

SUPREME COURT OF QUEENSLAND

CITATION: *Radford v White* [2018] QSC 306

PARTIES: **KATRINA PAULINE RADFORD**
(applicant)
v
NICOLE WHITE
(respondent)

FILE NO: SC No 3602 of 2018

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 17 December 2018

DELIVERED AT: Brisbane

HEARING DATE: 20 July 2018

JUDGE: Jackson J

ORDER: **It is declared that the video recording in the terms transcribed in paragraph [5] of these reasons forms the will of Jay Matthew Schwer within the meaning of s 18(2) of the *Succession Act 1981 (Qld)*.**

CATCHWORDS: SUCCESSION – MAKING OF A WILL – EXECUTION – INFORMAL DOCUMENT INTENDED TO BE WILL – GENERALLY – where application under *Succession Act 1981 (Qld) s 18* – where deceased made video recording purporting to be a will – where recording states intended dispositions of property – where recording contemplates deceased may “fill out the damn forms later” – whether video recording a document – whether video recording states testamentary intentions – whether video recording intended to operate without more as will – whether deceased had testamentary capacity
Succession Act 1981 (Qld), s 18

COUNSEL: D Stevenson for the applicant
S McLeod for the respondent

SOLICITORS: Wockner Lawyers for the applicant
Michelle Porcheron Lawyers for the respondent

- [1] **JACKSON J:** This is an application for an order that a video recording is a document that forms a will within the meaning of s 18(2) of the *Succession Act* 1981 (Qld) (“the Act”).
- [2] On 24 January 2018, Jay Matthew Schwer died as a result of a self-administered overdose of prescribed pain killers following his discharge from hospital after surgery. It is not suggested that he deliberately took his own life.
- [3] On the date of his death, Mr Schwer did not have a will executed under Part 2 of the Act. He was then aged 39 and appears to have been a United States citizen, although he had lived in Queensland for approximately 12 or 13 years. It is not suggested that he had a will made in accordance with the laws of any other jurisdiction.
- [4] On 21 November 2016, in the afternoon, Mr Schwer suffered injuries, including a significant head injury, in a motorcycle accident. He had purchased and started riding the motorcycle on that day.
- [5] Relevant to this proceeding, earlier that day Mr Schwer made a video recording of his testamentary intentions at the request of his de facto partner. The recording comprised a file on his personal computer. A transcript of what he said is as follows:

“It’s Monday the 21st November 2016. My girlfriend would like me to do a will before I pick up my motorcycle. As I am too lazy, I’ll just say it. Everything goes to Katrina Pauline Radford if anything was to happen to me.

If my daughter decides to go to school, on completion of a four year degree, in something other than the Arts – so any business, psychology, sociology degree, that’s fine – Katrina will have \$30,000 put/set aside in a savings account. That will be given to Aleena Schwer as of completion of college, as long as it’s before the age of 25. If she doesn’t graduate by the age of 25 from a university with a four year degree, that money will be absolved (sic) back to Katrina Radford. This money that will be accumulated is to be used for one thing only, and that is to put a deposit on a house in Aleena’s own name.

Other than that, all money, all super funds, all three – that would be Q Super, Sunsuper and Colonial Super – and any insurance policies attained with those will all go to Katrina Pauline Radford.

Nothing, I repeat, nothing, will go to my soon to be ex-wife Nicole White/Schwer.

Other than that, no I don’t really plan on dying, but if I do it’s by accident, and yeah, I’ll fill out the damn forms later. But as sound mind and body, everything goes to Kat. Not one thing will go to Nicole Schwer. The only thing that will be given to Nicole on – I take that back – nothing will be given to Nicole. Katrina should be allowed to maintain contact with Aleena on my behalf so she could find out who I really was as a person.

On Aleena’s 16th birthday, Kat will give all coinage and American girl doll to Aleena. All the coinage is just, mainly, old coins mainly her birth year,

silver coins and stuff like that. But I would like Katrina to have an impact, in, in as a mentor, per se in Aleena's life, if anything should happen to me and I would like Nicole White to respect that. I've never really done one of these so it's kind of weird.

Other than that, everything's good. ... I don't plan on dying today, hopefully"¹

- [6] As a result of the head injury suffered in the motorcycle accident later that day, it is not disputed that Mr Schwer suffered amnesia or memory loss in relation to that day and the succeeding days. It is not suggested that he later referred to or otherwise showed that he remembered the video recording.
- [7] From mid-2014, until of the date of Mr Schwer's death, the applicant became his girlfriend, then his de facto partner, and also the mother of their daughter, Taylor, who was born in December 2017.
- [8] The applicant applies for orders that the video recording is a document that forms a will of Mr Schwer within the meaning of s 18(2) of the Act because it purports to state the testamentary intentions of Mr Schwer and submits that the court should be satisfied that Mr Schwer intended the video recording to form his will.
- [9] The respondent was Mr Schwer's estranged wife, as at the date of his death. The respondent and Mr Schwer were married on 11 May 2007. On 8 May 2010, their daughter Aleena was born.
- [10] They separated in 2014. On 15 April 2015, the Family Court of Australia made consent orders, by way of property settlement, under which the respondent was to pay Mr Schwer the sum of \$5,000 and he was to transfer all his interest in the former matrimonial home situated at 3 Merton Drive, Upper Coomera to the respondent. Paragraph 7 of the order provided for their entitlements otherwise, apparently by way of final property settlement.
- [11] The respondent opposes the orders sought by the applicant on the ground that the court should not be satisfied that Mr Schwer intended the video recording to form his will.

Document

- [12] Only a document that has not been executed under Part 2 of the Act can form a will for the purposes of s 18(2). "Document" is defined in s 5 of the Act by reference to the *Acts Interpretation Act 1954* (Qld), which includes, as paragraph (c) of the definition of "document" in Schedule 1:

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

¹ "Ums" and "ahs" are omitted from the transcript of the audio recording. As to the need for a transcription see *Re Estate of Wai Fun Chan* [2015] NSWSC 1107, [25]-[27].

- [13] Cases have decided that a digital video disc² and an audio recording³ are documents within the meaning of s 18. In accordance with those decisions, the video recording on Mr Schwer's personal computer or the disc constituting the media on which that recording was made, is a document.

Did the video recording purport to state the testamentary intentions of Mr Schwer?

- [14] The transcript of the video recording demonstrates that it purports to state Mr Schwer's testamentary intentions. First, he states that the reason for the recording is that his girlfriend asked him to do a will before he picked up his motorcycle that day. As well, he explains that he will say it on the video recording and fill out "the damn forms" later. Third, he uses the words "but as sound mind and body", indicating perhaps a United States citizen's appreciation of a legal formality relating to wills. Fourth, most importantly, the dispositions that he intends are clear, including that "everything goes to" the applicant with her to make provision for \$30,000 to be put aside for Aleena for the stated purposes. He also specifically refers to his interests in superannuation funds, identifying three funds and any insurance policies "attained with" those funds, again to "go to" the applicant. Fifth, he makes it explicit that he wishes that "nothing will be given" to the respondent. Last, he provides for a bequest of his coinage and American girl doll to Aleena.
- [15] In my view, there is no question that the video recording purports to state Mr Schwer's testamentary intentions.

Did Mr Schwer intend that the video recording should without more operate as his will?

- [16] Some of the matters discussed under the previous heading suggest that Mr Schwer intended that the video recording would operate without more as his will. First, the context in which the recording was made was to do a will before he picked up the motorcycle that day. Second, the language he chose to express his intentions was positive and not conditional in any way that would affect it coming into operation. Third, Mr Schwer specifically said that the video recording was made and those dispositions said by him were made "if anything was to happen to" him. Lastly, he also specifically stated that he did not really plan on dying and that he intended to "fill out the damn forms later", but then continued with the words "but as sound mind and body", as formal language apparently intended to convey that this was his testamentary instrument in the meantime.
- [17] The starting point is that a will made under Part 2 of the Act is not made so as operate from some future nominated date or some future nominated event other than death. It is an instrument that disposes of property, in the event of death, that operates upon death unless revoked sooner.
- [18] When the question is whether an informal statement of testamentary intention is intended to operate as a will, other considerations may intrude. For example, the

² *Mellino v Wnuk & Ors* [2013] QSC 336.

³ *Re Estate of Carrigan (deceased)* [2018] QSC 206.

document may be a note or record of a person's testamentary intentions, in the sense that it records what they then intend will be put in a will to be made, but the document itself is not intended to operate as the will. That is why draft formal wills prepared for a person to execute do not qualify as an informal will.

- [19] A number of cases have considered whether an informal document, prepared as a stop gap, can operate as a will.⁴ In the present case, in my view, there is no significant difficulty. First, at the time of making the video recording, Mr Schwer clearly intended that it was to operate in the event of his death, possibly in the near future from riding his motorcycle. Second, that he stated that he intended to “fill out the damn forms” at some time in the future did not displace his intention that the video recording was to operate as his will in the meantime. Third, the delay in Mr Schwer attending to “fill out the damn forms” subsequently is readily explained by his head injury suffered in the motorcycle accident and associated loss of memory of the day on which he made the video recording.

Capacity

- [20] The presumption of capacity of a testator to make a will that operates where a will is executed in accordance with Part 2 of the Act, does not apply to an informal will.⁵ Accordingly, the applicant bears the onus of establishing Mr Schwer's capacity. The evidence dealt with his mental health and capacity in some detail. An affidavit by Mr Schwer's mother demonstrated that from childhood he functioned at a high intellectual level. He had a career in the United States armed forces as a young man. He was honourably discharged on medical grounds. Following discharge, he suffered or continued to suffer from post-traumatic stress disorder. The breakdown of his marriage to the respondent may have been related to that. However, from mid-2014 he formed a relationship with the applicant that appears to have been a strong and positive relationship.
- [21] With the financial support to which he was entitled as a war veteran, he enrolled in university and was undertaking a degree course in social work.
- [22] Up to 21 November 2016, his habits, relationship with the applicant, earlier family life and even earlier years, as set out in the affidavits and exhibits, show no signs of any lack of capacity. On the evidence, no question about Mr Schwer's capacity as at the date of the video recording emerges, in my view.
- [23] The respondent adduced some evidence about Mr Schwer's state of mind and behaviour in the months before his death. Two observations may be made about that evidence. First, it is not relevant to his capacity as at the date of making the video recording. Second, even if it were relevant, it does not displace the evidence otherwise that proves his capacity.

Conclusion

⁴ *Yazbek v Yazbek* [2012] NSWSC 594, [104]-[105]; *Public Trustee v New South Wales Cancer Council – The Estate of Rita Lillian McBurney* [2002] NSWSC 220, [49]; *Permanent Trustee Co Ltd v Milton* (1995) 39 NSWLR 330, 335; *Estate of Masters* (1994) 33 NSWLR 446, 469.

⁵ *Re Estate of Carrigan (deceased)* [2018] QSC 206, [17]; *Re Spencer (deceased)* [2015] 2 Qd R 435.

- [24] The applicant has established that the three factual conditions for the conclusion that the video recording forms a will within the meaning of s 18(2) are satisfied. First, there was a document within the meaning of the section. Second, the document purports to embody the testamentary intentions of Mr Schwer. Third, Mr Schwer demonstrated that it was his then intention that the document without more operation as his last will. These conditions have been satisfied as a matter of fact, not discretion.⁶
- [25] The present proceeding is constituted as an application for orders as to those conclusions but must be, in effect, for declaratory relief. It might have been better had the application included a claim for relief for proof of the video recording as Mr Schwer's will and for the appointment of an administrator to the estate. However, the appropriate parties are represented. The respondent, as the wife of Mr Schwer and as the mother of their infant daughter was an appropriate party. The applicant, as Mr Schwer's de facto partner and the mother of their daughter, was an appropriate applying party. And Mr Schwer's mother swore an affidavit for use in the proceeding and accordingly had notice of the proceeding.
- [26] In the circumstances, in my view, it is appropriate to declare that the video recording in the terms transcribed in paragraph [5] of this judgment forms the will of Mr Schwer within the meaning of s 18(2) of the *Succession Act* 1981 (Qld).

⁶ *Re Estate of Carrigan (deceased)* [2018] QSC 206, [16]; *Lindsay v McGrath* [2016] 2 Qd R 160, 177 [16], 185 [57] and 187 [63]; *Hatsatouris & Ors v Hatsatouris* [2001] NSWCA 408, [56].