SUPREME COURT OF QUEENSLAND

CITATION:	*In the Will of Esme Jane Ferris (deceased)* [2020] QSC 26
PARTIES:	**Peter Roy Ferris and Helen Joanne Downing (applicants)**
FILE NO/S:	No 931 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	2 March 2020
DELIVERED AT:	Rockhampton
HEARING DATE:	2 March 2020
JUDGE:	Crow J
ORDER:	**1. Declare that the will dated 14 March 2016 is invalid as the testator did not have testamentary capacity at the time of executing the will of 14 March 2016.** **2. Subject to the usual requirements of the registrar, a grant in common form can proceed in respect of the will dated 31 May 2005.** **3. An order that the executor's costs be met out of the estate on an indemnity basis.**
CATCHWORDS:	SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – GENERALLY – where the deceased sought to create a new Enduring Power of Attorney – where the deceased was thought to lack capacity – where the deceased subsequently created a second will – whether the deceased had testamentary capacity when creating the will *Succession Act* 1981 (Qld) *Uniform Civil Procedure Rules* 1999 (Qld) r 601 *Banks v Goodfellow* (1870) LR 5 QB 549 *In The Will of Edward Victor Macfarlane Deceased* [2012] QSC 20 *Philpott v Olney* [2004] NSW SC 592 *Re Estate Griffith (Deceased); Easter v Griffith & Ors* (1995) 217 ALR 284
COUNSEL:	A J Bierman (Solicitor) for the applicants

SOLICITORS: VAJ Byrne & Co for the applicants

[1] This application concerns the testamentary capacity of the deceased executor at the time of the execution of her second will dated 14 March 2016. The matter has been referred to the court by the registrar pursuant to r 601(2) of the *Uniform Civil Procedure Rules* 1999 (Qld).

[2] The testator, Esme Joan Ferris, died on 19 July 2019 aged 90 years. The testator's husband, Walter Roy Ferris predeceased the testator. The late Walter Roy Ferris and the testator had three children, Walter Allan Brian Ferris, Peter Roy Ferris (the first applicant) and Helen Joanne Downing (the second applicant). Neither of the wills make any provision for Walter Allan Brian Ferris, the eldest son of the later Walter Roy Ferris and the testator. However, an explanation is made of this in paragraph 8 of the will dated 14 March 2016 (the second will) which records that a provision was not made for Walter Allan Brian Ferris under the second will as he was gifted the family property known as "*Hereford Hills*" during his lifetime.

[3] The applicants advertised their notice of intention to apply for a grant of probate of the will dated 31 May 2005 (the first will) and served a copy of that notice upon the Public Trustee. Neither Walter Allan Brian Ferris nor any other person has objected to the grant of probate of the first will being made in favour of the applicants.

[4] On 31 May 2005, the testatrix, aged approximately 76 years, executed her first will and testament. By "the first will", the testatrix's children, the applicants Peter Roy Ferris and Helen Joanne Dowling, were appointed as executors with the estate being devised principally by clauses 3(c), (d), and (e) of the will to the testator's great granddaughter, Taylor Nicole Taranto, granddaughters Kelly Joanne Mai, Rebecca Jean McClure and the testator's two younger children, the applicants Peter Roy Ferris and Helen Joanne Dowling.

[5] In his affidavit sworn 27 February 2020, Mr Anton Johannes Bierman, solicitor, swears to the testator's state of mind in February 2015 that:[1]

---

1 Affidavit of Anton Johannes Bierman filed 28 February 2020.

> "2. My first personal contact with Esme Joan Ferris (the deceased) was on 3 February 2015 when she attended my office for the purpose of making an Enduring Power of Attorney.
>
> 3. During my first meeting with the deceased on 3 February 2015, the deceased's personal circumstances were discussed and instructions were taken to draw her Enduring Power of Attorney. At that time, I was satisfied that her instructions were clear and that she was totally aware of the consequences of her actions.
>
> 4. The Enduring Power of Attorney was formally executed by the deceased on 4 February 2015 and the matter was regarded as being finalised. This Enduring Power of Attorney appointed her sons Peter Roy Ferris (Peter) and Walter Brian Ferris (Walter) jointly as her attorneys in the event of her mental incapacity.
>
> 5. I met with the deceased again in 18 February 2015. The reason for the follow-up appointment was that one of her appointed attorneys, Walter indicated his unwillingness to act as an attorney due to his work commitments and unavailability.
>
> 6. During our meeting on 18 February 2015, I explained to the deceased that she will have to make another Enduring Power of Attorney whereby her son Walter will not be appointed and I asked her if she wanted to appoint anyone else in his place. She answered that she only wanted to appoint Peter and after discussion, I was completely satisfied that she understood the risks of only have one attorney appointed. Notwithstanding the risks associated with only having one attorney appointed, she executed the newly drafted Enduring Power of Attorney on the same day namely 18 February 2015.
>
> 7. I had no reason to suspect that the deceased did not have the mental capacity to make the Enduring Power of Attorney on 18 February 2015 or I would not have proceeded with the document."

[6] Given that the first will was executed more than a decade before the testator's attendance upon Mr Bierman on 3 February 2015, there is no reason to suspect that in 2005 when the first will was executed the testator did not have testamentary capacity. In addition to this later evidence, the applicants are entitled to rely upon the presumption as to capacity as explained by White J in *Philpott v Olney*[2] where White J said:

> "The onus of proving that the deceased had testamentary capacity lies upon the plaintiff. If the Court is not affirmatively satisfied that she had such a capacity it is bound to pronounce against the

---

2 [2004] NSWSC 592 at [12].

> documents. Where a document has been duly executed in accordance with the formal requirements for the making of a will and is rational on its face, such execution raises a prima facie case that the person is of competent understanding which may place an evidentiary onus on the person disputing that the document is the deceased's will to adduce evidence raising doubts as to the deceased's competency ... In this case no such evidentiary onus is thrown on the defendant."

[7] I conclude that the first will has been duly executed in accordance with the formal requirements for the making of a will and it is rational on its face. The presumption as to capacity flows from a duly executed and rational will and the conclusion of Mr Bierman in February 2015 that Ms Ferris has legal capacity supports the conclusion that the first will has been validly executed.

[8] Mr Bierman further swore to the testator's circumstances in October 2015:[3]

> "8. The deceased then attended a further appointment with myself on 27 October 2015. Her proposed attorney, Simon Mai, brought her to my offices for the meeting but he was not present during the meeting. During this meeting, I noticed that she did not make eye contact with me as she did before in our previous meetings and I became concerned about her mental state.
>
> 9. Before our meeting with the deceased on 27 October 2015, her son Peter, who was concerned about his mother's financial affairs, handed me some paperwork evidencing the transfer of a substantial amount of money from her account to an account of her granddaughter and also some documents showing arrears on her mortgage repayments.
>
> 10. The deceased indicated to me that she wanted to appoint only Simon Mai as her attorney as she is no residing with Simon and his wife Kelly Mai who in turn is the granddaughter of the deceased. My response was that she should not feel pressured to appoint Simon as her attorney just because she is living with him and she responded that she is worried about not having an attorney at all. After questioning her on this point, it became clear that she did not remember that she had previously appointed her sons Peter and Walter as her attorneys and she also did not remember that she had removed Walter as her attorney in February that year.
>
> 11. The deceased could not even remember our previous meetings. I asked her about her house now that she was living with her granddaughter and she said she thinks it was sold but was not sure. The deceased seemed confused then as to whom she

---

3 Affidavit of Anton Johannes Bierman filed 28 February 2020.

really wanted to appoint as her attorney as she then mentioned Peter's name again.

12. I the [sic] also asked her about the money transfer to her granddaughter. Her response was that she never transferred any monies to her granddaughter and upon showing her the document evidencing the transaction, she mentioned that she may have transferred some monies but she was not sure. She also could not explain the mortgage arrears or why there was a mortgage registered against her property in the first place.

13. As a result of my observations and the discussion I had with the deceased during our meeting on 27 October 2015, I was not satisfied that she understood the consequences of her actions and I did not feel that she could execute a valid legal document and I therefore declined to drawn any documentation for her.

14. I informed Simon Mai of my opinion as to the deceased's mental state and my unwillingness to draft any legal documentation for her and they left my offices.

15. The deceased passed away 19 July 2019 and her death certificate reflected Alzheimer's disease for years as one of the causes of her death.

16. I met with the deceased's children on 5 August 2019 to discuss the administration of the deceased's estate. At that meeting I informed the children that I have record of a will dated 31 May 2005 made by the deceased at our offices.

17. The deceased's children then informed me that their mother had made another will on the 14 March 2016 which intended to revoke all previous wills.

18. I was surprised by the fact that the deceased had made a new will as I am of the opinion that the deceased could not have made any valid legal document since that last time I met with her. I then asked the children if they have any medical evidence supporting the cause of death as noted on the death certificate and was provided with a letter from Dr Peter Rofe, consultant psychiatrist dated 3 March 2016 which confirmed that the deceased needed residential care, preferably in the dementia unit."

[9] The experienced psychiatrist Dr Peter Rofe examined the testator in late February or early March, 2016. Dr Rofe's report provides important information. Dr Rofe was able to obtain background information, not from the testator, but rather from Kelly Mai, who attended the consultation with her grandmother in March 2016. Dr Rofe specifically notes that the testator could not provide a proper history and that the testator had "all the hallmarks of an evolving Alzheimers [sic] Disease. Both short

term and long term memory were significantly affected".[4] It was the testator's granddaughter, Kelly Mai, whom provided the history, namely that the testator was one of nine girls and one boy and went to primary school in the country near Gladstone. The testator was then married at age 22 and remained married to her late husband Walter Roy Ferris until he passed away aged 92. Dr Rofe includes in the family history that the applicant's, Helen Joanne Dowling, daughter Kelly Mai, was raised by the testator and the testator had since early 2015 resided with Kelly Mai and her husband, Simon Kurt Mai.

[10] As the testator had provided Dr Rofe with a flawed history, a CT scan showing vascular dementia of significant proportions, Dr Rofe diagnosed Ms Ferris as suffering from rapidly progressing Alzheimer's disease such that Dr Rofe recommended that the testator ought to, in March 2016, be admitted to a dementia unit. Despite this on 14 March 2016 the testator in fact executed a second will, which radically altered the first will. Kelly Mai's husband, Simon Kurt Mai, an undischarged bankrupt, was made executor of the estate.

[11] Significant changes to the distribution of the estate were made by Clause 5 of the 2016 will, relevantly Clause 5 provides:[5]

> "(a) TO GIVE five percent (5%) to my great-granddaughter **TAYLA NICOLE TARANTO**;
>
> (b) TO GIVE five percent (5%) to my great-granddaughter **BREEANNA JOANNE MAI**;
>
> (c) TO GIVE five percent (5%) to my great-granddaughter **MADISON JADE MAI**;
>
> (d) TO GIVE five percent (5%) to my granddaughter **REBECCA JOAN MCLURE**;
>
> (e) TO GIVE five percent (5%) to my daughter **HELEN JOANNE ANDREWS**;
>
> (f) TO GIVE seventy-five percent (75%) to my son **PETER ROY FERRIS** and my granddaughter **KELLY JOANNE MAI** and if more than one in equal shares…"

[12] There has been no attempt to prove the second will. Simon Kurt Mai has renounced his executorship of the second will. Each of the seven beneficiaries of the second will have sworn affidavits that notwithstanding the fact that each beneficiary would

---

4 Ex AJB-1 to the affidavit of Anton Johannes Bierman filed 28 February 2020.

5 Ex D to the affidavit of Peter Roy Ferris and Helen Joanne Downing filed on 15 November 2019.

benefit to a lesser extent under the first will, they have no objection to the court granting probate of the (first) will, noting that the deceased was suffering from Alzheimer's Disease at the date of the execution of the (second) will.

[13] The affidavits of the seven beneficiaries of the second will are on identical terms. They reach conclusions and opinions without deposing to the facts. Nonetheless, the intent of the beneficiaries of the second will is clear; they all consent to proof of the first will and not the second will.

[14] I will adopt the principles and approach set out by McMeekin J *In The Will of Edward Victor Macfarlane Deceased.*[6] Relevantly,[7]

> "[9] Where there is doubt as to the testamentary capacity of the testator, as there is in this case, the plaintiff bears the onus of proving that the testator had the necessary capacity at the relevant point in time. Probate will not be granted where there is significant doubt as to the testator's soundness of 'mind, memory and understanding' at the point in time the will was executed. Gleeson CJ in *Re Estate of Griffith (Deceased); Easter v Griffith & Ors* noted that "[t]he power freely to dispose of one's assets by will is an important right, and a determination that a person lacked (or, has not been shown to have possessed) a sound disposing mind, memory and understanding is a grave matter."
>
> [10] Furthermore Gleeson CJ held:
>
> > The traditionally accepted formula for determining testamentary capacity is that stated by Sir Alexander Cockburn CJ in *Banks v Goodfellow*:
> >
> > > 'It is essential to the exercise of [testamentary] power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusions shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.'"

---

6 [2012] QSC 20.

7 *In The Will of Edward Victor Macfarlane Deceased* [2012] QSC 20 at [9] – [10] (footnotes omitted).

[15] In adopting these above principles, I am satisfied on the evidence that the testator did not have testamentary capacity at the time of the signing of the second will on 14 March 2016.

[16] Accordingly, I make the following orders:

1. Declare that the will dated 14 March 2016 is invalid as the testator did not have testamentary capacity at the time of executing the will of 14 March 2016.
2. Subject to the usual requirements of the registrar, a grant in common form can proceed in respect of the will dated 31 May 2005.
3. An order that the executor's costs be met out of the estate on an indemnity basis.