SUPREME COURT OF QUEENSLAND

CITATION:	***In the estate of Edward Steven Middleton (deceased)*** [2019] QSC 128
FILE NO/S:	No 3813 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2019
JUDGE:	Boddice J
ORDER:	**I shall hear the parties as to the form of orders.**
CATCHWORDS:	SUCCESSION – MAKING OF A WILL – where the deceased made two Wills during his life – where the first in time, made in 1994, appointed his daughter, the applicant, as Executor and left his entire Estate to her, apart from a bequest of $20,000 to his parents – where the second in time, made in 2013, appointed the Public Trustee of Queensland as Executor and left the Estate to the RSPCA (aside from two minor specified requests) – where the latter Will was removed from the Public Trustee by the plaintiff and could not be located – whether the 1994 Will or the 2013 Will was the last valid Will of the deceased – whether the deceased died intestate *Succession Act 1981* (Qld) *Re Fraser* [2010] QSC 208 *Trickey v Davies* (1994) 34 NSWLR 539 *Welch v Phillips* (1836) 1 Moo PCC 299; 12 ER 828
COUNSEL:	L M Quinn for the applicant A B Fraser for the Public Trustee M Steele for the RSPCA
SOLICITORS:	Quinn Legal Services Pty Ltd for the applicant Official Solicitor to the Public Trustee for the Public Trustee Wheldon & Associates for the RSPCA

[1] Edward Steven Middleton died on 13 December 2018. He left an Estate in Queensland worth approximately $600,000.

[2] During his lifetime the deceased made, relevantly, two Wills. The first in time was executed in accordance with the requirements of the *Succession Act 1981* (Qld) (***"the Act"***) on 22 July 1994. By that Will, the deceased appointed his daughter, the applicant, as Executor. He left his entire Estate to the applicant, apart from a bequest of $20,000 to his parents.

[3] The second, prepared by the Public Trustee of Queensland, was executed in accordance with the requirements of the Act, on 5 February 2013. It appointed the Public Trustee of Queensland as Executor and left his Estate to the RSPCA (aside from two minor specified bequests). That Will contained a specific statement that the deceased had decided not make provision for the applicant. An addendum gave reasons for that decision.

[4] The original 2013 Will has not been able to be located, despite due search and enquiry.

Application

[5] By application filed 9 April 2019, the applicant seeks a declaration that a document, being a copy of the 1994 Will, forms the last Will of the deceased. The applicant contends the 2013 Will was revoked under the presumption of destruction and that Probate should be granted on the document dated 22 July 1994, as an informal Will, the deceased having intended that that document operate as his last Will.

[6] The Public Trustee of Queensland resists the relief sought by the applicant. He contends that the circumstances support a conclusion that the deceased revoked the 2013 Will by destroying it on the mistaken assumption that its destruction would revive the 1994 Will. The revocation of the 2013 Will is therefore ineffective and it ought to be declared the last Will of the deceased. Alternatively, the Public Trustee of Queensland submits that the document sought to be declared an informal Will is incapable of constituting an informal Will.

[7] The RSPCA, as an interested beneficiary under the 2013 Will, also resists the relief sought by the applicant. It submits that a consideration of the circumstances as a whole, supports a conclusion that the presumption that the 2013 Will was revoked by the deceased by destruction, has been rebutted and there is no proper basis upon which a Court could declare the document dated 22 July 1994, was a valid informal Will of the deceased.

Evidence

[8] The factual circumstances surrounding the preparation of the 1994 Will are not in dispute.

[9] At the time of its execution, the deceased had two surviving children, a daughter, being the applicant, and a son from an earlier marriage, with whom he had no relationship due to irreparable differences. Another daughter had died in 1989.

[10] After the death of the deceased's wife in 1997 (the applicant's mother), the relationship between the deceased and the applicant deteriorated to the point where they had extended periods of no contact. The relationship was particularly strained between 2005 and 2014. It improved considerably from 2014. They had a good relationship at the time of the death of the deceased.

[11] At a time when he was in a fractured relationship with the applicant, the deceased attended upon the Public Trustee of Queensland and gave instructions consistent with the terms of the 2013 Will. There is no dispute as to the circumstances surrounding its preparation and execution by the deceased.

[12] The original 2013 Will was held by the Public Trustee of Queensland from its creation until 28 July 2016. On that date, the deceased took possession of the original Will. His signed acknowledgement of its receipt contained a statement that it was his intention to:

> "Make arrangements for the ongoing retention, storage and safe keeping of the before mentioned Will document and it is not my intention to return the document to the Public Trustee of Queensland for safe keeping purposes. I understand that it is my responsibility to take appropriate action to store the said document in a safe and secure place, and that failure to do so may result in loss to me, my estate and/or my beneficiaries, as my Executor(s) may not be able to take appropriate action to administer my Estate if the said document is missing on my death."[1]

[13] After the deceased had repaired his relationship with the applicant, the deceased expressed to others an intention to leave everything to the applicant, except for a monetary sum to care for his pet dog.

[14] The deceased also expressed an intention to leave everything to the applicant in discussions with the applicant. These discussions took place in 2018, at a time after the deceased had been diagnosed with lung cancer. Despite treatment, his condition deteriorated and he was admitted as an inpatient to the Royal Brisbane Hospital in November 2018.

[15] Prior to his admission to hospital, the deceased provided a note to a next door neighbour. Relevantly, that note stated the neighbour was to let the applicant know if he did not come out of hospital. It said the applicant would "find my Will (to her) and other items".[2]

[16] In her conversations with the deceased in hospital, the deceased advised the applicant he had executed a Will in 2013, at the height of their conflicts and when he was angry with the applicant. The deceased said when he had re-built their relationship he decided to write to the Public Trustee "to get them to cancel his Will".[3] The deceased said that was not adequate for him and he arranged to pick the Will up "so there was no

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1 Second affidavit of M L Middleton, filed 9 April 2019, MLM-3.
2 First affidavit of M L Middleton, filed 9 April 2019, MM-1.
3 Second affidavit of M L Middleton, filed 9 April 2019 at [46].

confusion in the future for me and that his 1994 Will was what he wanted for his last wishes". [4]

[17] The applicant said the deceased was a decisive and organised individual. She found the 1994 Will in his filing cabinet in a file labelled "Wills". She did not find the original 2013 Will. It was not in the Will folder. Other searches after the deceased's death proved fruitless.

[18] When the deceased was in hospital, the applicant advised him she had found his Will dated 1994. She showed the deceased the document. He said words to the effect "that is my Will".[5] The applicant asked the deceased if he wanted to re-do his Will as it named his mother and father, who were now deceased. The deceased replied "no".[6] A social worker present at the time discussed ways to prepare a new Will. The deceased indicated the 1994 Will was his current Will and he was "okay with how it was". [7]

[19] This conversation took place on 3 December 2018, 10 days before his death. On that date, the deceased executed an Enduring Power of Attorney in favour of the applicant. There is no suggestion the deceased, at the time, was incapable of expressing his testamentary intentions.

Legal principles

[20] Section 13 of the Act provides the circumstances in which a Will may be revoked. Relevantly, those circumstances include, revocation by means of a later Will, or by a document declaring an intention to revoke the Will, or by the testator destroying the Will with the intention to revoke it, or writing on the Will or otherwise dealing with it in a way which satisfies the Court that the testator intended to revoke it.

[21] A presumption of destruction will arise where the original Will was in the custody of the testator at the date of death and it is either lost or missing on that death. That presumption was described in *Welch v Phillips* (1836) 1 Moo PCC 299; 12 ER 828 at 302:

> "If a will traced to the deceased, and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect, unless there is sufficient evidence to repel it. It is a presumption found on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved, by a person of ordinary caution, in some place of safety, or would not be either lost or stolen; and if on the death of the maker it is not found… it is in a high degree probable, that the deceased himself has purposely destroyed it."

[22] There are two other principles relevant to revocation of a Will. First, the doctrine of dependent relative revocation, which arises in circumstances where a testator revokes a

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4 Second affidavit of M L Middleton, filed 9 April 2019 at [48].
5 Second affidavit of M L Middleton, filed 9 April 2019 at [28].
6 Second affidavit of M L Middleton, filed 9 April 2019 at [29].
7 Second affidavit of M L Middleton, filed 9 April 2019 at [30].

Will on a mistaken assumption of law or fact, the revocation being contingent upon the fact that the assumption is correct.[8]

[23] An example of the enlivening of such a doctrine is where a testator revokes a Will by destroying it with the intention that its destruction will revive a previous Will and the Court is satisfied that the testator would not have done so if the testator had known that the previous Will would not be revived.[9]

[24] Second, revival of a revoked Will. This principle allows for the possibility that a previously revoked Will may be declared to constitute a deceased's last Will, having regard to acts of the deceased which demonstrate afresh that the deceased intends that the revoked Will constitute his Will. This latter principle has limited application.

[25] Generally, a revoked Will will only be revived by re-execution or by a Codicil. Mere statements, without more, cannot convert the revoked Will. There normally is required conduct by the deceased to manifest the requisite intention, such as altering the document. Physical dealing may be sufficient to satisfy the requirements of an informal Will.[10]

Discussion

[26] Although the applicant deposes to a conversation with the deceased, in which the deceased said he had decided to write to the Public Trustee to get them to cancel his 2013 Will,[11] there is no correspondence of that nature.

[27] The letter the deceased sent to the Public Trustee, dated 28 July 2016, headed "Re: my Will – lodged with you as trustee several years ago", stated:

> "I hereby request return of the above (original) of my Will.
> I will contact you again if I require your services in the future." [12]

[28] That letter contains no assertion of an intention to cancel his Will. The acknowledgement signed by the deceased, when obtaining receipt of the original Will, also did not contain any statement to the effect that it was his intention to revoke or cancel that Will.

[29] Evidence as to the deceased's conduct after receipt of the original 2013 Will is limited. There is no evidence the deceased ever stated to any person that he had destroyed the original 2013 Will. There is no evidence the deceased ever expressed to any person an intention to destroy the 2013 Will, other than the conversation he had with the applicant to the effect that he subsequently picked the Will up so there was no confusion in the future. It was in the course of that conversation, the deceased is said to have stated his 1994 Will was what he wanted for his last wishes.

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8 Willem Kilian et al, *Australian Succession Law* (Thomas Reuters, 2012) (***"Australian Succession Law"***) at 165.1710.

9 See *Re Fraser* [2010] QSC 208 at [17]-[21].

10 *Trickey v Davies* (1994) 34 NSWLR 539 at [546]; See generally *Australian Succession Law* at 155.670.

11 Second affidavit of M L Middleton, filed 9 April 2019, MLM-2.

12 Second affidavit of M L Middleton, filed 9 April 2019 at [46].

[30] Whilst there is no evidence the deceased ever stated he had destroyed the 2013 Will, the failure to locate the original, in circumstances where there is evidence the deceased was a meticulous person, raises the presumption that the deceased destroyed the original with the intention that he revoke its content.

[31] That necessary intention does not automatically flow from the mere fact the deceased requested the original from the Public Trustee in 2016. However, the deceased's subsequent statements to the applicant as to his intention that the 1994 Will operate, are entirely consistent with the deceased having destroyed the 2013 Will with the intention that it be revoked by that destruction. His statement that he intended his Estate to go to the applicant is also consistent with the destruction being with an intention to revoke the 2013 Will, as the 2013 Will left his Estate to the RSPCA.

[32] The deceased's statements to the effect that the 1994 Will would be his last Will, are consistent with the deceased's intention being to revoke the 2013 Will, on the basis the 1994 Will would operate as his last Will. However, I am not satisfied the evidence supports a finding that the deceased's revocation of the 2013 Will was conditional upon the 1994 Will being revived as his last Will.

[33] The repair of the deceased's relationship with his daughter, as well as the deceased's statements that he wished his daughter to benefit from his entire Estate, are consistent with the deceased unconditionally intending that the RSPCA no longer receive the benefit of his Estate.

[34] The fact that the deceased was a meticulous person who would have not intended to die intestate does not detract from the finding. By the time of its destruction, the deceased did not intend for the RSPCA to receive any benefit from his Estate. His Estate was to go to his daughter, the applicant.

[35] I find the deceased destroyed the original 2013 Will, intending by its destruction that it, unconditionally, be revoked as his last Will.

[36] The 1994 Will was plainly revoked by the terms of the 2013 Will. Further it was the deceased's clear intention that the applicant not benefit from his Estate at that time.

[37] The revocation of the 1994 Will was unconditional. That revocation was intended by the deceased to operate upon execution of the 2013 Will.

[38] I find the 1994 Will was revoked at that time.

[39] The remaining issue for determination is whether there is evidence sufficient to found a conclusion that the deceased intended the previously revoked 1994 Will be revived and operate as his last Will. The deceased made statements to that effect. However, mere statements are insufficient to revive the 1994 Will.

[40] An information Will requires that there be identified a document which the deceased intended form his last Will.

[41] The original 1994 Will cannot itself be such a document. Section 18 of the Act expressly excludes from an operative informal Will, a document which has been executed in accordance with the requirements of the Act. The original 1994 Will was plainly such a document.

[42] It is doubtful, on the evidence, that the deceased even turned his mind to the possibility that a copy of the 1994 Will could be a document which he intended to form his last Will.

[43] Even if the applicant could successfully contend that the copy could constitute an informal Will, the evidence does not support a finding that the other requirements of s 18 of the Act are met in the present circumstances.

[44] Mere statements do not suffice. There must be conduct by adoption of the document, or other physical actions, which satisfy the Court that the deceased person intended the document contended for as an informal Will form the deceased's last Will.

[45] The evidence is insufficient to satisfy that requirement. At best, the evidence establishes the deceased intended the applicant receive his Estate and that he expressed the view that his 1994 Will was what he wanted for his last wishes.

[46] There is no conduct sufficient to support a finding that a copy of the 1994 Will was to be the document the deceased intended to operate as his last Will.

[47] I find that the requirements for an informal Will are not established on the evidence.

Conclusions

[48] The deceased destroyed the original 2013 Will, intending thereby to revoke that Will. That revocation was effective.

[49] The revocation of the 2013 Will was not conditional upon the 1994 Will being revived and becoming operative. The revocation of the 2013 Will was unconditional.

[50] Whilst it was the deceased's intention that the applicant receive the benefit of his Estate, the evidence is insufficient to establish that the deceased intended that a copy of the 1994 Will form his last Will.

[51] The 1994 Will having been revoked, there was no valid Will as at the date of the death of the deceased.

[52] The deceased died intestate.

Orders

[53] I shall hear the parties as to the form of orders.