

# SUPREME COURT OF QUEENSLAND

CITATION: *Re Ambrose* [2019] QSC 3

PARTIES: **IN THE WILL OF IVY MAY AMBROSE (dec'd)**  
**STEPHEN KENNETH HARTWELL**  
(applicant)

FILE NO: No 62 of 2019

DIVISION: Trial Division

PROCEEDING: Application on the papers

DELIVERED ON: 9 January 2019

DELIVERED AT: Brisbane

HEARING DATE: Application on the papers

JUDGE: Davis J

ORDER: 

- 1. Pursuant to r 489(1) of the *Uniform Civil Procedure Rules 1999 (Qld)* this application proceed without an oral hearing.**
- 2. Pursuant to r 7 of the *Uniform Civil Procedure Rules 1999 (Qld)* the time for filing and hearing this application be abridged.**
- 3. Subject to the formal requirements of the Registrar, the photocopy of the will of IVY MAY AMBROSE of Arcare Endeavour, 65 Endeavour Boulevard, North Lakes, Queensland, 4509 that is Exhibit SKH1 to the Affidavit of Stephen Kenneth Hartwell filed 7 January 2019 be admitted to probate until the original will or more authenticated evidence be brought into and left in the Registry.**

CATCHWORDS: SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – GRANTS OF PROBATE AND LETTERS OF ADMINISTRATION – LIMITED, SPECIAL AND CONDITIONAL GRANTS OF PROBATE AND ADMINISTRATION – PROBATE OF LOST WILL – where the applicant is a solicitor and executor of a will – where the testator is deceased – where the will was lost after the testator’s death – whether the presumption that nonproduction of the original will signifies destruction and revocation by the testator arises – whether probate should be granted of a copy of the will

*Uniform Civil Procedure Rules 1999 (Qld) r 598*

*Cahill v Rhodes* [2002] NSWSC 561, followed  
*Frizzo v Frizzo* [2011] QSC 107, followed

*In the will of Dianne Margaret Cardie* [2013] QSC 265, cited *In the Will of Leonie Lyle Warren deceased* [2014] QSC 101, followed

SOLICITORS: Bickford Lawyers for the applicant

- [1] The applicant is a solicitor and the sole executor of the will of the deceased. The applicant applies for probate of a document described as “the photocopy of the will of IVY MAY AMBROSE” (the photocopy will). It is apparent that the original will has been lost.
- [2] The applicant also applies for procedural orders:
- (i) that the application proceed without oral hearing, pursuant to r 489(1) of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR); and
  - (ii) the time for filing and hearing the application be abridged, pursuant to r 7(2) of the UCPR.
- [3] The applicant describes in his affidavit<sup>1</sup> the events that led to the application. The deceased executed the will on 28 April 2014 and the applicant then took possession of it.<sup>2</sup> The deceased died on 16 May 2014.<sup>3</sup> In or about April 2018, the applicant’s office was renovated. The applicant placed the original will in a box with other personal papers. After the renovation, the applicant cleaned out his office and disposed of rubbish. The box in which the original will was placed is not able to be located. The applicant swears to his belief that the original will was accidentally disposed of in that process.<sup>4</sup>
- [4] The photocopy will was copied onto a USB stick and provided by the applicant to his solicitors in or about November 2016. His solicitors uploaded the photocopy will to their computer records and the document for which probate is sought was printed from those records.<sup>5</sup>
- [5] There is no doubt that the Court has jurisdiction to grant probate to a copy of a will.<sup>6</sup> This power is one sourced in the common law and not the *Succession Act 1981* (Qld).<sup>7</sup> Rule 598 of the UCPR requires that an applicant for probate give notice of intent to make the application for probate. The applicant has complied with that rule.<sup>8</sup>
- [6] In *Frizzo v Frizzo*,<sup>9</sup> Applegarth J followed *Cahill v Rhodes*<sup>10</sup> and held that five matters must be established for a successful application for the admission to probate of a copy will.<sup>11</sup> These are

---

<sup>1</sup> Affidavit supporting probate application of Stephen Kenneth Hartwell, filed 7 January 2019, CFI 2.

<sup>2</sup> At [6].

<sup>3</sup> At [2], exhibit SKH2.

<sup>4</sup> At [8].

<sup>5</sup> At [10].

<sup>6</sup> *Re Clayton (dec’d)* [1957] QWN 35; *In the Will of Leonie Lyle Warren deceased* [2014] QSC 101 (*Warren*).

<sup>7</sup> In the will of Dianne Margaret Cardie [2013] QSC 265 at [16]–[19].

<sup>8</sup> Affidavit of publication and service of Hannah Grace Smith, filed 7 January 2019, CFI 3.

<sup>9</sup> [2011] QSC 107.

<sup>10</sup> [2002] NSWSC 561.

- (i) there was actually a will;
- (ii) that will revoked all previous wills;
- (iii) the applicant overcomes the presumption<sup>12</sup> that, if the will cannot be produced to the Court, it was destroyed by the testator with the intention of revoking it;
- (iv) there is evidence of the terms of the will; and
- (v) the will was duly executed.

- [7] The applicant submits that these matters can be established in relation to the photocopy will.<sup>13</sup>
- [8] The first two matters are simple enough. The photocopy will is attached to the supporting affidavit of the applicant.<sup>14</sup> The applicant deposes to having read that document and believing it to be a true copy.<sup>15</sup> The first matter is established.
- [9] Clause 1 of the photocopy will expressly revokes all prior wills and testamentary acts. The second matter is established.
- [10] The applicant submits that the presumption that the will was destroyed does not here arise, because the will can be last traced to his possession rather than that of the deceased.<sup>16</sup> In that respect, the applicant refers to the remarks of Peter Lyons J in *Warren*, where his Honour adopted the description of the presumption given in *Lee's Manual of Succession Law*:
- “... the law presumes that, if a will last traced to the possession of the deceased testator cannot be found, it was destroyed by the testator with the intention of revoking it.”<sup>17</sup>
- [11] In the alternative, he submits that if the presumption arises, it is rebutted because the absence of the will is explained by the applicant losing it.<sup>18</sup>
- [12] I accept the applicant's primary submission. The presumption relates to the intent of the testator, and the clear intent was that the will remain with her solicitor and operate upon her death. The presumption does not arise here.
- [13] The applicant submits that the photocopy will demonstrates the terms of the original will and its due execution (the fourth and fifth matters). I accept that submission. The five relevant matters are established.
- [14] It is appropriate to grant probate of the photocopy will, until the original will or more authenticated evidence be brought into and left in the Registry, and I will so order.

---

<sup>11</sup> At [161]. See also *Warren* at [8].

<sup>12</sup> See *Allan v Morrison* [1900] AC 604; *Warren* at [11].

<sup>13</sup> Submissions of the applicant, filed 7 January 2019, CFI 5 at [7].

<sup>14</sup> Affidavit supporting probate application of Stephen Kenneth Hartwell, filed 7 January 2019, CFI 2 at exhibit SKH1.

<sup>15</sup> At [11].

<sup>16</sup> Submissions of the applicant, filed 7 January 2019, CFI 5 at [7.3].

<sup>17</sup> See *Warren* at [11].

<sup>18</sup> Submissions of the applicant, filed 7 January 2019, CFI 5 at [7.4].

[15] THE ORDER OF THE COURT IS THAT:

1. Pursuant to r 489(1) of the *Uniform Civil Procedure Rules 1999* (Qld) this application proceed without an oral hearing.
2. Pursuant to r 7 of the *Uniform Civil Procedure Rules 1999* (Qld) the time for filing and hearing this application be abridged.
3. Subject to the formal requirements of the Registrar, the photocopy of the will of IVY MAY AMBROSE of Arcare Endeavour, 65 Endeavour Boulevard, North Lakes, Queensland, 4509 that is Exhibit SKH1 to the Affidavit of Stephen Kenneth Hartwell filed 7 January 2019 be admitted to probate until the original will or more authenticated evidence be brought into and left in the Registry.