SUPREME COURT OF QUEENSLAND

CITATION:	*Theophanous & Ors v Gillespie* [2002] QCA 117
PARTIES:	**MARLISS KAYE THEOPHANOUS** **BENJAMIN CYRIL GILLESPIE** **NICOLE ANN GILLESPIE** **ANNA KAREENA KIVIRANTA** **(as executors of the Will of Cyril Bertram Gillespie deceased)** (plaintiffs/respondents) v **DEREK LEONARD GILLESPIE** (defendant/appellant)
FILE NO/S:	Appeal No 6300 of 2001 SC No 4022 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 March 2002
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2002
JUDGES:	Davies and McPherson JJA and Byrne J Separate reasons of each member of the Court, each concurring as to the orders made
ORDER:	**Appeal dismissed with costs to be assessed on an indemnity basis**
CATCHWORDS:	SUCCESSION - WILLS, PROBATE AND ADMINISTRATION - THE MAKING OF A WILL - TESTAMENTARY CAPACITY - SOUNDNESS OF MIND, MEMORY AND UNDERSTANDING - GENERALLY - where testator was terminally ill - where evidence of independent witnesses - whether the testator lacked testamentary capacity PROCEDURE - COSTS - APPEALS AS TO COSTS - JURISDICTION TO ENTERTAIN - where no leave obtained from the trial judge - whether the appeal was incompetent *Supreme Court Act* 1995 (Qld), s 253 *Re Golden Casket Art Union Office* [1995] 2 QdR 346, followed

COUNSEL: P W Hackett for the appellant
W Sofronoff QC, with D R Murphy, for respondents

SOLICITORS: A B Douglas & Associates for the appellant
McCullough Robertson for respondents

[1] **DAVIES JA:** This is an appeal against a judgment given in the Supreme Court on 14 June 2001. The action in which judgment was given was one by four of the five executors of the will of Cyril Bertram Gillespie, dated 24 August 1998, to prove that will in solemn form. The testator died on 15 September 1998 aged 57 years. He had been suffering from cancer for some time. The defendant in the action, the present appellant was the other executor of that will. The appellant and three of the four respondents (Marliss, Benjamin and Nicole) are adult children of the testator by his marriage. The other respondent (Anna) is a woman who, at the time of the testator's death and for some years before, had been his de facto wife.

[2] The appellant opposed the grant of probate on the basis that the testator lacked testamentary capacity on 24 August 1998. The appellant propounded an earlier will dated 24 April 1998. The difference between the two wills, unsurprisingly, is that the appellant received substantially less under the second than under the first.

[3] There was no issue between the parties as to the testator's testamentary capacity on 24 April 1998. However the appellant asserted at the trial that his mental condition deteriorated by or in August 1998 such that by 24 August, he was not of testamentary capacity.

[4] In addition to these two wills, the testator also made wills in 1998 on 11 and 17 August. Under these wills also the appellant received substantially less than under the will of 24 August. Consequently the appellant's case was, unsurprisingly, that the testator lacked testamentary capacity when he executed those wills. It is unnecessary to refer further to these wills other than to say that the appellant relied on the fact of the execution of so many wills in such a short time in support of his contention that, during that period in August, the testator lacked testamentary capacity.

[5] There were numerous witnesses who, at the trial, deposed to the testator's testamentary capacity on, immediately prior to and subsequent to 24 August. On the other hand no opinion was expressed by any witness that he lacked testamentary capacity at any relevant time.

[6] In a very comprehensive and thorough judgment the learned trial judge analysed in detail all of the evidence touching on the testator's testamentary capacity at relevant times. He accepted the evidence of witnesses, especially independent witnesses who deposed to facts showing that he had testamentary capacity at relevant times. In view of his Honour's extensive analysis of the evidence it is sufficient for present purposes to refer, only briefly, to the evidence of witnesses who were plainly independent.

[7] Perhaps the most important of these was Mr Walker, a solicitor who had known the testator for many years and who had been his solicitor for some years. He gave evidence of the occasions on and about the relevant time when he spoke to the testator. In particular, on 24 August he had three conversations with the testator. The first was in the Wesley Hospital where he went to see the testator at the latter's

request. There he had a most detailed conversation with the testator about changes which the latter wished to make to his will. In this respect it is sufficient to mention that the testator was a business man whose affairs involved several companies and that, consequently, the instructions which were given were quite complex involving as they did not only bequests but transfers of shares in order to ensure what the testator thought was the appropriate division of his property between his children.

[8] Then, after going back to his office and making some calculations of share numbers in order to achieve what the testator had requested, Mr Walker telephoned the testator and explained to him how his instructions could be implemented. It appeared to Mr Walker that the testator understood what he said and he then drew up the will.

[9] Mr Walker then returned to the hospital, this time with his secretary Ms Bourboulas, where he again saw the testator. Initially they had a conversation about the affairs of the testator's principal company, the testator expressing the view that the debtors' ledger was getting too big and that some steps ought to be taken to correct this; and he asked Mr Walker to get in touch with Anna and to start issuing summonses against debtors if it was thought appropriate. Then, before going through the terms of his will with him, Mr Walker asked a series of six questions, as he had on previous occasions, in order to test the testator's alertness. He answered these satisfactorily. Mr Walker then went through the will with the testator who signed it then in the presence of Mr Walker and Ms Bourboulas.

[10] Ms Bourboulas, who had noted down the questions and answers, also gave evidence of the testator's alertness on this occasion. Ms Bourboulas had been with Mr Walker to see the testator on previous occasions when he had made the earlier wills to which I have referred. So she was then familiar with the testator and was an experienced legal secretary.

[11] The third independent witness was a Mr Howard Hall who had known the testator since the early eighties and had been involved in a number of business ventures with him. He visited the testator in the Wesley Hospital on several occasions. He said that the testator was always quite coherent and not in any way confused. He remembered, in particular, one occasion, which he thought was in late August 1998, when they discussed a property in which they had a shared interest but about which Mr Hall had previously expressed some concern because the title was solely in the name of the testator. The testator initiated the conversation on this occasion telling Mr Hall that he had given full instructions to Benjamin about Mr Hall's interest in the property. It appears that this conversation occurred somewhere between 25 and 28 August shortly after the execution of this will.

[12] A fourth independent witness was a Mr Witham, a pastor who visited the testator in the Wesley Hospital. The learned trial judge was able to infer that the visit occurred between 30 August and 6 September, probably about a week after 24 August. The pastor related a religious discussion which he had with the testator whom he said appeared to be very clear, precise and positive. He also said that his experience in pastoral care had given him a lot of experience in dealing with people suffering from mental problems and that nothing emerged from his discussion to suggest that the testator was in any way confused or, for that matter, in any way abnormal.

[13] And finally there was evidence from two treating doctors, Dr Grimes and Dr Lumley. The former was an expert in palliative care who had a number of lengthy conversations with the testator at relevant times. The latter saw him on 22, 23, 24, 25 and 27 August. Each said that the testator did not appear to him to be confused or to give any indication of lack of testamentary capacity. Both the Mater Hospital records, where the testator had been before he was moved to Wesley Hospital, and the Wesley Hospital records tend, at least negatively, to support this evidence.

[14] There was, in addition a good deal of evidence from some of the respondents which supported the conclusion that the testator had testamentary capacity at the relevant time. Against that the appellant and his former girlfriend spoke of a couple of occasions on which the testator appeared to be confused; and he adduced evidence from two doctors who gave evidence that the drug regime to which the testator was subject because of his increasing pain was such that it could cause confusion. However neither of these doctors ever saw the testator and neither expressed any opinion concerning the testator's capacity.

[15] It is not in the least surprising, in those circumstances, that the learned trial judge accepted the evidence of the independent witnesses, to whom I have referred, that the testator had testamentary capacity at the relevant time. Indeed, as I have already mentioned, there was no evidence to the contrary. The highest that the appellant's case could ever be put was that it proved that the testator could have been confused at the relevant time.

[16] Mr Hackett, whose written submissions on this appeal put the argument as well as it could have been put for the appellant, acknowledged the difficulty which faced the appellant in attempting to overturn findings of fact based on credit. The difficulty is increased in this case because of the apparent quality of the evidence upon which those findings were made and the absence of any contradicting evidence. In my opinion, there is no substance in this appeal and it must be dismissed.

[17] The notice of appeal also purports to appeal against an order that the appellant pay the respondents' costs on an indemnity basis. In my opinion the appeal against that order must also be dismissed. One obvious and sufficient reason for this is that, once the substantive appeal is dismissed, the appeal on costs is an appeal against an order as to costs only within the meaning of s 253 of the *Supreme Court Act* 1995 (Qld): *Re Golden Casket Art Union Office* [1995] 2 QdR 346. Consequently, no leave having been obtained from the learned trial judge, the appeal is incompetent.

[18] That being the case, Mr Hackett quite properly concedes that there is no argument against the respondents' contention that they should have the costs of the appeal also on an indemnity basis.

Orders

Appeal dismissed with costs to be assessed on an indemnity basis.

[19] **McPHERSON JA:** I agree with what Davies JA has written. The appeal should be dismissed with costs against the appellant assessed on an indemnity basis.

[20] **BYRNE J:** I agree with Davies JA.