SUPREME COURT OF QUEENSLAND

CITATION:	*Black & Anor v Scotson (No 2)* [2019] QSC 295
PARTIES:	**LESLEY ANNE BLACK AND THOMAS WILLIAM BLACK** **as executors of the will of JAMES McINALLY** (plaintiffs) **v** **MICHAELA ALICE SCOTSON** **as personal representative of CAROL JANE SCOTSON** (defendant)
FILE NO:	13032 of 2018
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	28 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions received 20 November 2019
JUDGE:	Ryan J
ORDERS:	**The Court pronounces for the full force and validity of the Will of James McInally, late of 1 Burnier Court, Shailer Park, Queensland, dated 4 February 2018, a copy of which is Exhibit D to the plaintiffs' affidavit of scripts filed 14 February 2019.** **Subject to the formal requirements of the Registrar, a grant of Probate of the Will of James McInally, dated 4 February 2018, is to be made to Thomas William Black.** **The plaintiffs' and the defendant's costs of the proceeding are to be paid from the estate on the indemnity basis, capped at $82,500 and $53,000 respectively.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW THE EVENT – GENERAL PRINCIPLES AND THE EXERCISE OF DISCRETION – Where the plaintiffs' were the successful party – Where the plaintiffs' acknowledged some suspicious circumstances attended the

making of the will – Where the court was obliged to examine the circumstances in which the will was executed – whether the court should depart from the general rule

COUNSEL:	G R Dickson for the plaintiffs J A Sheean for the defendant
SOLICITORS:	Michael Cooper Lawyer for the plaintiffs Smith & Stanton for the defendant

[1] On 6 November 2019 I delivered my judgment in this matter.

[2] I indicated to the parties that I would pronounce in solemn form for the force and validity of the will of James McInally dated 4 February 2018 and that I would hear them further on the question of the grant of probate, the form of the final order and costs.

[3] At the time I delivered my judgment, I was concerned that granting probate to Mr Black might not be in the best interests of the estate; not because he was not a fit and proper person, but because, having regard to the state of the relationship between the parties, there was a risk of further disputes between them.

[4] After delivering my judgment, I urged the parties to attempt to reach agreement about the further administration of the estate.

[5] The parties were able to reach agreement about the financial adjustments which are to be made in the administration of the estate, and now agree that a grant of probate ought to be made in favour of Mr Black. I will make such an order, together with an order pronouncing for the full force and validity of the February 2018 will.

[6] That leaves the question of costs.

[7] The plaintiffs acknowledge in their submissions that the defendant had "some reasonable grounds" for opposing the will. And at the trial, the plaintiffs acknowledged that suspicious circumstances attended the making of the will.

[8] However, having succeeded at trial, they seek the following orders:

1. That their costs of the proceeding be paid from the estate of the deceased on an indemnity basis capped at $82,500; and

2. That the defendant pays her own costs of the proceeding.

[9] The defendant seeks the payment of her costs, capped at $53,000 out of the estate for the following reasons:

- She acted with *bona fides* in lodging her caveat; and

- the court was *obliged* to examine the evidence "as to the testator's appreciation and approval of the content of the will" upon the plaintiffs' acknowledgement that suspicious circumstances attended the making of the 2018 will.

[10] The plaintiffs submit that the defendant ought not to be granted her costs out of the estate. As I understand the plaintiffs' submissions, they claim that the defendant's concerns should have been allayed pre-trial, after they provided certain documents to her.

[11] Those documents included –

- letters by Dr Hewson, Dr Fitzgerald and Mr Langridge, all of whom stated, in effect, that they had no concern about Mr McInally's testamentary capacity, which were provided to the defendant in August 2018; and

- information from Mr Hoare, the solicitor who prepared Mr McInally's will, which was provided to the defendant in September 2018.

[12] Obviously, the defendant's concerns were not allayed in 2018 and the matter progressed towards trial.

[13] The trial commenced on 25 July 2019.

[14] On 10 July 2019, the plaintiffs made an offer to settle this matter, on certain terms, with each party bearing their own costs.

[15] On 12 July 2019, before the defendant responded to their offer to settle, the plaintiffs provided Mr McInally's medical records to the defendant.[1]

[16] Those medical records included the results of two cognitive assessments which suggested that Mr McInally suffered from diminished executive function, including an assessment undertaken a matter of days before he signed his February 2018 will.

[17] On 19 July 2019, the defendant rejected the plaintiffs' 10 July 2019 offer to settle and referred to the results of Mr McInally's cognitive assessments, as well as to other entries in the medical records which referred to Mr McInally being "variously weak and confused". The defendant offered to settle the matter on her terms[2] on the basis that, having regard to the small size of the estate, the costs of a trial would eclipse any increase in the gift to her were she to succeed. The plaintiffs did not accept that offer.

[18] I infer that the letters of Dr Hewson, Dr Fitzgerald and Mr Langridge were obtained by the plaintiffs, and provided to the defendant, before the plaintiffs appreciated that material in the medical records raised issues about Mr McInally's capacity.

[19] However, even though the relevant material was brought to the plaintiffs' attention on 19 July 2019, I infer that the plaintiffs sought no further information from the doctors with a view to reconciling that material with their opinions that Mr McInally had testamentary capacity. Certainly none was provided to the defendant before trial.

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1 I draw this inference from other correspondence because the letter of 12 July 2019 was not before me.

2 Namely, that the Public Trustee be appointed as administrator and with certain terms as to costs.

[20] I am prepared to conclude that the defendant was *bona fide* in her concerns about the circumstances attending the making of the February 2018 will because of Mr Black's involvement in it.

[21] The plaintiffs conceded that suspicious circumstances attended the making of the February 2018 will. Further, the medical records provided in 2019 raised an obvious issue about Mr McInally's testamentary capacity, which was drawn to the plaintiffs' attention but which was not addressed by them prior to trial.

[22] In those circumstances, I am prepared to make an order that the costs of each party be paid out of the estate on an indemnity basis, capped at $82,500 and $53,000.