

SUPREME COURT OF QUEENSLAND

CITATION: *In the Will of Valerie Eve Robson (deceased)* [2020] QSC 52

PARTIES: **ANN SMITH AND LOREI SUZANNE THOMPSON**
(Applicants)

FILE NO/S: BS 2285 of 2020

DIVISION: Civil

PROCEEDING: Application on the papers

ORIGINATING COURT: Supreme Court

DELIVERED ON: 25 March 2020

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Brown 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 VALERIE EVE ROBSON, Unit 1, 33 Jarnahill Drive, Mount Coolum in the State of Queensland that is Exhibit A to joint Affidavit Supporting Probate Application of Ann Smith and Lorei Suzanne Thompson affirmed 26 February 2020 be admitted to probate until the Original Will or more authenticated evidence be brought into and left in the Registry.**
- 4. The Estate pay the costs of the Application.**

CATCHWORDS: SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – MAKING OF A WILL – TESTAMENTARY INSTRUMENTS – WHEN LOST, MISLAID, DESTROYED OR NOT AVAILABLE – where a copy of the original will was executed and provided to a named executor – where the original will was misplaced and never located – where the only evidence of the will is the copy provided to the executor – whether the copy of the original will should be admitted to probate

Uniform Civil Procedure Rules 1999 (Qld), rr 7, 489 & 598
Cahill v Rhode [2002] NSWSC 561, considered
Frizo v Frizo [2011] QSC 107, followed

SOLICITORS: Sunshine Coast Legal Pty Ltd for the Applicants

- [1] This is an application on the papers seeking an order of the Court that the photocopied Will of Valerie Eve Robson (the Deceased), dated 20 December 2004, be admitted to probate.
- [2] The Deceased died on 29 August 2019. She was diagnosed with Alzheimer's on 10 December 2012. The photocopy of the Will is dated 20 December 2004. The photocopy of the Will in question shows that the Will has been duly executed on 20 December 2004 and witnessed. The Will states that it was prepared by Noel Woodall & Associates Lawyers.
- [3] A copy of the Will was sent via post to Ann Smith, the deceased's stepsister.¹ Ms Smith has deposed that the Deceased had told her in advance that she would be an executor of the Will and that the Deceased would send her a copy of the Will. Ms Smith has verified that the handwritten comments on the Will, namely "Annie – Copy of my will. Any questions – just ask Val" and "Original with" above the words "Noel Woodall & Associates" are, from her knowledge of the Deceased's handwriting, in the Deceased's handwriting. Ms Smith maintained a copy of the Will until the death of the Deceased.
- [4] Gordon Hirst, the brother of the Deceased, on 14 March 2013 was appointed as the Deceased's guardian to make decisions regarding her accommodation and health care. He stated that he was told by Ms Smith that she had received a phone call in approximately mid-2013 from Noel Woodall & Associates advising that they had the Deceased's original Will and whether someone wished to collect it. Mr Hirst deposed to the fact that he then attended the offices of Noel Woodall & Associates, collected the Deceased's original Will from their safe custody and returned to his home at Kandanga. Mr Hirst, states that he believes he left the original Will with the Deceased's other documents at his home at Kandanga, but after numerous exhaustive searches he has been unable to locate the original Will. He stated that he

¹ See affidavit of Ann Smith filed 2 March 2020 at page 1.

does not believe that the Deceased destroyed the original Will because it was physically impossible for the Deceased to do so after he brought it to his home at Kandanga. Mr Hirst deposed that subsequent to that time, the Deceased had not attended his residence as, by that stage, her health had deteriorated to the extent she was unable to travel to his property.²

- [5] Medical evidence provided by Dr Gregory Beake supports the fact that the Deceased had capacity at the time she made the Will. Dr Beake was her treating physician from 2004 to 2009, his first consultation having occurred on 11 November 2004. He stated that at no time during the period he treated the Deceased did he hold the view that she did not possess capacity. Dr Beake stated that the evidence of the Deceased's diagnosis of "an Alzheimer's type dementia"³ on 10 August 2012 by Dr Jayasinghe, where Dr Jayasinghe recorded that over the last two years her family and neighbours had noted she was forgetful, supported his view that she still had capacity when he last saw her on 18 April 2009.
- [6] Ann Smith and Lorei Suzanne Thompson are the stepsister and sister of the Deceased respectively. They state that when the Will was made on 20 December 2004, the deceased had not been diagnosed as suffering from Alzheimer's, nor did they consider that she was exhibiting signs of impaired capacity.
- [7] The evidence supports the fact that the Deceased had capacity at the time of execution of the will.⁴
- [8] Applegarth J in *Frizo v Frizo*⁵ applied the principle of *Cahill v Rhode*⁶ and held that five matters must be established for there to be a successful application for the admission to probate of a copy of a will, namely:
- (a) there was actually a will;
 - (b) that the will revoked all previous wills;
 - (c) the applicant overcomes the presumption that, if the will cannot be produced to the Court it was destroyed by the testator with the intention of revoking it;

² See affidavit of Gordon Hirst filed 2 March 2020.

³ See affidavit of Gordon Hirst filed 2 March 2020, at exhibit GB1.

⁴ Where a Will has been duly executed and witnessed there is a presumption of capacity.

⁵ [2011] QSC 107.

⁶ [2002] NSWSC 561.

- (d) there is evidence of the terms of the will; and
- (e) the will was duly executed.

[9] In the present case, the copy of the Will that has been produced satisfies the four requirements in subparagraphs (a), (b), (d) and (e).

[10] As to the Applicants overcoming the presumption that, if the Will cannot be produced to the Court it was destroyed by the testator with the intention of revoking it, there is clear evidence that that was not the case. The original Will remained in the custody of the Deceased's solicitors, Noel Woodall & Associates Lawyers, and was picked up by her brother, after he was appointed as her guardian, who is now unable to find the original. The Deceased never attended her brother's house subsequent to him obtaining the original Will. If the presumption does arise,⁷ I am satisfied it has been rebutted by the evidence of Mr Hirst.

[11] In all of the circumstances, it is appropriate to grant probate of the photocopy of the Will and to do so without an oral hearing.

[12] A notice has been advertised in the Law Reporter of the application for grant of probate of the Will dated 20 December 2004. A copy of the notice has been posted to the Public Trustee. According to the solicitor, Mr Joshua Woodall, when the notice was published it was not thought that the original Will had been lost. It was only subsequent to the advertisement that it was realised that only a copy could be located. He, therefore, states that the notice is in partial error as the words "of the copy" should have been inserted. Given the evidence establishes that the photocopy of the Will is the same as the original held at Noel Woodall & Associates, I am prepared to dispense with further compliance with r 598 of the *Uniform Civil Procedure Rules 1999 (Qld)*.

[13] I make the order in accordance with the terms of the draft order.

Orders

1. Pursuant to r 489(1) of the *Uniform Civil Procedure Rules 1999 (Qld)* this application proceed without an oral hearing.

⁷ Cf *In the Will of Leonie Lyle Warren (deceased)* [2014] QSC 101 at [12] where P Lyons J suggested the presumption did not arise where the original will was lost by the solicitors in that case.

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 VALERIE EVE ROBSON, Unit 1, 33 Jarnahill Drive, Mount Coolum in the State of Queensland that is Exhibit A to joint Affidavit Supporting Probate Application of Ann Smith and Lorei Suzanne Thompson affirmed 26 February 2020 be admitted to probate until the Original Will or more authenticated evidence be brought into and left in the Registry.
4. The Estate pay the costs of the Application.