

# SUPREME COURT OF QUEENSLAND

CITATION: *Re Fawkes* [2020] QSC 200

PARTIES: **In the will of JOAN FAWKES, deceased**

FILE NO: BS No 6368 of 2020

DIVISION: Trial Division

PROCEEDING: Application on the papers

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: Orders made 26 June 2020, reasons delivered on 15 July 2020

DELIVERED AT: Brisbane

HEARING DATE: Application determined without oral hearing

JUDGE: Davis J

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

**2. Subject to the formal requirements of the Registrar, the photocopy of the will of Joan Fawkes of Emmaus Village Aged Care, 930 Gympie Road, Chermiside, Queensland, that is exhibit A to the affidavit of Noel Eric Fawkes and Glen McAleese filed on 15 June 2020, 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 original of the will of the deceased cannot be located – where the original was held by the deceased or by the solicitors that prepared the will – where a liquidator has been appointed to the firm of solicitors that prepared the will – where there is no doubt the will existed – where there are copies of the will available – where the will revoked all previous wills – where there is no evidence of any intention by the testator to revoke the will – whether it is appropriate to grant probate to a copy of the will

*Uniform Civil Procedure Rules 1999*, r 489

*Allan v Morrison* [1900] AC 604, cited

*Cahill v Rhodes* [2002] NSWSC 561, cited

*Frizzo v Frizzo* [2011] QSC 107, followed  
*In the will of Leonie Lyle Warren deceased* [2014] QSC 101,  
cited

SOLICITORS: McInnes Wilson Lawyers for the applicants

- [1] The applicants, Noel Eric Fawkes and Glen McAleese, are the executors and trustees named in the will of Joan Fawkes (now deceased) dated 2 September 2014 (the will).
- [2] Mr Fawkes and Mr McAleese cannot locate the original will and applied for probate on a photocopy of the will. They sought to have the application determined without oral hearing pursuant to r 489(1) of the *Uniform Civil Procedure Rules* 1999.
- [3] On 26 June 2020, I made the following orders:
1. Pursuant to r 489(1) of the Uniform Civil Procedure Rules 1999 (Qld), this application proceed without an oral hearing.
  2. Subject to the formal requirements of the Registrar, the photocopy of the will of Joan Fawkes of Emmaus Village Aged Care, 930 Gympie Road, Chermside, Queensland, that is exhibit A to the affidavit of Noel Eric Fawkes and Glen McAleese filed on 15 June 2020, be admitted to probate until the original will or more authenticated evidence be brought into and left in the Registry.

### **History**

- [4] Mrs Fawkes died on 17 February 2020 at the aged care facility where she resided, Emmaus Village Aged Care, 930 Gympie Road, Chermside. She was then 95 years of age.
- [5] Mr Fawkes is Mrs Fawkes' son and Mr McAleese is her grandson. Apart from Mr Fawkes, Mrs Fawkes bore two other children, Beverley (now Beverley Warrick) and Marilyn. Marilyn predeceased Mrs Fawkes.
- [6] There is no doubt that the will was prepared by Lang Hemming & Hall Solicitors. The copy of the will bears the name and address of those solicitors. On its face, the will is validly executed and one of the witnesses is a solicitor, Daniel John McIvor.
- [7] While the evidence is not particularly clear, it seems that the will was retained by Lang Hemming & Hall or Mrs Fawkes but a copy found its way to the proposed executors, Mr Fawkes and Mr McAleese.
- [8] Upon the death of Mrs Fawkes, Lang Hemming & Hall were approached but the original will cannot be found.
- [9] Lang Hemming & Hall is a trading name of The LawStore Group Pty Ltd, an incorporated law practice. The practice suffered during the COVID-19 pandemic and a liquidator, Mr Jarvis Archer, was appointed to the company.

- [10] Often when a legal practice fails, the Queensland Law Society is appointed receiver to the practice. That did not occur here. The practice is in the hands of Mr Archer who appointed a senior solicitor, Myles Murphy, as his agent to deal with aspects of the practice, including documents held in safe custody.
- [11] Mr Murphy has sworn that he has located some files relating to Mrs Fawkes but has not located a file concerning the preparation of the will. He has also been unable to locate the will itself.

### **Determination**

- [12] In *Frizzo v Frizzo*,<sup>1</sup> Applegarth J followed the New South Wales decision of *Cahill v Rhodes*<sup>2</sup> and held that five matters must be established for the admission to probate of a copy will.<sup>3</sup> These are:
1. there was actually a will;
  2. that will revoked all previous wills;
  3. the applicant overcomes the presumption<sup>4</sup> that, if the original will cannot be produced to the court, it was destroyed by the testator with the intention of revoking it;
  4. there is evidence of the terms of the will; and
  5. the will was duly executed.
- [13] Mr Fawkes and Mr McAleese have produced a copy of the 2014 will.<sup>5</sup> On its face, it appears to be a will of Joan Fawkes and appears to be properly executed. By clause 1 of the will, all former testamentary instruments are revoked. The terms of the will are clear from the copy.
- [14] The real issue is whether the applicant has overcome the presumption that the original of the will was destroyed by Mrs Fawkes with the intention of revoking it.
- [15] There is no direct evidence of what became of the will. It seems to be assumed that Lang Hemming & Hall retained it. However, there is no record of that occurring. There is no record of the will being sent to Mrs Fawkes. Indeed, there is no file or record of any file being opened by Lang Hemming & Hall, even though it is clear from the copy of the will that those solicitors prepared the will, no doubt on Mrs Fawkes' instructions.
- [16] Mrs Fawkes was elderly when she made the will. At that stage, she was living in a unit in Chermside.<sup>6</sup> Before her death, she moved to Emmaus Village Aged Care, also in Chermside.

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<sup>1</sup> [2011] QSC 107.

<sup>2</sup> [2002] NSWSC 561.

<sup>3</sup> *Cahill v Rhodes* [2002] NSWSC 561 at [55].

<sup>4</sup> *Allan v Morrison* [1900] AC 604 and *In the will of Leonie Lyle Warren deceased* [2014] QSC 101.

<sup>5</sup> Exhibit A to the affidavit of Noel Eric Fawkes and Glen McAleese filed on 15 June 2020.

<sup>6</sup> Her address is described in the will as 165/27 The Boulevard, Chermside.

- [17] There are three realistic possibilities:
1. the will was sent by Lang Hemming & Hall to Mrs Fawkes who lost it, perhaps during her move to Emmaus Village Aged Care;
  2. the will was sent to Mrs Fawkes who destroyed it with the intention of revoking it; or
  3. the will was retained by Lang Hemming & Hall who have lost it, perhaps during the winding up of the incorporated legal practice.
- [18] The absence of any relevant records of Lang Hemming & Hall is odd. It is clear that the will was prepared by Lang Hemming & Hall, however, as I have already observed, there are no records. It is standard solicitors' practice to open a file, record instructions, prepare the will and then document what became of it after it was signed. There should be a copy of the letter sending the will to Mrs Fawkes or some third party, depending upon her instructions. Alternatively, there should be some safe custody record if the will was retained by Lang Hemming & Hall.
- [19] Mrs Fawkes was conscious of the need for a will. She had Lang Hemming & Hall prepare it and she executed it. There is no evidence that, for some reason, she had decided to die intestate. The probate application has been duly advertised and no party has come forward alleging a later will.
- [20] Mrs Fawkes clearly told her executors, Mr Fawkes and Mr McAleese, that she had made the will, as she provided them with a copy. There is no suggestion that they have been made aware of any later will. They believe that the will is the last will and testament of Mrs Fawkes.
- [21] The destruction and revocation of the will by Mrs Fawkes seems unlikely. It is far more likely that the will has been lost by either her or Lang Hemming & Hall. Of those two options, the latter is the most likely. I cannot believe that Lang Hemming & Hall would have prepared the will without opening a file and keeping records of what became of the will once it was executed. The absence of those records suggests that the records have been lost. The practice has gone through the upheaval of liquidation and the most likely fate of the will is that it was lost by those solicitors.
- [22] I am satisfied that the will was not revoked by Mrs Fawkes and that probate ought to be given of the copy of the will.
- [23] For those reasons, I made the orders which I did.