receiving a letter from Stan's solicitor demanding information about the administration of Danuta's estate:

"That's it. He just wants to have the money. Contact to [sic] my solicitor and tell him that I want to give 1 property to Krystina and 2 to Jenny."

45 Krystina claims that in October 2017 Maria told her to go to the "solicitors to sign something... it's a surprise". Krystina said that Maria explained she wanted to give her one of Danuta's houses because she had done a lot for her and Danuta over the years. Krystina claims she felt conflicted and asked about the others to which Maria replied:

"Don't worry about the others. They only look out for themselves. Look at how they have treated Danuta and me. They didn't appreciate Danuta's efforts. They just burnt her out. I am not doing anything more for them. Danuta did not have nice things to say about all of them for a long time, because of what they did to her. I don't forget those things."

4 October 2017: Andrew, Susan and Rebecca visit Maria

46 On 4 October 2017, Andrew Snopkowski and Maria's granddaughters, Susan Curran (daughter of Wieslawa and Andrew) and Rebecca Rydzewski (daughter of Stan), arrived unannounced at Kevin's house to visit Maria. According to Stan, he had planned to attend but had fallen ill and was unable to join them.

47 At the time of the visit, neither Andrew, Susan nor Rebecca had seen Maria for over 12 months. As children, Susan and Rebecca had regular contact with Maria. However, in the five or so years before the disputed transfer, they, particularly Susan, had limited contact with Maria.

48 Andrew, Susan, Rebecca and Kevin gave evidence about the 4 October 2017 meeting. While several facts are in dispute, they agree that during that visit:

- (1) Maria did not appear to recognise Andrew, Susan or Rebecca;
- (2) Susan handed Maria an invitation to Rebecca's engagement party and repeatedly urged her to attend;
- (3) Maria spoke in Polish. Susan interpreted for Rebecca who does not speak Polish;
- (4) when informed that Stan would be attending the engagement party, Maria smiled and said she would like to see him. Later she asked why Stan had not visited her. Kevin then said, "my door is open... Stan is free to visit Maria";
- (5) at some point during that visit Rebecca and Kevin left the room, leaving Maria, Andrew and Susan alone.

49 Rebecca stated that when she arrived, she was shocked to see how much her grandmother had physically deteriorated and "felt quite emotional". She was unsure when she had previously seen Maria and thought it might have been

in January 2016. She claimed that her grandmother was using a walking stick, was “very wobbly and shaky” and “hunched over”. She claimed that despite it being the afternoon her grandmother was still in her pyjamas and smelt like she had not showered for a few days.

50 Susan claims that, after greeting her grandmother, she asked in Polish “Do you recall who I am?” to which Maria replied, “No”. Susan explained that she was her granddaughter, the daughter of Andrew and Wieslawa, and Rebecca was the daughter of Stan. According to Susan, when she told Maria they last met about 12 months ago while Maria was living with Stan at St Mary’s, Sydney, Maria replied that she did not know where St Mary’s was and did not think that she had been there.

51 According to Susan, when she asked Maria whether she spoke English, Maria replied in Polish, “My English is very poor”. After informing Maria that Rebecca did not speak Polish, Maria chided her for not teaching Rebecca Polish, appearing to believe that Rebecca was her daughter. Susan said she reminded Maria of Susan’s sisters and two of Maria’s lifelong friends. Maria said she could not recall them.

52 According to Susan, when she raised with Maria the invitation to attend Rebecca’s engagement party, she replied “I don’t know, I don’t think I go to parties.”

53 Susan claims that while Kevin and Rebecca were out of the room, the following conversation took place:

Susan: "Can you tell Andrew about the legal paperwork you had sent to Andrew via Kevin in July? What would you like us to do about it?"

Maria: "What paperwork?"

Susan: "Did you see a solicitor?"

Maria: "No, I didn't see anyone. I don't not [sic] know what paperwork you are talking about".

(Susan showed Maria the paperwork that consisted of a letter from Paine, Ross and Co with a form for Andrew to sign to confirm that Wieslawa is the

daughter of Maria and that Wieslawa gives permission to Maria to administer the Western Australia property, and any decisions Maria makes in regard to the property, Wieslawa cannot hold Maria liable for. The paperwork compromised [sic] the letter that Andrew and Stan had sent through Mr Darryl Browne to Paine, Ross and Co, to request a visit with Maria to discuss Danuta's estate and Maria's wellbeing.)

Maria: "I can't read the paperwork anyway. I would need to ask Kevin and Jenny about it, they do that".

Susan: "Do you receive your aged pension in your bank account?"

Maria "I don't know, Kevin and Jenny take it all".

Susan "So you know about Danuta's houses?"

Maria "No I don't, I can't say as I don't remember".

Susan "Do you know that you are to get all Danuta's money and houses?"

Maria "I don't know about them. If she gave them to me, I don't know."

Susan "What about Danuta's money. Did you get that?"

Maria "Don't ask because I don't remember, or if I did know, I have forgotten. Ask Kevin and Jenny, they would know what they did".

Susan "Well the paperwork says that you got all Danuta's houses and money".

Maria "Did I? Then yes. I must have them".

Susan: "Do you remember going to a solicitor to sign documents and ask for Andrew to sign documents?"

Maria "I don't know, maybe I have been, maybe I haven't been, I don't know. Kevin and Jenny would know. They do all that".

Susan "What would you like Andrew to do with the letter sent to Andrew to sign?"

Maria "What letter?"

Susan "The letter that you sent to Andrew to sign as Wieslawa has dementia and cannot sign it.

Maria "What? She has dementia? When did that happen?"

Susan: "Since 2008. Mum told you back then. You saw Mum decline over the years."

Maria "No I don't remember. Why didn't you tell me".

54 In a statement dated 3 April 2018, Andrew gave a similar account. Andrew did not give oral evidence or prepare a written statement for these proceedings. His statement made on 3 April 2018 was contained in the documents filed by the Trustee as required under s 58 of the *Administrative Decisions Review Act*.

55 According to Kevin, when Jenny arrived home shortly after Susan, Andrew and Rebecca left and Maria said:

“They want me to go a party, but they did not take me to [Danuta’s] funeral. Parties are not important to me. You can have parties anytime, but what was important is that they did not take me to funeral.”

56 Jenny supported that claim.

Maria meets with Mr Ireland and transfers properties to Jenny and Krystina

57 On 14 September 2017 and 25 October 2017, Maria met with Mr Ireland. As noted, Jenny arranged the meetings, on her account, at Maria’s request. Kevin and Jenny attended each meeting. A Polish interpreter attended the second but not the first meeting.

58 In answer to a summons issued at the request of the applicants, Paine Ross & Co produced to NCAT its files in relation to the disputed transfer, among other things. In addition, Mr Ireland attended and gave evidence in answer to a summons issued at the request of the respondents.

59 In a file note made of the 14 September 2017 meeting (the **first meeting**), Mr Ireland wrote:

“Maria Rydzewski 1. Chase Police Transfers:

1. ~~Wiesława~~ Jenny = 1 house -> [address deleted]
2. Jenny = 1 house -> [address deleted]
3. Krystina Rydzewski= 1 house -> [address deleted]

All rents to go to Maria

* potentially get an interpreter

+ sign a statement in Polish

1. docs to sign ???

2. statement -> to be [???] to Polish + signed by Mum, witnessed by interpreter

-> certificate from geriatrician?

Or if interpreter says what she says + I say it's clear she has capacity, the OK

* to calculate stamp duty

* [???]

-> dr ltr of advice

-> get acknowledgement of advice + instructions

-> not under duress + obtained legal advice

-> will translated...?

-> send her the translated will, advise + ask her to confirm"

60 In preparation for the meeting on 25 October 2017 (the **second meeting**), Mr Ireland arranged for three documents to be translated from English into Polish: a letter addressed to Maria dated 21 September 2017 setting out his understanding of Maria's "previous instructions"; an undated document headed "Acknowledgment of advice and instructions to solicitor" and a copy of Maria's will, dated 22 September 2016. Mr Ireland thought it likely that those translated documents were not sent to Maria in advance of the second meeting but rather were handed to her to read at that meeting.

61 Contained in the Paine Ross & Co file are two versions of the "Acknowledgment of advice and instructions to solicitor". One is undated and refers to Maria's "wish to give 1 NSW property to my daughter in law Janina Rydzewski and 1 NSW property to her daughter Krystina Rydzewski" (emphasis added). The second version, signed and dated 25 October 2017, refers to Maria's "wish to give 2 NSW properties to my daughter in law Janina Rydzewski and 1 NSW property to her daughter Krystina Rydzewski"

(emphasis added) but is otherwise identical to the first version. Each contain the following:

- “5. I want to give [Jenny and Krystina] these properties because they have always been kind to me and looked after me while I have been elderly. My son, Stanislaus Rydzewski and my son-in-law, Andrew Snopkowski, have not been as kind to me or looked after me as Janina and Krystina have, so I have decided not to give a property to them.
6. These property transfers do not in any way affect my Will and the gifts made under it.”

62 The Paine Ross & Co file also includes two versions of the letter from Mr Ireland to Maria setting out his understanding of the instructions given by Maria at the first meeting. One dated 21 September 2017 refers to the transfer of one property to Jenny and one to Krystina. The other, dated 25 October 2017, refers to the transfer of three properties, two to Jenny and one to Krystina.

63 In oral evidence, Mr Ireland said that at the first meeting Maria gave instructions to give away two properties, one to Jenny and one to Krystina. He said he was “taken aback” when, at the second meeting, Maria “added another property”.

64 Mr Ireland did not meet with Maria after the second meeting nor arrange for an interpreter to read to Maria the amended translated documents. He said that sometime after that meeting he prepared an amended “Acknowledgment of advice” and letter setting out his understanding of Maria’s “previous instructions”. In re-examination, Mr Ireland said that at the second meeting the interpreter read out the two original translated documents (referring to two properties) and he then instructed the interpreter “to explain that the third property was to be included”.

65 Mr Ireland prepared a handwritten and a typed file note of the second meeting. Each refer to the transfer of three properties. Neither refer to the claim made by Mr Ireland that Maria corrected his understanding that three, not two, properties were to be transferred, nor to the interpreter being asked

to “explain that a third property was to be included in the transfer”. The typed file note reads in part:

- “9. I asked Maria to confirm once again what properties she was giving away and to whom. She replied that she wanted to give [address deleted] to Jenny, [address deleted] to Jenny and [address deleted] to Christina.
10. I asked Maria to explain again why she was giving away the properties to Jenny and to Jenny and Kevin's daughter Krystina, and not to her son Stan or her son-in-law Andrew. Maria explained that she wanted to give Jenny and Krystina property because they and Kevin were the only people helping her and had done a good job of looking after her.
11. I presented the 3 translated documents in duplicate to Maria for her to read them and sign them. Maria read the documents and signed them at the meeting and left the originals with me. I gave Maria copies of the documents she had signed for her to take away with her from the meeting.”

66 When taken to the entry in the file note of the first meeting, which records Wieslawa’s name as crossed out as the transferee of the third property and Jenny’s name written in substitution, Mr Ireland said he could not recall the third property being discussed at that meeting, nor what prompted him to amend the file note by substituting Jenny as the transferee of the third property or when that occurred.

67 Jenny disputes that at the first meeting Maria said she wanted to give away two properties. She claims that at all times Maria’s stated intention was to give away three properties.

Rental income from the disputed properties and payment

68 In answer to questions about the entry in the file note of the first meeting “all rental goes to Maria”, Mr Ireland agreed that he did not create a formal document to reflect that instruction.

69 Jenny and Krystina deny promising to give Maria the rental income from the transferred properties. In cross-examination Jenny said while she had “every intention of using the income to fix up Maria’s house” there was “no promise, agreement, condition, nothing”.

70 In cross-examination, Jenny was asked whether she agreed with the following statement made by the barrister who represented Kevin in the proceedings before the Guardianship Division of NCAT on 3 July 2018:

“What happened was this. In Mr Ireland's file note he made a note of an informal promise that the properties had been transferred, that the transferees, Jenny and Krystina, would utilise those funds to the benefit of Maria. That still holds.”

71 Jenny denied making an informal promise but said that it was and remains her intention to “fix Maria's house up and what she needs”.

Payment of stamp duty and legal costs

72 In cross-examination, Mr Ireland was questioned about the entry in the file note of the first meeting “to calculate stamp duty”. Mr Ireland said he probably raised the issue of stamp duty and relied on Jenny to translate the meaning of that term. (Jenny acted as the interpreter at that meeting. Apparently she is more proficient in Polish than Kevin.) When questioned about Jenny's account that she translated him as saying, “If you want to give a gift like that, you have to pay the government taxes”, Mr Ireland agreed that was not a correct statement of the law, explaining that the transferee, not the transferor, bore the liability for stamp duty. He said, however, that it is not uncommon for people giving gifts to pay stamp duty on the transferred property.

73 The file note of the second meeting refers to Jenny raising the issue of who would pay stamp duty and legal costs; Mr Ireland explaining that as per her “previous instructions” they would be borne by Maria; and Maria confirming that was her intention:

“8. Jenny queried who would pay the stamp duty and legal costs. I explained that Maria's previous instructions to us, as reflected in our letter dated 25 October 2017, were that Maria would pay the stamp duty, legal costs, registration fees and associated costs of the transactions. Maria confirmed this was her intention.”

Maria's understanding of English

- 74 Mr Ireland described Maria's grasp of English as "patchy" and while she appeared to be able to understand simple words, she struggled if something was a bit more complex and "look[ed] for assistance to... the family around her". He agreed with the proposition that he had no way of knowing whether Jenny accurately interpreted what he said to Maria and what Maria said to him.
- 75 Mr Ireland said he recalled Maria looking at the translated documents at the second meeting. When questioned about his understanding of her degree of literacy he said, "there might have been some words she possibly wouldn't have known". He agreed that he was unaware of the file note dated 26 May 2016 made by Ms Paine in the context of preparing Maria's will:

"Mrs Rydzewski has limited English. Her language is Polish. Also enquired whether she could read Polish and her literacy is limited. So having a Polish translation of the documents was not going to assist."

Maria's mental capacity

- 76 Mr Ireland said that, in his view, on the six or so occasions he met with Maria she did not appear to lack understanding or to be vague. When asked about the entry contained in the file note of the first meeting, "certificate from a geriatrician?", Mr Ireland denied making that entry because he held concerns about Maria's mental capacity. He said he made that entry because he was conscious that Maria was "quite old" and was about to give away "huge amounts of property" to some members of her family. In those circumstances, "it was a natural lawyer's instinct, to try and protect what she wanted to do".
- 77 Contained in the Paine Ross & Co file was a medical certificate prepared by Maria's GP, Dr Yusuf Bassa, dated 15 September 2017. It read:

"Mrs Maria Rydzewski has been assessed for capacity. She lives with her son Kevin and his wife Janina in Kurrajong.

I review her monthly for the last 12 months.

She is 92 yr old who is on warfarin therapy for AF.

She is mobile with stooped posture.

She is able to make decisions regarding her health and financial affairs.”

78 Mr Ireland denied having any dealings with Dr Bassa or requesting Dr Bassa to assess Maria’s mental capacity. He said he probably left the task of obtaining an assessment to Kevin and Jenny.

79 Kevin and Jenny also deny requesting Dr Bassa to provide the certificate or having requested him to conduct tests to assess Maria’s capacity. Jenny stated she had attended all Maria’s consultations with Dr Bassa. A timeline prepared by Krystina, attached to her statement dated 4 April 2020, apparently prepared in the context of the proceedings before NCAT, states:

“15/9/17

Kevin and Jenny took Maria to Dr Bassa Appointment.”

80 Mr Ireland claimed that he asked Maria “at least three times” whether she “really wanted” to proceed with the disputed transfer and her reasons for wanting to do so. He said he recalled “pushing” and asking Maria to explain why she was singling out Jenny and Krystina. He claimed Maria said words to the effect that Stan was a “bit bossy” and a “bit financially motivated” but in his view she otherwise did not appear ill-disposed towards Stan. He said he understood that Maria treated the properties she had inherited from Danuta differently from the remainder of her estate and considered them to be “a windfall”. The file notes of the first and second meetings contain no reference to Maria being questioned about why she had decided to make the disputed transfer or Maria describing the properties as a windfall.

81 Mr Ireland said that he was aware when he met with Maria that she was living with Kevin and Jenny and that they were acting as her carers. He said he was unaware if Maria had any other confidants. When asked whether he held any concerns about Maria apparently not having anyone to talk to about the transfers apart from the beneficiaries, he said he would have liked the opportunity to speak to Maria alone but “of course there were English

difficulties". He said when he asked Maria whether she would like to meet with him alone, she said no. Jenny and Kevin support that claim.

- 82 Mr Ireland denied holding any concerns that Maria might have been subject to duress or undue influence but agreed there might be a perception of duress or undue influence.

Maria's financial position

- 83 When asked about his understanding of Maria's financial position when she made the disputed transfer, Mr Ireland stated that Maria did not seem to have a "great need for a great amount of money" and appeared to be content with what she had and being looked after by the family. He agreed he did know the value of her total estate or the proportion of her estate represented by the transferred properties. He said he was nonetheless satisfied that she "was comfortable".

- 84 While he was aware that Maria was of advanced age and had "some physical issues", Mr Ireland agreed that he had not made any enquiries about Maria's health or her current or likely future medical costs. He said he was not aware of Maria having any significant medical costs.

Maria is admitted to hospital

- 85 In January 2018, Maria was diagnosed with breast cancer, which had been in remission for about a decade. On 15 February 2018, she commenced five sessions of targeted radiotherapy. On 28 February 2018, she was admitted to hospital with sepsis, pneumonia and renal failure. She was assessed as being extremely unwell. There were concerns that she may not survive. In late March 2018, Maria was transferred to a rehabilitation unit where she remained until she was discharged into the care of Stan in April 2018.

Maria's medical history pre-admission

- 86 When admitted to hospital in February 2018, Maria had several long-standing significant health problems, including osteoporosis and vascular disease, in

particular hypertension, atrial fibrillation and episodes of cardiac failure. In addition, Maria was reported to be incontinent and to require significant care and support. The available medical records reveal a history of recurrent falls dating back to 2010, several resulting in significant injuries.

87 In March 2014, following a fall in which she suffered a left wrist fracture, Maria underwent a cerebral CT scan which revealed evidence of “chronic microvascular ischemia”. As a result of further falls, in July 2015 a repeat CT scan again identified the presence of atrophic change.

88 It is agreed that by October 2017, Maria required significant assistance with the activities of daily living.

Dr Bassa’s clinical records

89 Maria commenced seeing GP, Dr Bassa, in March 2016 and saw him on a regular basis until she was admitted to hospital in February 2018. As noted above, in a letter dated 15 September 2017, Dr Bassa certified that Maria “is able to make decisions regarding her health and financial affairs”. In a record of consultation dated 15 September 2017, Dr Bassa recorded:

“appearance ... normal
behaviour ... good
speech ... clear
mood ... appropriate
thought form and content ... appropriate
perception issues and hallucination ... nil
cognition good, insight and judgement ... good
rapport good.
faulty thinking ... no
generalisation ... nil
personal ...

black and white ...

catastrophe ... no

mindreading ... no”

90 In a letter dated 3 April 2018 addressed to the “NSW Guardianship Tribunal” [sic], apparently provided at the request of the respondents, Dr Bassa wrote that he reviewed Maria on a monthly basis and was “very happy” with the care provided by Kevin and Jenny over the past 22 months. He wrote that he had “tested Maria’s memory” and she was “always aware of the questions and exhibited reasonable capacity”.

91 In the context of making the decision the subject of these proceedings, the Trustee obtained an opinion from Christopher Zucker of Zucker Legal about the prospects of success of the legal actions proposed by the applicants. For the purpose of providing that advice, Mr Zucker wrote to Dr Bassa requesting further information. In a letter in response dated 19 December 2018, Dr Bassa wrote:

“... It has become evident to me that Maria Rydzewski’s mental awareness and her capacity to make decisions has changed. In my opinion a potential cause of this change in her cognitive capacity is the recurrence of her breast cancer. This diagnosis is of course very stressful and it may be the sudden change in her morbidity and the commencement of her treatment that has caused her decline in her mental capacity.

Maria Rydzewski was questioned by me regularly during our consultations regarding her mental state in the previous 12 months. Her responses indicated to me that she was aware of her treatment and care provided by her son Kevin and his wife Janina and was able to make decisions about who she lived with.”

Maria’s mental capacity

Observations on Maria’s mental capacity

92 The parties agree that when assessed in March 2018 by neuropsychologist, Dr Shelley Simpson, Maria lacked the mental capacity to make decisions of any complexity, such as the decision the subject of these proceedings, and this remains the case. However, they disagree about whether Maria had the requisite mental capacity at the time she made the disputed transfer. I

summarise below the evidence given by family members and friends of their reported observations of Maria. I will return to consider the submissions made by the parties about the reliability of that evidence.

93 Stan's evidence is to the effect that by September 2016 (the last time he saw Maria before she was admitted to hospital in February 2018), Maria's cognitive capacity was significantly impaired. Among other things he claims that:

- (1) prior to her death, Danuta complained to him about the amount of care she was now required to provide Maria and said that Maria had dementia and wandered, wetted the bed at night and had trouble finding the toilet. For that reason, she slept with Maria. Stan claims that Kevin was party to that conversation;
- (2) after Danuta's death Maria kept forgetting that Danuta had died. He chided Jenny for reminding Maria about Danuta's death as it made her "upset all over again";
- (3) during a consultation, immediately after Dr Bassa had taken her blood pressure, Maria asked "when will the doctor take my blood pressure?". When, at Dr Bassa's request, he translated that comment, Dr Bassa said that is "a worry". Stan claims he then raised with Dr Bassa his concern that Maria was taking Losec, which he understood "accelerates dementia". Dr Bassa said he would look into prescribing an alternative medication. (Stan could not recall when this consultation occurred. The only time he could have accompanied Maria to see Dr Bassa was between March 2016, when Maria commenced seeing Dr Bassa, and 1 September 2016, when Maria went to live with Kevin).

94 Stan was cross-examined about Maria's decision in May 2016 to make a new will and to appoint Kevin and himself as joint enduring attorneys and joint enduring guardians. Stan acted as interpreter for Maria at the meeting with Ms Paine. Stan said that he did not raise "any concerns" with Ms Paine, and was

“happy that she understood... but I don’t know if she understood”. He said he knew that Maria always trusted him and looked to him for guidance. With respect to Maria’s decision made four months later to appoint him as sole enduring guardian and sole attorney, Stan said he was confident that Maria did not feel pressured to make that appointment and did so freely.

95 Kevin denied Stan’s claim that Danuta had raised concerns about Maria’s mental capacity or suggested that she had dementia. Kevin claims that Dr Bassa had never mentioned to him that Maria may have dementia. He agrees that he and/or Jenny always accompanied Maria to appointments but said this was because she needed transport, not because she could not communicate with Dr Bassa. He claimed that Dr Bassa and Maria spoke to each other in English, and he would translate any “complex issues”.

96 Jenny, Kevin and Krystina recounted in some detail conversations each claimed to have had with Maria, including during the last period she lived with them (September 2016 to February 2018). See, for example, Jenny and Kevin’s account of conversations with Maria about her decision to “give more” to Kevin at [40]-[42] above, which, if accepted, would tend to indicate that during those conversations Maria was lucid and responsive.

97 The respondents tendered affidavits prepared by Jenny and Kevin’s daughters, Janina Zahra and Wanda Spiteria, and family friends, Rose Spiteria and Wanda Kupczak. None were required for cross examination.

98 Janina Zahra and Wanda Spiteria stated that they visited the family home on a reasonably regular basis throughout the period Maria was living with their parents. Each claimed that during those visits:

- (1) Maria recognised them and members of their respective immediate families;
- (2) Maria engaged in conversation with them and their respective families. Each recounted conversations they had with Maria during that period.

Janina, for example, reported Maria warning her and her children to stay away from the family dog because he bites. The dog was eventually put down for biting a child;

- (3) they saw no evidence to suggest that Maria may have some mental disability or impairment;
- (4) Maria was able to communicate with her non-Polish speaking grandchildren.

99 Rose Spiteria met Maria about 20 years ago when her son married Jenny and Kevin's daughter, Wanda. She said that during the period Maria was living with Kevin and his family, she visited every fortnight, usually for between three to four hours. During those visits, she and Maria would socialise and talk about their respective families. Rose claims she and Maria conversed in English (Rose does not speak Polish) and because English is not their first language, they kept the conversation simple. She said that during their conversation Maria did not merely respond to what she was saying but initiated topics of conversation.

100 Rose claimed that she has been involved with helping elderly people for many years, some of whom had dementia. She claimed that Maria did not display any of the difficulties she had observed in people with dementia, such as forgetfulness.

101 Wanda Kupczak has known Maria for 50 years. They met when Kevin and Jenny married. Wanda's first language is Polish. She claims that she and Maria spoke to each other in Polish. She observed that Maria spoke to Kevin and Jenny's children, none of whom are fluent in Polish, in English with some Polish words thrown in. In Wanda's opinion, Maria was "the full quid".

Assessment by neuropsychologist, Dr Simpson

102 On 26 March 2018, following a referral from the hospital treating team, neuropsychologist, Dr Simpson, met with Maria and conducted a neurological assessment. An interpreter was present.

103 In a report dated 26 March 2018, Dr Simpson recorded that Maria presented as “vague and confused” and her affect was reactive. Dr Simpson noted that Maria’s treating team reported concerns about Maria’s capacity to make informed decisions regarding her accommodation options on discharge from hospital. In addition, she noted that during her admission Maria had been assessed by geriatrician, Dr Demontiero, who concluded that she did not have capacity to make informed decisions about financial management or her health care needs.

104 In the course of her assessment, Dr Simpson administered several tests including the Rowland Universal Dementia Assessment Scale (**RUDAS**), in which Maria scored 11/30.

105 Dr Simpson concluded in her report:

“Mrs Rydzewski's current performance on cognitive testing indicates that she is currently performing at floor / Basal levels on all basic cognitive screening tools. That is, she is performing at the lowest percentile band across all cognitive domains. She is markedly disoriented and has extremely limited knowledge regarding her own current and past personal history. Further she has difficulty both understanding and at times even expressing basic information. Overall her current cognitive profile is consistent with a moderate to severe stage neurodegenerative process most likely consistent with an Alzheimer's disease.

In regards to Mrs Rydzewski's capacity to make fully informed decisions regarding her current and future accommodation care needs, it is my professional opinion that, based on her current moderate to severe dementia impacting on all areas of cognitive functioning, combined with her limited insight, that she does not possess the depth of cognitive processing required to make decisions regarding her current and future accommodation needs.” (Emphasis added.)

106 On 11 March 2019, at the request of the applicants, Dr Simpson conducted a further neurological assessment and repeated the RUDAS test. On this

occasion, Maria score had decreased to 5/18 from 11/30 in March 2018. Dr Simpson concluded that the assessment provided evidence of:

“[F]urther deteriorated cognitive abilities (relative to initial 2018 assessment) which indicated that she now presented with a severe end stage neurodegenerative process that was considered consistent with Alzheimer's Disease, with possible concomitant vascular related brain changes.”

Expert opinion on Maria's mental capacity

- 107 At the request of the applicants, consultant neurologist and neurophysiologist, Professor Matthew Kiernan, prepared two reports, each dated 1 April 2020, for these proceedings. At the request of the respondents, geriatrician, Associate Professor Tuly Rosenfeld, prepared a report dated 8 March 2020. In their respective reports, each addressed whether, in October 2017, Maria had the mental capacity to make an informed decision about the disputed transfer. Prof Kiernan and Associate Prof Rosenfeld gave oral evidence concurrently.
- 108 At the request of the respondents, consultant neuropsychologist, Dr Jane Lonie, prepared a report dated 18 February 2020. The respondents decided not to rely on that report. It was tendered by the applicants. In addition to the reports of the assessments she conducted in 2018 and 2019, at the request of the applicants, Dr Simpson prepared a further report dated 3 April 2020 addressing Associate Prof Rosenfeld's opinion that Maria was suffering from delirium during the assessment she conducted in 2018. Drs Simpson and Lonie gave oral evidence concurrently.
- 109 Dr Simpson was the only expert to have met with and assessed Maria. For the purpose of preparing their respective reports, each expert was provided with extensive material, including the records of Maria's GPs from 2010, the 2018 hospital admission and statements prepared by family members and friends commenting on their observations of Maria.
- 110 While the experts agree about much, points of disagreement arose about whether:

- (1) in October 2017, Maria lacked the mental capacity to understand the import of the disputed transfers;
- (2) between October 2017 and March 2018, there was a marked deterioration in Maria's cognition;
- (3) when assessed by Dr Simpson in March 2018, Maria was suffering from delirium;
- (4) it is likely that Maria suffered a stroke around the time of her hospital admission.

Impact of physical illnesses on Maria's cognitive function

- 111 Associate Prof Rosenfeld is the only expert to express the opinion that Maria had the cognitive capacity to understand the import of the disputed transfer. He agrees with the other experts that in October 2017 Maria was probably suffering from vascular brain disease and dementia which had resulted in cognitive impairment. But, in his opinion, that impairment was not of such a degree as to extinguish Maria's capacity to make significant decisions, such as the decision relating to the disputed transfer.
- 112 In Associate Prof Rosenfeld's view, the onset of physical illnesses in early 2018 — cancer, pneumonia, sepsis and possibly a stroke, together with radiation treatment — likely resulted in delirium and a reduction in Maria's cognitive function from about late January 2018. In his view, Maria had effectively been "hit by a truck" and her cognitive capacity in March 2018 was "very different" from her cognitive capacity in October 2017.
- 113 In Associate Prof Rosenfeld's opinion, "sub-clinical brain disease" of the type revealed on the 2014 and 2015 CT scans taken of Maria's brain is likely to have made her especially susceptible to the effects of an acute physical illness and led to an acute worsening in her cognition. In his view, the most likely explanation for the evident confusion Maria displayed during testing in March 2018 was that she was suffering from delirium, namely "the acute,

usually reversible — if the cause of that delirium is removed — reduction in cognitive function associated with acute confusion, change in consciousness, reduced attention, concentration and distractibility”. Associate Prof Rosenfeld stated that older, frail people with “underlying but subclinical reduction in brain reserve” who suffer a physical illness are particularly susceptible to delirium which can take “weeks sometimes months to resolve”.

114 In reaching his opinion, Associate Prof Rosenfeld considered the following contemporaneous medical records to be especially significant:

- (1) the report dated 7 November 2016, in which vascular surgeon, Dr Anthony Gray-Weale, stated that he “had a long chat to Mrs Rydzewski and her son and daughter-in-law...[Mrs Rydzewski] appears to understand the ramifications of not proceeding with her aneurysm repair”;
- (2) the report dated 23 January 2018, in which oncologist, Dr Linh Trinh, stated that Maria was able to state a history of previous mastectomy. (Associate Prof Rosenfeld acknowledges that Dr Trinh did not actually state that Maria herself gave that history (she was accompanied by family members) and noted that Maria could not recall the name of the surgeon or hospital. In his opinion, Maria’s inability to recall that information was unremarkable.);
- (3) Dr Bassa’s letter dated 17 September 2017.

Response to Associate Prof Rosenfeld’s opinion that Maria was suffering from delirium

115 Prof Kiernan disagrees with Associate Prof Rosenfeld’s opinion that Maria was probably suffering from delirium when tested by Dr Simpson in March 2018. The evidence of Drs Simpson and Lonie was consistent with that given by Prof Kiernan.

- 116 According to Prof Kiernan, there is no medical evidence to indicate that Maria was suffering from delirium when assessed by Dr Simpson in March 2018. In support he pointed to the contemporaneous medical records which stated that the physical illnesses that had triggered Maria's admission had resolved by the time she was assessed and the opinion of her treating team that she was ready for discharge. These include the report prepared by Dr Tasnoora Ali, dated 23 March 2018, stating that Maria's pneumonia had resolved and her renal function had returned to the normal range.
- 117 In addition, Prof Kiernan disagreed with Associate Prof Rosenfeld that the onset of breast cancer and subsequent treatment may have adversely affected Maria's cognition. Referring to the studies relied upon by Associate Prof Rosenfeld in support of his opinion, Prof Kiernan asserted that they are of little relevance because they primarily relate to forms of treatments Maria did not receive, such as chemotherapy and intensive radiation. He pointed out that Maria had received a small amount of targeted radiation which was reported to be "well tolerated".
- 118 Describing a formal neurological assessment as a "bread and butter assessment", Prof Kiernan asserted that its "very common" for neuropsychologists to decline to undertake such assessments if the patient is suffering delirium and no experienced and qualified neuropsychologist would do so. While accepting that delirium is sometimes misdiagnosed by health practitioners, Prof Kiernan asserted that a neuropsychologist trained in the assessment of cognitive impairment would not miss the presence of delirium.
- 119 In response, Associate Prof Rosenfeld stated that it can be difficult to detect delirium in a frail, elderly person with underlying brain disease and cognitive impairment, such as Maria, and "single organ specialists" are often ill equipped to do so. He asserted that because delirium can manifest in many different ways, it is often difficult to distinguish between delirium and underlying dementia. Geriatricians, because of their "whole person" focus, are especially well placed to distinguish delirium from dementia.

- 120 Referring to Dr Simpson's repeated use of the word "confusion" in her report of the 2018 assessment, Associate Prof Rosenfeld asserted that in medicine the word "confusion" is commonly used to indicate delirium. Prof Kiernan disagreed. He argued that if, as Associate Prof Rosenfeld contended, Maria was suffering from delirium when assessed by Dr Simpson, it would be expected that at some point there would have been some improvement in her cognition. However, Dr Simpson's 2019 assessment, together with family reports, reveals a progressive decline.
- 121 In a detailed report dated 3 April 2020, Dr Simpson responded to the opinion expressed by Associate Prof Rosenfeld that, when tested in March 2018, Maria was probably suffering from delirium. Dr Simpson stated that she is "acutely aware of delirium affecting older patients with and without dementia" and, if Maria had been suffering with delirium, consistent with her practice she would have discontinued the assessment.
- 122 Dr Simpson stated that "it is clinically accepted" that individuals with delirium typically present with:
- (1) markedly impaired attention that is fluctuating in nature;
 - (2) impaired level of consciousness which is again fluctuating in nature;
 - (3) variable orientation to person, place and time.
 - (4) slow and often incoherent language/inappropriate language;
 - (5) variable memory skills (often fluctuating in nature dependent on level of alertness and attention).
- 123 Dr Simpson stated that Maria did not present with any of these features, claiming:
- (1) while she was "notably fatigued", Maria's level of consciousness did not fluctuate at all throughout the two-hour assessment. She was not

noted to be restless, agitated, irritable or present with combative behaviour;

- (2) there was no evidence of perceptual disturbances, including hallucinations or delusions and, as recorded in the report of the 2018 assessment, Maria attempted to concentrate throughout the assessment. Dr Simpson noted no fluctuations in Maria's level of alertness or sustained attention throughout that assessment;
- (3) throughout the assessment Maria engaged well and attempted to answer all questions asked. According to Dr Simpson, in her clinical experience, a patient with delirium would find it impossible to complete a basic 15-minute cognitive screen. In stark contrast, throughout the two-hour assessment Maria was able to reasonably sustain concentration and to attempt tasks;
- (4) Maria was notably disoriented to person, place and time throughout the assessment. For example, she was unable to report the date, her address, her age, the names of her children or her husband, or recall if she had any grandchildren. According to Dr Simpson, it is highly unlikely that a person with delirium would be unable to recall *any* such extensive autobiographical information;
- (5) Maria's speech throughout the assessment was coherent and there was no rambling or difficulties with her thought form. The attending Polish interpreter reported that Maria's language was clear and intelligible. According to Dr Simpson, some of Maria's responses to questions did not make sense, for example, when asked who she would like to be her guardian, she said she could ask her "neighbours next door" but she was not sure "they would want do it". Nonetheless, it was apparent that Maria understood the questions asked.

Progressive decline in cognition

124 Prof Kiernan considered that the presence and ongoing effects of multiple vascular risk factors, particularly hypertension, arrhythmia and cardiac failure, served to worsen Maria's vascular brain disease, leading to progressive cognitive impairment and dementia, which in his view had commenced by 2010, possibly earlier. In support of his opinion that there had been a slow and progressive decline in Maria's cognitive function, Prof Kiernan pointed to:

- (1) the record of a health assessment dated 12 March 2010 which noted that Maria was "slightly impaired across a range of activities of daily living including dressing, personal hygiene, bathing, social contact and home safety";
- (2) the medical notes indicating that Maria had been doubly incontinent since 2010;
- (3) the clinical notes documenting that Maria had been unsteady on her feet and had multiple falls dating back to 2010. According to Prof Kiernan, progressive gait unsteadiness and falls are commonly identified in the context of vascular dementia;
- (4) the long history of Maria being assisted by others to manage her finances, attend medical appointments, manage her medication and so forth.

125 Drs Lonie and Simpson agreed.

Stroke hypothesis

126 A further point of difference between the experts is whether Maria suffered an acute stroke around the time of her admission to hospital in March 2018. Pointing to the fact that Maria was then suffering from known risk factors of stroke — high blood pressure, atrial fibrillation, and transient ischaemic attacks (a stroke that resolves within 24 hours) — Associate Prof Rosenfeld

argues that there is a “strong likelihood” that Maria suffered an acute stroke shortly before or during that admission. In his view, this would be consistent with the acute deterioration in cognitive function identified by Dr Simpson in the 2018 and 2019 assessments. He stated that relatives often report a definite deterioration in physical and cognitive function “for no apparent reason”.

- 127 Prof Kieran disagrees, pointing out that the medical records of Maria’s admission contain no suggestion that she suffered or displayed any features of stroke either when she was acutely unwell or later when she was medically stable. Drs Lonie and Simpson agree.

Reliability of Dr Bassa’s opinion on capacity

- 128 In support of his opinion that Maria had the mental capacity to make an informed decision concerning the disputed transfer, Associate Prof Rosenfeld placed reliance on, among other things, Dr Bassa’s clinical notes dated 15 September 2017. He stated that those notes indicate that a “screening test” was conducted, which, while “not comprehensive and not part of the testing that I undertake”, is likely to have alerted Dr Bassa to problems had they been present.
- 129 Associate Prof Rosenfeld disagreed with the proposition that Dr Bassa’s 15 September 2017 notes, which included the entry, “behaviour... good”, were merely a list of Dr Bassa’s opinions. Rather he asserted the notes listed Dr Bassa’s observations of Maria.
- 130 Drs Lonie and Simpson were critical of the reliance placed by Associate Prof Rosenfeld on Dr Bassa’s clinical notes. Pointing out that there is no evidence of Dr Bassa administering any “test” of cognition — a point conceded by Associate Prof Rosenfeld — Dr Simpson stated that “at best” the conclusions stated in his notes were based on “basic observations of a non-English speaking lady in the absence of a qualified interpreters... relying solely on her children as interpreter”. They assert that without a qualified interpreter, Dr Bassa could not have assessed, in any reliable manner, whether Maria’s

thought form and content was “good”, whether she had “perceptual issues/hallucinations”, and whether her cognition, insight and judgement were “good”. They said it is not possible to ascertain from Dr Bassa’s “checklist” the basis on which “the boxes were crossed or the opinions reflected therein were formulated”.

- 131 Drs Lonie and Simpson strongly disagree with the proposition that had there been problems with Maria’s cognition in September 2017 it is improbable Dr Bassa would have failed to detect those problems, given that, by then, he had seen Maria on 38 occasions over a period of about 18 months. Dr Lonie stated that it is entirely possible that Dr Bassa did not detect any problems, especially given that Maria was largely communicating through a third party. Dr Lonie asserted that in developed countries dementia remains undetected in 50 per cent of people who regularly see their GP. Referring to her 20 years of clinical experience, Dr Lonie stated that she regularly sees people with significant cognitive problems which have gone undetected. She stated that it is not a surprise but “a source of frustration” that GPs regularly fail to detect dementia, even where it is moderately severe. Dr Simpson agreed.

Ability to preserve a social façade

- 132 The experts agree that people with dementia are capable of presenting “well-preserved yet shallow social behaviours” and to engage in “social and surface level conversations”. They agree that is not uncommon for family members and others close to the person to be unable to see behind that social façade. Prof Kiernan explained:

“[T]he social facade is often maintained in dementia patients. In fact, these are learned behaviours dating back to infancy. So, if you smile at a child, the child often smiles back. And we see that in people who've got severe cognitive impairment. There's a utilisation behaviour. So for instance, if I put my hand out to a patient who's demented, they'll often grab my hand and shake my hand. You might perceive that they're actually shaking your hand, but in fact it's a utilisation behaviour. Similarly, if I provide a glass, they'll take the glass and drink from it. That doesn't mean that they wanted to drink, or they should be drinking, it's just a utilisation behaviour. And these are laid down in infancy and are present and remain throughout a dementing illness.”

133 In addition, the experts agree that if Maria had been displaying problems with cognition, when she met with Mr Ireland he may not have been able to identify the underlying problem, especially given they largely interacted through an intermediary. However, Associate Prof Rosenfeld stated that it would have been evident to Mr Ireland had Maria demonstrated the types of behaviour recorded by Dr Simpson in her March 2018 assessment. Drs Simpson and Lonie and Prof Kiernan disagreed.

Situational dependency

134 Associate Prof Rosenfeld and Prof Kiernan agree that environmental or situational dependency is a factor which influences decision-making in older people such as Maria. Associate Prof Rosenfeld explained:

“[T]here's no doubt at all with any older, frail person who is reliant on other people, who finds themselves in a situation of dependency... always invariably in very many cases that I see, there's an issue of ... influence. The influence of the environment and the situation they're in.”

135 In Associate Prof Rosenfeld's view, Maria's physical proximity to Kevin's family in the 14 months before making the disputed transfer, “invariably” had a “situational effect” and influenced her decision-making.

136 Prof Kiernan considered Maria's lack of contact with Stan in the period before making the disputed transfer to be a facet of her “environmental dependency”. He explained:

“Maria is living with the son Kevin and Kevin's family without any contact with the larger extended family to whom she may consider might be beneficiaries to a transfer of properties or part of her estate. So, I think that this is a key part of the discussion. In the context, so we know that someone has impaired reasoning, mental flexibility, judgement. And this 12 months period is critical behind the decision to transfer the properties.”

Significance of Maria's changed recollection of Stan

137 In her report of the March 2018 assessment, Dr Simpson recorded that Maria recalled that she had four children but could not recall their names, ages or where they lived. Later in that assessment she referred to her sons “Stan and

Kashik [sic]”. In contrast, in the 4 October 2017 family meeting, Maria smiled when Stan’s name was mentioned, said she had not seen him for some time, asked why he had not visited and said she missed him very much and would like to see him.

- 138 Prof Kiernan was questioned about the significance of Maria’s differing recollections of Stan and whether it evidenced, as Associate Prof Rosenfeld contended, a marked decline in her cognition between the October 2017 meeting and the March 2018 assessment. Prof Kiernan said that it did not cause him to change his opinion and merely demonstrated “clear fluctuations”, which were influenced by numerous factors, such as the environment (home/hospital) and the amount of sleep Maria had the night before.

Maria’s understanding of the disputed transfer

- 139 Drs Simpson and Lonie and Prof Kiernan are of the opinion that Maria lacked the ability to understand the broad import of the disputed transfer. Associate Prof Rosenfeld disagrees.
- 140 Associate Prof Rosenfeld and Prof Kiernan agree that it is unlikely that in October 2017 Maria had a clear understanding of the nature and value of her assets. Associate Prof Rosenfeld is of the opinion that, because of Maria’s limited education and limited involvement in the management of her financial affairs, it is likely she had a general understanding that she held several properties and that they were worth a considerable amount of money, but didn’t know of their exact value. In his view, Maria had the cognitive capacity to understand the nature of her estate but could not say whether in fact she possessed that understanding.
- 141 Prof Kiernan is of the opinion that Maria lacked the capacity to understand the value of her total assets and the proportion represented by the transferred properties. In his view, Maria would have had an understanding about the family home but not the assets she had inherited from Danuta.

142 In Associate Prof Rosenfeld’s opinion, Maria would have been capable of understanding that the properties inherited from Danuta were a “windfall”. Prof Kiernan disagreed. He stated that the problems of working memory and ability to evaluate information exhibited in the 2018 assessment could not have appeared overnight and it is likely they had been present for several years.

Maria’s proficiency in English

143 Maria’s first language is Polish. She attended school for 2 years in Poland and started work on a farm at the age of 14. She migrated to Australia in 1950. While the parties agree that Maria can neither read nor write English, prefers to speak Polish and needs an interpreter for legal and other complex matters, they disagree about the extent to which she was proficient in spoken English at the time of the disputed transfer.

144 While acknowledging that Maria’s understanding of English is basic, the respondents claim that Maria could nonetheless communicate in English, pointing, for example, to the evidence given by her long-time friend Rose Spiteria, who could not speak Polish.

145 The applicants disagree and describe Maria’s English as “basic”.

The correct and preferable decision — prospects of success and impact on financial position

146 The determination of the correct and preferable decision requires an assessment to be made of the prospects of success of the proposed set-aside action together with an assessment of the impact on Maria’s financial position, if it were to succeed or fail in part or whole.

Cost of litigation

147 At the request of the Tribunal, in July 2020 the Trustee provided an estimate of the likely costs of the proposed set-aside action, prepared by Mr Zucker. In his opinion:

- (1) if the matter were to proceed to hearing, Maria's likely costs would be in the range of \$120,000 to \$140,000, including solicitor, counsel and expert witnesses' fees and disbursements;
- (2) if the proposed legal action succeeded and a costs order was made in Maria's favour, her costs would probably be about \$25,000 (party-party costs), assuming that the defendants had capacity to pay an adverse costs order;
- (3) if the proceedings failed, Maria's likely costs would be in the range of \$220,000 to \$250,000 (being for her own costs and those of the defendants).

Prospects of success

- 148 The applicants assert that there are good prospects of each of the proposed actions succeeding; the respondents assert that the prospects of success are poor.
- 149 In *Degiorgio v Dunn (No 2)* (2005) 62 NSWLR 284; [2005] NSWSC 3, in the context of considering the meaning of the phrase "without reasonable prospects of success" in a predecessor to the *Legal Profession Uniform Law Application Act 2014* (NSW), Barrett J explained that the phrase does not set a "high or inflexible bar" and:

[E]quates its meaning with 'so lacking in merit or substance as to be not fairly arguable'. The concept is one that falls appreciably short of 'likely to succeed'.

- 150 Were this a case where the costs Maria would incur if the actions failed are likely to be modest and are unlikely to have any material impact on her overall financial position, it would arguably be sufficient to be satisfied that there are reasonable prospects that the proposed action would succeed. However, if the proposed action is unsuccessful, Maria is likely to incur costs of around \$250,000. Given the known unknowns of litigation this figure is at best an estimate and may vary considerably in either direction, depending on, among other things, the scope of issues in dispute, the length of the hearing, the

competence and efficiency of the party's legal representatives and the case management strategies adopted by the Supreme Court. A further complicating factor is that the assessment of the prospects of success can only be based on the available material. As the respondents point out, if proceedings were to be commenced in the Supreme Court, additional material may become available.

151 In my view, given the significant costs if the actions were to fail, I must be satisfied that the proceedings are likely to succeed, not merely that there are "reasonable prospects" of success.

Maria's financial position

152 In June 2020, the Trustee estimated the total value of the three transferred properties to be \$2,115,000.

153 In a report dated 6 July 2020, the Trustee recorded:

- (1) the estimated value of Maria's total assets is \$1,686,000, which included the family home, valued at \$1,350,000.
- (2) Maria has no income, and in the past 19 months her cash assets have reduced from \$488,900 to \$336,000.

154 As the applicants point out, if this rate of depletion continues it will be necessary to sell Maria's home in the next 12 months.

155 If the proposed action succeeds Maria stands to gain about \$2 million, possibly more given the recent movement in the Sydney residential property market. However, if the proposed action were to fail, she may incur costs of around \$250,000, making the sale of the family home inevitable and decreasing the funds available to provide for her future medical treatment and care.

Basis for setting aside the disputed transfer

156 The applicants nominate four possible bases on which the disputed transfer could be set aside:

- (1) lack of mental capacity to make the disputed transfer;
- (2) unconscionable conduct;
- (3) undue influence;
- (4) the disputed transfer is “unjust” within the meaning of the *Contracts Review Act*.

Assessment of the lay evidence

157 Before considering each of the proposed actions, it is necessary to address the submissions made by the parties about the proper approach to the assessment of the lay evidence, in particular the evidence given by witnesses who interacted with and had the opportunity to observe Maria around the time of the disputed transfer.

158 The applicants contend that the Tribunal should give little weight to the lay evidence as it relates to past events and (lay) opinions about Maria’s mental capacity. They contend that, given the contested and emotively charged nature of these proceedings, the evident antagonism between the parties and those within their respective “camps”, and the widely recognised phenomenon of the fallibility of human memory, the Tribunal should give greater weight to contemporaneous documents and to evidence given by independent, disinterested witnesses, in particular the expert witnesses.

159 The respondents contend that in circumstances where the only expert to meet with Maria did so six months after the disputed transfer was made, the expert evidence is at best “supplemental” and greater weight should be given to the lay evidence, including the observations of Maria’s GP and Mr Ireland, each of

whom had significant interactions with Maria before she made the disputed transfer. In support, they point to the following passage from *Tobin v Ezekiel*; *Estate of Lily Ezekiel* [2011] NSWSC 81 at [32]:

[T]he evidence of those with experience in dealing with elderly people, and who have personally observed the testator at and around the relevant time, is of considerable significance, often more than the opinions of others, medically qualified or not, who have not personally observed the testator at relevant times. (Citations omitted.)

160 In addition the respondents rely on the comments of Windeyer J in *Revie v Druitt* [2005] NSWSC 902 at [34]:

[L]ay evidence of the activities, conversations, family circumstances and relationships of the deceased and evidence from doctors, often general practitioners who were treating doctors during the lifetime of the deceased, usually is of far more value than reports of expert specialist medical practitioners who have never seen the deceased.

(1) Lack of mental capacity to make the disputed transfer

161 As Gleeson CJ observed in *Re Estate of Griffith (dec'd); Easter v Griffith* (1995) 217 ALR 284 at 290: “The power freely to dispose of one’s assets by will is an important right, and a determination that a person lacked (or, has not been shown to have possessed) a sound disposing mind, memory and understanding is a grave matter.” The same can be said of gifts made by living donors. A gift made to a child or a grandchild may be an expression of love or gratitude. Antipathy, even unreasonable antipathy, towards less favoured family members does not necessarily evidence mental incapacity.

162 A transaction may, however, be set aside if the relevant party lacked mental capacity at the time they entered into that transaction. In making that assessment, the starting point is the presumption that the relevant party had the requisite mental capacity: *Attorney-General v Parnter* (1792) 29 ER 632; *Murphy v Doman* [2003] NSWCA 249 at [36]; *Szozda v Szozda* [2010] NSWSC 804 at [20]-[21]. Whether the relevant party had the requisite mental capacity to enter into the subject transaction is to be assessed by reference to the particular transaction and the time it was made: *Croft v Sanders* [2019]

NSWCA 303 at [126], citing *Gibbons v Wright* (1954) 91 CLR 423 at 438; [1954] HCA 17 (*Gibbons*).

163 In *Gibbons*, the High Court held that “the law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions.” Rather, each party to a transaction must have “a capacity... to understand the general nature of what he is doing by participating in that transaction.” The complexity (or otherwise) of the transaction is one variable that must be considered when determining a person’s capacity to enter it: see *Croft v Sanders* at [126].

164 In *Gibbons*, the capacity of two sisters to execute a mortgage and a memorandum of transfer which had the indirect effect of severing their joint tenancy was challenged. It was held that it was not sufficient for the sisters merely to have had the capacity to understand the direct legal effect of the respective instruments. Rather, it was necessary (at 438-439):

[T]hat the two sisters should have been capable of understanding, if the matter had been explained to them, that by executing the mortgages and the memorandum of transfer they would be altering the character of their interests in the properties concerned, so that instead of the last survivor of the three joint tenants becoming entitled to the whole, each of them would be entitled to a one-third share which would pass to her estate if she still owned it at her death.

Did Maria have the capacity to understand the import of the disputed transfer if explained to her?

165 The question to be determined is not whether, when Maria transferred the three properties to Jenny and Krystina, she suffered some degree of general cognitive impairment, but whether she was able to understand the general nature of the “particular transaction” in question “when explained”: *Gibbons* at 438.

166 Whether Maria lacked the mental capacity to make the disputed transfer is not easily determined.

167 The applicants argue that Maria was elderly, ill, suffering from brain disease and so cognitively impaired at the time of transferring the properties that she

was disabled from understanding, even in a general sense, the nature and consequences of the disputed transfer. While some emphasis is placed by the applicants on the observations made by Andrew, Susan and Rebecca of Maria's mental health and cognition shortly before the transaction was entered into, they place greatest weight on the documented history of cognitive decline and the clinical opinions of Prof Kiernan and Drs Lonie and Simpson.

- 168 In some respects, the expert evidence for the applicants is quite impressive. Nevertheless, as numerous courts have observed, the evidence of people who have personal knowledge of an elderly person may carry greater weight than the opinions of others, even experts, who have less (or no) personal experience of the elderly person and their cognition at the relevant time: see, for example, *Revie v Druitt* [2005] NSWSC 902; *Atwell v Morgan* [2019] WASC 182; *Nicholson v Knaggs* [2009] VSC 64.
- 169 While the expert evidence for the applicants is, prima facie, persuasive, its shortcomings, due to no fault of those experts, is that it was given by witnesses who had not had the chance to assess Maria at the relevant time. Only one of them, Dr Simpson, actually had a chance to observe Maria and those assessments were made several months after the disputed transfer. The opinions of other experts about her capacity at the time of the transfer is based on inferences drawn from Maria's history as they interpreted it.
- 170 As the applicants point out, the weight of expert evidence is that Maria was suffering from cognitive impairment of such a degree at the time of the disputed transfer that she was incapable of understanding the nature of the transfer, even if it were explained to her. Prof Kiernan and Drs Lonie and Simpson stress that there are contemporaneous documents which tend to support a finding that Maria's cognitive capacity had been gradually deteriorating since about 2010.
- 171 However, as the respondents indicate, there is evidence which, if accepted, casts doubt on the reliability of that opinion. This includes:

- (1) the evidence given by family and friends who had contact with Maria throughout the period she was living with Kevin and his family;
- (2) the account given by Mr Ireland of his two meetings with Maria to discuss the disputed transfer, in particular her responses to his questions about the reason she was giving the properties to Jenny and Krystina, and his claim that at the meeting where the interpreter was present she said that she considered the properties she had inherited from Danuta to be a windfall;
- (3) the fact that in the 18 months before making the disputed transfers, Maria had met with three different solicitors, none of whom are reported to have raised concerns about her decision-making capacity; and
- (4) Dr Bassa's opinion as recorded in the certificate dated 15 September 2017 and the letter to Mr Zucker dated 19 December 2018, together with the absence of any mention of cognition recorded in his clinical notes made over the 20 months in which he saw Maria.

172 The respondents submit that in respect of Maria's capacity at the time of the disputed transfer, much greater weight should be placed on Mr Ireland's recollections of the legal meetings and on the general observations by Dr Bassa, than on the opinions of the three experts who support the applicant's position.

173 In respect of the lay witnesses, each party criticises the evidence of the other in terms of general reliability, memory and motivation and lack of independence. In my view, it is unnecessary to analyse the evidence of each these witnesses in fine detail. None of the family members is disinterested. Some have a direct interest in this litigation; others are supporters of those with those interests. Both sides are antipathetic to each other and this may have infected the evidence they have given. However, while that evidence would be scrutinised and approached by the Supreme Court with caution, it

puts it too high, in my view, to suggest that because of those factors the lay evidence is likely to be dismissed by the Court as unreliable. Corroboration or support from expert opinion evidence will be weighed when making those assessments.

- 174 Mr Ireland presents a different evidentiary problem. It is not clear how much weight should be placed on his evidence to the effect that he had satisfied himself of Maria's capacity. He had a difficult situation to deal with: a client who was obviously elderly, barely spoke English, was not a well person and who was clearly reliant on the relatives who accompanied her to the meeting to translate what was being said and to interpret Mr Ireland's legal explanations. Mr Ireland was not conversant with the Polish language. He placed himself in a situation where he was not able to talk to Maria alone or through an independent intermediary but was entirely reliant on relatives who had a direct interest in the transfer proceeding. This was very unfortunate. He sought to satisfy himself that Maria had capacity and was firm in his evidence to the effect that she was. But, because of the way those conversations were conducted, some doubts remain about the reliability of his observations. That doubt is increased by the expert evidence that people suffering dementia can often maintain a shallow social façade suggestive of normal (or sufficient) cognitive capacity. In my view, Mr Ireland's over-reliance on the directly-interested relatives suggests that he may have overstated his evidence. That is not to say it must be rejected out of hand, but it cannot bear the weight the respondents seek to place on it.
- 175 In addition, the unanswered issues surrounding Maria's meetings with Mr Ireland raise further questions about the reliability of Mr Ireland's account of those meetings. It is not clear why Wieslawa's name was crossed out in the file note of the first meeting. Nor is it clear what, if anything, was discussed at those meetings about Maria's entitlement to rent from the transferred properties and the circumstances surrounding Maria signing the amended transfer documents.

- 176 Dr Bassa's evidence, in its current form, is also problematic. While he kept some clinical notes, they were sparse and except for the note dated 15 September 2017, did not address the question of Maria's mental capacity. He appears to have looked after Maria's general health, but the available material does not create the impression that he paid great attention to her mental capacity, much less to have assessed it rigorously in terms of her ability to understand a legal document or transaction.
- 177 In all of the conflicting evidence, there appear to be one constant and reliable thread of evidence: Maria's gratitude, first to Danuta, then to Jenny and Krystina, for looking after. Coming very late in her life, with members of family taking care of her, it is plausible that she decided to reward those who had been most recently caring for her by giving away Danuta's properties. That conclusion is bolstered by the fact, as emphasised by the respondents, that when she made the disputed transfer Maria had not seen Stan, reputedly her favourite child, for some time. That conclusion is also strengthened by Maria's history of using her estate to "punish" a child who had fallen out of favour. Maria and her husband wrote Kevin out of their respective wills, when he fell out of favour as a young man. When the relationship improved, Kevin was reinstated as a beneficiary.
- 178 A transaction of this kind is not, of itself, complex. It merely transfers title from one person to another. Of course, there were ramifications — stamp duty issues, loss of potential income, capital gains implications, the legalities of documentation and registration of title and other things. But the essence of the transaction was simple. Maria may have lacked capacity to understand the general import of that transaction. On the other hand, given the relative simplicity of the transaction, and Maria's apparent motivation, it is plausible that, despite her cognitive decline, at the time the transfer was made she had sufficient capacity to understand the general nature of the transaction and the explanation she received about the documentation.
- 179 In my view, on the evidence currently before the Tribunal, both parties would have an arguable case in terms of the capacity question if the matter were to

proceed to the Supreme Court. On the basis of their expert evidence, the applicants in my view have a stronger case. While close to the line, I am not satisfied that an action brought on the basis of Maria's alleged lack of mental capacity is *likely* to succeed on this ground.

Consideration of whether to proceed to consider the applicants' alternative proposed bases

180 The respondents argue that no evidence suggestive of either unconscionability or undue influence has been led by the applicants. It was also submitted that it was never put to either respondent that they had acted unconscionably or exerted undue influence and that therefore the Tribunal should place little weight on the applicants' submissions on these points.

181 I disagree. First, the respondents were on notice from the outset that the applicants' case was based on four possible bases: lack of mental capacity, unconscionability, undue influence and under the *Contracts Review Act*. Second, the evidence relating to environmental and other forms of dependency on the part of Maria, as well as the evidence relating to the manner in which the legal meetings took place and the expert evidence, were all relevant to the questions of unconscionability, undue influence and unjust contracts.

(2) Unconscionable conduct

182 A transaction may be set aside on the basis of unconscionable conduct where one party to that transaction is at a special disadvantage and the other party takes advantage of their superior position or bargaining power to use that opportunity unconscientiously: *Blomley v Ryan* (1956) 99 CLR 362; [1956] HCA 81; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; [1983] HCA 14; *Hanna v Raoul* [2018] NSWCA 201. As Deane J explained in *Commercial Bank of Australia Ltd v Amadio* at 474:

Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so.

183 In contrast to the doctrine of undue influence, which requires that the will of the weaker party be overborne, the doctrine of unconscionable conduct can apply even in relation to transactions that are entered into voluntarily by a weaker party: *Commercial Bank of Australia Ltd v Amadio* per Mason J at 461; *Hanna v Raoul* at [90]-[91].

184 In *Mentink v Olsen* [2020] NSWCA 182, the Court of Appeal (Meagher and Payne JJA) at [2] listed the elements necessary to set aside a transaction on the basis of unconscionable conduct:

(1) that one party to the transaction is placed at a “special disadvantage” vis-à-vis the other in the sense that the disabling condition or circumstance is one which seriously affects the ability of that party to make a judgment as to his or her own best interests; and (2) that the other party understood the plaintiff to be at a special disadvantage and its effect with respect to his or her not being in a position to look after his or her interests. Where those circumstances make it prima facie unfair or “unconscientious” that the “stronger party” procure or accept the weaker party’s assent to the impugned transaction, the onus is cast on the stronger party to show that it was fair, just and reasonable: *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 at 461–462 (Mason J), 474 (Deane J, Mason and Wilson JJ agreeing); [1983] HCA 14.

Was Maria at a special disadvantage?

185 The question posed by this element is whether Maria was under a disadvantage that was “special” in the sense that it involved an inability “to make a judgment as to... her own best interests”: *Thorne v Kennedy* (2017) 263 CLR 85; [2017] HCA 49 at [64]; or “to make worthwhile decisions in [her] own interests”: *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; [2013] HCA 25 at [124]. Such disadvantage may be situational or relational, have been created or exacerbated by an absence of advice or explanation, and may coexist with a “full understanding” of the transaction: *Mentink v Olsen* at [3]; *Bridgewater v Leahy* (1998) 194 CLR 457; [1998] HCA 66 at [115]. A special disadvantage can arise because “illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect [the person’s] ability to conserve [their] own interests”: *Blomley v Ryan* at 415.

186 The applicants contend that because of a combination of factors, Maria was at a special disadvantage, namely, her cognitive impairment, age, illness, lack of education in Polish and English, lack of English language skills, lack of legal knowledge and sophistication, and lack of experience in managing her own financial affairs. They also argue that her dependency, physically and psychologically, on Jenny and Krystina, and on Jenny and Kevin to manage the meetings with Mr Ireland, were further aspects of her position of special disadvantage when making the transfer. In addition, they point to the role played by Mr Ireland acting as de facto solicitor for Jenny and Krystina in advising them about the execution of the transfer documents. For all these reasons, the applicants submit it can be readily inferred that Maria's ability to make judgments about her own best interests was seriously and adversely affected.

Did Jenny and Krystina know of Maria's special disadvantage?

187 In the applicants' submission, it would have been obvious to Jenny and Krystina that Maria was in a position of special disadvantage. She lived with Kevin, Jenny and Krystina. They took her to medical appointments. They knew her general history and were familiar with her medical history and limited language skills, education and financial experience. Jenny arranged the meetings with Mr Ireland and, with Kevin, was his primary contact. Jenny acted as interpreter during those meetings. Jenny held the view that Maria was vulnerable to manipulation by family members and can be "naïve and trusts that people are good, fair and will do the right thing" (documents produced under s 58 *Administrative Decisions Review Act*, Tab O, p 778).

188 Jenny and Krystina deny that they procured the transfer of the properties to benefit themselves. Each claims that they resisted Maria's efforts to give them the properties. Nevertheless, they accepted the gifts.

Was the disputed transfer "fair, just and reasonable"?

189 In my view, there are strong prospects that the Supreme Court would find proven the first two elements in a claim of unconscionable conduct. In

reaching that conclusion I have assumed that Maria's level of cognitive impairment at the time of the disputed transfer was at the level as assessed by Associate Prof Rosenfeld. (I apply this assumption in considering the remaining proposed actions.)

190 Therefore, the onus shifts to Jenny and Krystina to establish that the disputed transfer was "fair, just and reasonable": *Commercial Bank of Australia Ltd v Amadio* at 474; *Blomley v Ryan* at 428-429. In their submission, the applicants submit that the respondents have failed to discharge that onus.

191 The evidence of Maria's situational dependency on those caring for her, the combined effects of her multiple physical and cognitive deficits, her lack of financial experience and acumen, the questions that hang over the manner in which she received advice and gave instructions to Mr Ireland, the absence of advice about the likely implications of the disputed transfer on her overall financial position, the uncertainty surrounding her entitlement to receive rent from the dispute transfer, taken together, suggest unfairness. Neither Jenny nor Krystina took steps to ensure Maria received professional and/or independent advice about the likely impact of the disputed transfer on her financial position. They and Mr Ireland were aware that when the disputed transfer was made, Kevin's immediate family were effectively her only confidants. Maria gave away some 60% of her property assets where Mr Ireland did not know about her financial circumstances. Further, the weight of evidence is that Maria did not know what stamp duty was, and that she was erroneously informed that she was obliged to pay it. When it is also considered that Maria had no source of income (apart from interest), her cash reserves were low and, as a consequence, her financial independence diminished, thus ensuring her continued financial dependency on the respondents' family, the impression of the disputed transfer being not fair, just and reasonable becomes even stronger.

192 This is not to say that the respondents, or members of their family, deliberately set out to exploit Maria. Her position of special disadvantage, however, meant that she was probably not in a position to judge, much less

look after, her own best interests without independent legal and financial advice.

193 In my view, given the weight of evidence, together with the onus of proof that would lie upon the respondents to prove that the transactions were fair, just and reasonable, it is likely that an action based on unconscionable conduct would succeed.

(3) Undue influence

194 In *Commercial Bank of Australia Ltd v Amadio*, Mason J distinguished unconscionable conduct from undue influence at 461 in the following terms:

In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.

195 In *Olsen v Mentink* [2019] NSWSC 1299, Sackar J at [341] explained the distinction in these terms:

Undue influence in particular is concerned with whether or not an individual's free will has been subordinated by another whether through the application of pressure or exertion of some kind of other influence. Unconscionability, on the other hand is concerned with whether one has taken advantage of another who is vulnerable.

196 Applying those principles to this case, the following questions arise for determination:

(a) Were there factors personal to Maria whereby she was vulnerable to undue influence, for example, being illiterate, or having little or no experience or capacity in business?

(b) Was Maria a free agent and capable of protecting herself?

- (c) Was Maria under the influence of Jenny and Krystina to such an extent that her acts were not free acts and her will was subordinate to theirs?
- (d) Was the act of making the disputed transfer well understood by Maria?
- (e) Was Maria's freedom to make a decision constrained in terms of assessing alternatives and deciding between them?
- (f) To prove undue influence:
 - (i) Is there any direct evidence of the circumstances of the disputed transfer that is consistent with undue influence?
 - (ii) Is there a presumption, based on a relationship of ascendancy or influence and carer/dependent, that the disputed transfer was the result of undue influence?
 - (iii) In circumstances of such a presumption, have Jenny and Krystina positively proved that the disputed transfer, nevertheless, was the result of Maria's free will?

197 Many of these issues have been discussed above.

Was Maria a free agent?

198 As the applicants point out, the weight of evidence is that throughout the period Maria was living with them, Kevin, Jenny and Krystina held passionate and negative feelings about Stan. Each admitted being "livid" with Stan for, among other things, abandoning Maria and not assisting with the repair of the properties she inherited from Danuta. Jenny, in particular, was furious with Stan. Her statement to Maria: "Yes, he sucked on your tit till he was 29", demonstrates the strength of her antipathy towards Stan. The weight of evidence is that not only did Kevin, Jenny and Krystina hold heightened

feelings against Stan, they discussed those feelings with and in the presence of Maria. Taken together with Maria's dependency in terms of her residing with and being cared for by them, in my view it is arguable that Maria was not a free agent.

Was Maria constrained in assessing alternatives and deciding between them?

199 Maria did not have the benefit of an independent third party or confidant with whom to discuss the proposed transfer. All interactions with Mr Ireland were in the presence of Jenny and Kevin. Mr Ireland conceded that he did not advise Maria as to the advantages and disadvantages of the transfer, nor did he assess or give Maria advice about its likely impact on her overall financial position.

200 Taken together with Maria's limited education, limited business acumen and impaired cognition, in my view this element is arguable.

Presumption of undue influence

201 The weight of evidence is that Jenny and Krystina were Maria's carers, giving rise to a presumption of undue influence. While more difficult to determine, it is arguable that Jenny and Krystina would be unable to positively establish that the disputed transfer was the result of Maria's free will.

Consideration

202 While more difficult to establish than the claim of unconscionable conduct, in my view the claim of undue influence is arguable.

(4) Action under the *Contracts Review Act*

203 The *Contracts Review Act* provides for the grant of relief, including an order that a contract is void and, in the case of a land instrument, an order terminating the operation of that instrument, where a court finds a contract or a provision thereof "to have been unjust in the circumstances relating to the contract at the time it was made": s 7.

204 Section 9 of the *Contracts Review Act* lists the considerations that the court must take into account in determining whether the contract was unjust in the circumstances relating to the contract at the time it was made. There is considerable overlap between the considerations listed in s 9 and those relevant to determining whether Maria is entitled to equitable relief on the ground of unconscionable conduct and/or undue influence.

205 Broadly, for the reasons discussed above in relation to unconscionable conduct, in my view, it is likely that a claim brought under the *Contracts Review Act* would succeed.

Conclusion — the correct and preferable decision

206 I conclude that it is arguable that each of the proposed set-aside actions would succeed. However, in my view, the prospects of the disputed transfer being set aside on the basis of unconscionable conduct and in an action brought under the *Contracts Review Act* are stronger, and each is likely to succeed. I acknowledge that if the proposed actions were to be commenced, it is possible, if not probable, that additional material would become available, which may strengthen or weaken the prospects of having the disputed transfer set aside.

207 The question then arises, given the attendant risks of litigation, whether it is in Maria's best interests to commence one or more of the proposed actions, or at least those actions I have concluded are likely to succeed.

208 If the only likely outcome of the disputed transfer being set aside would be that Stan and Wieslawa would inherit a greater share of Maria's estate, I would be inclined to the view that the attendant risks of litigation would not be justified. However, setting aside the disputed transfer would strengthen Maria's overall financial position and financial independence and, importantly, significantly expand the options available to her for her future medical treatment, care and support. While Maria is of an advanced age it is possible that she may live on for a number of years. Her ability to survive the

constellation of conditions which led to her hospitalisation in February 2018 suggests that, despite her many problems, her health is resilient.

209 For these reasons, I have decided that the correct and preferable decision is to set aside the Trustee's decision, and in substitution for that decision to decide to commence action in the NSW Supreme Court to have the disputed transfer set aside on the basis of unconscionable conduct and in an action brought under the *Contracts Review Act*. In reaching this conclusion I have had regard not only to the statutory instructions that Maria's welfare and interests be given paramount consideration and that she be protected from exploitation, but also the importance of preserving family relationships: s 39 of the Trustee Act. With respect to the latter, in my view, given the evident antipathy within the family, commencing legal action to set aside the disputed transfer is unlikely to materially impact on those relationships.

210 In addition, I recommend that the Trustee immediately seek the advice of Senior Counsel experienced in the equity jurisdiction as to whether claims on the grounds of Maria's lack of mental capacity and undue influence should also be pursued.

211 Giving the evolving nature of litigation of this type, in the event that additional material becomes available which materially alters my assessment of the prospects of success of the proposed litigation, it will be necessary and appropriate that the Trustee reassess whether to commence and/or to continue any legal action.

I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar