SUPREME COURT OF QUEENSLAND

CITATION:	*Re: Estate of Carrigan (deceased)* [2018] QSC 206
PARTIES:	**In the Estate of GRANT PATRICK CARRIGAN, Deceased**
FILE NO/S:	SC No 5708 of 2018
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	6 September 2018
DELIVERED AT:	Brisbane
HEARING DATES:	6 June 2018; Further written submissions on: 27 June 2018, 23 July 2018 and 25 July 2018
JUDGE:	Boddice J
ORDER:	**1. I shall hear the parties as to the form of orders and costs.**
CATCHWORDS:	SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – OTHER CASES – where the testator committed suicide – where the testator sought to amend his formal Will by audio statements recorded shortly prior to his death – whether, pursuant to s 18 of the *Succession Act (Qld)* 1981, these recordings legally amended the testator's formal Will – whether the testator had the requisite testamentary capacity, at that time – whether the recorded statements reflected the testator's intended disposition of his estate SUCCESSION – MAKING OF A WILL – EXECUTION – INFORMAL DOCUMENT INTENDED TO BE WILL – GENERALLY – where the testator made audio recordings shortly prior to his death – whether these recordings constitute 'informal documents' within the meaning of s 18 of the *Succession Act (Qld)* 1981 – whether the testator appreciated the contents of his estate when making the audio recordings – where the testator's estate included property and two life insurance policies – whether the audio recordings indicated an intention to distribute life insurance policies to the testator's children

Acts Interpretation Act 1954 (Qld), s 36
Succession Act 1981 (Qld), s 18

Banks v Goodfellow (1870) LR 5 QB 549, considered
Carr v Homersham [2018] NSWCA 65, cited
Frizzo v Frizzo [2011] QSC 107, cited
Hatsatouris & Ors v Hatsatouris [2001] NSWCA 408, applied
Lindsay v McGrath [2015] QCA 206; [2016] 2 Qd R 160, cited
Re Estate of Wai Fun Chan, Deceased [2015] NSWSC 1107, cited
Re Spencer (deceased) [2014] QSC 276; [2015] 2 Qd R 435, applied
Re: White; Montgomery v Taylor [2018] VSC 16, cited

COUNSEL: R D Williams for the Applicant
M Arthur for the Litigation Guardian

SOLICITORS: Clifford Gouldson Law for the Applicant
CRH Law for the Litigation Guardian

[1] On 30 January 2017, Grant Patrick Carrigan ('the deceased'), died at his home address in Goondiwindi. He was aged 35 years. The cause of death was a self-inflicted gun-shot wound to his head. The deceased was survived by his wife, the applicant in this proceeding, and two children, aged 8 and 11 years.

[2] By application filed 29 May 2018, the applicant seeks a declaration, pursuant to Section 18 of the *Succession Act* 1981 (Qld) ("the Act"), that part of a recorded message dictated by the deceased shortly prior to his death, forms his last Will and Testament. An order is also sought for a grant of letters of administration with that Will, to be made to the applicant as administrator. In the alternative, the applicant seeks an order that there be a grant of probate of the deceased's Will dated 22 February 2011, to the applicant as executor.

Background

[3] The deceased was a qualified helicopter pilot. At the time of his death he owned all of the issued share capital in a helicopter business, through which he provided helicopters

for mustering and feral animal control. In the years prior to his death, the deceased had been involved in a number of legal disputes in relation to the conduct of that business.

[4] The stress of those legal disputes impacted on the deceased's relationship with the applicant and his home life. On the day of his death, the applicant left the family home with her children and the deceased's sister and mother. They travelled to a motel in Brisbane. Prior to doing so, the applicant sought a domestic violence order from the police station at Goondiwindi. The deceased took his own life later that afternoon.

The Estate

[5] The deceased's estate comprised his interest in the helicopter company and the family home. The estimated net value of the estate is in excess of $1,600,000. Those funds include money obtained by way of benefit from a small superannuation account.

[6] In addition to those assets, the deceased held two life insurance policies with a combined value of $6,000,000. Each policy had a designated nominated beneficiary in accordance with the policy terms. The nominated beneficiary, in each policy, was the applicant.

Wills

[7] The last formal Will executed by the deceased was dated 22 February 2011. It appointed the applicant as executor and trustee and bequeathed the whole of the estate to the applicant, in the event she survived the deceased by 30 days.

[8] Enquiries undertaken for the purposes of this application confirmed that the firm of solicitors that prepared that Will was not ever contacted by the deceased to prepare a subsequent Will and that no other relevant organisation holds a subsequent formal Will.

The application

[9] Shortly prior to his death, and at a time after the deceased had become aware the applicant and the children had left the family home, the deceased prepared two communications.

[10] First, at 5.09 pm on 30 January 2017, the deceased left a voice mail message on the mobile telephone of a close friend. In it, the deceased stated:

> *"Hi Stuart. Grant Carrigan. Goondiwindi Helicopters. Thank you for your help. If anything ever happens to me can you please make sure my life insurance policy, in the top of my gun safe, doesn't screw my family over and make sure they pay entitlements to my children. Fifty, fifty percent. $3 million to Corey. $3 million to Chloe and I leave every asset I own to my wife, Jennifer, who I love with all my heart."*

During the recording of that message the deceased was obviously distressed and crying.

[11] The friend retrieved this message shortly after its receipt. He spoke to the deceased for some time. After the deceased terminated the call, the friend called the deceased back at 5.24 pm. There was no answer. The friend left a message asking the deceased to call him. The friend heard no further from the deceased.

[12] The second communication was recorded on a mini tape recorder in the possession of the deceased. Relevantly, that recording contained the following:

> *"My name is Grant Patrick Carrigan of Goondiwindi Helicopters.*
> *It is the 30th January 2017.*
> *This is my last Will to be the final one over anything else I've got written.*
> *Every single asset I own belongs to my wife, will be left to my wife, Jennifer Carrigan, who I love more than anything in the world.*
> *My six million dollar life insurance policy will be split in two for Corey, my son, who I love, and Chloe, my daughter, who I love, three million dollars each."*

[13] The time at which this recording was made is not known. However, during the recording there can be heard a telephone ringing in the background, consistent with the friend's attempts to call the deceased back at 5.24pm.

[14] After that message had been recorded there was a break in the recording before the recording resumed with a personal message for the applicant. Again, during this recording the deceased's distress is obvious.

Relevant principles

[15] Section 18 of the Act provides:

> *Court may dispense with execution requirements for will, alteration or revocation*

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

[16] Whether a deceased intended a document or part of a document to form their Will, requires the satisfaction of three factual conditions. First, that there was a document. Second, that the document purports to embody the testamentary intentions of the deceased. Third, that the deceased, by some act or words, demonstrated that it was his then intention that the document, without more, operate as his last Will.[1] Satisfaction of these three conditions is a matter of fact, not discretion.[2]

[17] In determining these factual considerations, evidence of testamentary capacity is relevant, as a presumption of testamentary capacity does not exist in the absence of a formally executed Will.[3] The onus of proving testamentary capacity, in the case of an informal Will, lies on the party seeking to convince the Court the deceased intended that informal document to constitute his or her Will.

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[1] *Lindsay v McGrath* [2015] QCA 206; [2016] 2 Qd R 160 adopting the principles in *Hatsatouris & Ors v Hatsatouris* [2001] NSWCA 408 at [56].
[2] *Lindsay* at [16], [57], [63].
[3] *Re Spencer (deceased)* [2014] QSC 276; [2015] 2 Qd R 435.

[18] The discharge of that onus often arises as part of a consideration of all of the facts and circumstances, when determining the three factual considerations necessary for satisfaction of the requirements of s 18(2) of the Act. A satisfactory discharge of the onus may be met notwithstanding the absence of detailed medical or other evidence. As was observed by Lindsay J, in *Re Estate of Wai Fun Chan, Deceased*,[4] an informal Will, which is rational on its face and which was created using a patently rational process, may allow the necessary inference that the maker of the informal Will was mentally competent and that he or she knew and approved of the contents of that Will.

[19] The test for testamentary capacity was summarised by Applegarth J, in *Frizzo v Frizzo*:[5]

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

Discussion

[20] Both the voicemail message, and the tape recorded conversation, can constitute a document.[6] However, whilst the contents of the voicemail message are suggestive of an indication of the deceased's last wishes, the applicant does not contend that this document could satisfy the requirements of s 18(2) of the *Succession Act*.

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[4] [2015] NSWSC 1107.
[5] [2011] QSC 107 at [21] – [22].
[6] Definition of 'document', s 36 of the *Acts Interpretation Act* 1954 (Qld).

[21] The applicant does contend that the recorded message constitutes an informal Will which satisfies the three factual considerations necessary for its declaration as the deceased's last Will. The applicant further submits that although this recorded message was plainly made shortly prior to the deceased taking his own life, those facts and circumstances do not support a conclusion that the deceased lacked testamentary capacity at the time he created that informal Will.

[22] As to the first factual consideration, I am satisfied the recorded conversation constitutes a document within the meaning of the term as used in s 18(2) of the Act.

[23] As to the second factual consideration, there is no doubt, considering the words used in the recorded conversation, that the recording purports to embody the deceased's testamentary intentions. Testamentary intentions refers to what is to be done with your property upon your death.[7] The opening words specifically contain the deceased's intention as to the disposal of his property as well as an intention that the document revoke any previous Will. Further, the recorded message contains a clear bequest of "every single asset" owned by the deceased to the applicant.

[24] The statement by the deceased that the proceeds of his life insurance policies be paid to his children equally, is itself significant, in the context of his earlier bequest of every single asset to the applicant. That statement suggests the deceased drew a distinction between his assets and the proceeds of the policies.

[25] As to the third factual consideration, a consideration of the facts and circumstances establishes that at the time the deceased created that document, he demonstrated by his own words an intention that the document, without more, operate as his last Will.

[26] These conclusions constitute a satisfaction of each of the formal requirements of s 18(2) of the Act.

[27] The remaining issue is whether a consideration of the facts and circumstances establishes that the deceased had the requisite testamentary capacity at the time he made the document. The fact that he did so whilst in the throes of a decision to take his own

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[7] *Lindsay* at [45].

life does not, of itself, give rise to a presumption that he lacked testamentary capacity.[8] However, it is a relevant factor to be considered in determining whether the requirements for testamentary capacity existed at the time of the creation of that document.

[28] In considering those circumstances, it is relevant to note that whilst the deceased had been under stress for a considerable period of time, he was not receiving mental health assistance or taking any relevant medications at the time of his death. There is also no evidence of any previous suicide attempts.

[29] As to the requirements in *Banks v Goodfellow*,[9] a consideration of the contents of the recorded conversation establishes the deceased was aware of the significance of that recording, as representing his last Will. The deceased was also aware, generally, of the nature, extent and value of his estate. The recorded message contains a specific reference to his business. He specifically referred to his assets. He specifically referred, in value terms, to the life insurance policies. He also referred to all persons who may reasonably be thought to have had a claim upon his testamentary bounty, namely the applicant and his two children.

[30] Further, the recorded conversation indicates an ability to evaluate and discriminate between the claims of those persons. The document exhibits an intention to divide his estate so that the proceeds of the life insurance policies be divided equally between his children, with every other asset being left to his wife, the applicant.

[31] A matter of concern is that the recorded conversation indicates a clear intention that the applicant not be the beneficiary of the proceeds of the life insurance policy. That indication is consistent with the earlier voice mail message recorded on his friend's mobile telephone.

[32] A factor to consider is whether, in such circumstances, the contents of the recorded conversation in truth reflect the deceased's intended disposition of his estate, having regard to his incorrect understanding as to his legal entitlement to dispose of those life insurance policy proceeds, other than to the nominated beneficiary of those policies.

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[8] See, generally *Re: White; Montgomery v Taylor* [2018] VSC 16 at [58].
[9] (1870) LR 5 QB 549.

[33] Having considered all of the circumstances, I am satisfied that in making the recorded conversation, the deceased intended the applicant receive all of the assets of his estate. The proceeds of the life insurance policies are not assets of his estate. His stated desire in relation to their disposition does not detract from his clearly stated position in respect of every asset in his estate.

[34] I am satisfied the deceased had the requisite testamentary capacity to dispose of those assets in accordance with that stated intention. His mistake as to the proceeds of the life insurance policies being able to be disposed by him was a legal error. That error does not infect the existence of the requisite testamentary capacity, nor does it detract from the deceased's clear intention that the recorded conversation form his last Will.

[35] The recorded conversation contains a rational, logical disposition of the deceased's assets. Nothing in its contents or the surrounding circumstances gives rise to a doubt, sufficient to call into question the existence of the relevant testamentary capacity at the time the recorded conversation was made by the deceased.

[36] The observations of Basten JA (with whom Leeming JA agreed) in *Carr v Homersham*[10] are apposite:

> "*To speak of there being a 'doubt' as to testamentary capacity is to say little more than that a real issue has been raised on the evidence, which requires the resolution of the court. Unless such an issue has been raised, testamentary capacity need not be addressed; its existence will be presumed.* ***Once the issue is raised, the court must resolve it; that must be done by a consideration of all the evidence and the inferences which may be drawn from it. It is true that the court must be affirmatively satisfied as to testamentary capacity, but in doing so, it should be alert to the fact that to find incapacity and thus invalidate a formally valid will is, in the words of Gleeson CJ, "a grave matter."*** *A doubt which does not preclude the probability that the testator enjoyed testamentary capacity cannot warrant a finding of invalidity."* [emphasis added]

[37] In coming to this conclusion I note the deceased's two children were afforded separate, independent representation for the purposes of the determination of this application. The appointed litigation guardian for that purpose expressly supports the making of a declaration that the recorded conversation constitutes the deceased's last Will.

[38] I shall hear the parties as to the form of orders and costs.

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[10] [2018] NSWCA 65 at [47].