SUPREME COURT OF QUEENSLAND

CITATION:	*Horn v Rafferty* [2003] QSC 088
PARTIES:	**KENNETH FRED HORN** (Applicant) v **STUART RAFFERTY** (Respondent)
FILE NO:	S271/2002
DIVISION:	Trial Division
DELIVERED ON:	3 April 2003
DELIVERED AT:	Rockhampton
HEARING DATE:	28 January 2003
JUDGE:	Dutney J
ORDER:	**The caveat lodged against the grant of probate in the estate of Joan Sinclair Horn, deceased, be removed**
CATCHWORDS:	WILLS, PROBATE AND LETTERS OF ADMINISTRATION – PROBATE – CAVEAT – whether or not caveator has an interest in the estate or a reasonable prospect of establishing an interest – whether evidence does not raise a doubt whether the grant ought to be made – resumption of cohabitation after divorce – whether suspicion of undue influence - where mutual wills executed *Uniform Civil Procedure Rules* rule 626(2) *Birmingham v Renfrew* (1937) 57 CLR 666, referred to
COUNSEL:	Mr T Arnold for the Applicant Mr G O'Driscoll for the Respondent
SOLICITORS:	Grant & Simpson for the Applicant de Groot & Co for the Respondent

[1] The application presently before the court is for the removal of a caveat against a grant of probate in the estate of Joan Sinclair Horn.

[2] There is no dispute that the will in relation to which probate is sought is the last testamentary document executed by the testatrix. Rule 626(2) of the UCPR provides for the setting aside of a caveat if the court considers that the evidence does not show that the caveator has an interest in the estate or a reasonable prospect of establishing an interest, or if the evidence does not raise a doubt whether the grant ought to be made.

[3] The argument put in support of retention of the caveat is twofold. Firstly, it is submitted that the material filed on behalf of the caveator raises a suspicion of undue influence affecting the will such that the will should be proved in solemn form. Secondly, it is submitted that the caveator has *locus standi* to protect the equitable interests arising on a constructive trust flowing from mutual wills.

[4] I am not satisfied that the material in fact raises a suspicion of undue influence.

[5] The relationship between the applicant and the testatrix was a rocky one. The testatrix and the applicant were married for seven years until the grant of a decree nisi on 24 July 1997. the parties resumed cohabitation in about March 1998 and continued to so reside until the testatrix died on 14 October, 1999. The relevant will was executed on 17 May, 1999.

[6] The testatrix died from cancer of the bowel and liver.

[7] The applicant's affidavit deposed to the fact that the testatrix had suffered from breast cancer in 1994 but had been in apparent remission following surgery until cancer was re-diagnosed in August 1999. The relevant will was the second will made by the testatrix following the resumption of co-habitation. The earlier will was executed on 12 March, 1998. The estate largely comprised a house and contents at 4 Rosslyn Close, Yeppoon which the testatrix owned as tenant-in-common with the applicant. Under the 1998 will the estate was left to the testatrix' children and grandchildren from an earlier relationship and the present caveator was appointed executor. Under the 1999 will the estate was left to the applicant with a gift over of half the estate to her surviving children and half to the surviving children of the applicant in the event the applicant predeceased the testatrix. At the same time the applicant executed a will leaving his estate to the testatrix with a gift over of half the estate to his surviving children and half to the surviving children of the testatrix in the event of the testatrix predeceasing the applicant.

[8] The wills were executed at the offices of Maguire & Associates, Solicitors, at Yeppoon.

[9] Mr Maguire also prepared the 1998 will. He deposed to being informed by the testatrix at the time of its execution that she and the applicant had separated. At the time of the execution of the 1999 wills Mr Maguire was told either by or in the presence of the testatrix that she and the applicant had resumed cohabitation. Mr Maguire invited the testatrix to provide instructions for the

1999 will in the absence of the applicant but the invitation was declined. Mr Maguire read through the 1999 wills and explained their effect prior to execution.

[10] A report from Dr Julien Gregory, the testatrix' GP, dated 23 September 2002 was not entirely co-incident with the affidavit of the applicant. Dr Gregory reported that the testatrix was expressing serious doubts about her marriage to the applicant in the latter part of 1996. Following her divorce in July 1997 she continued to cohabit with the applicant. By January 1998 she was saying she was having problems living with the applicant but was prepared to tolerate it. In March 1998 she had her right breast removed as a result of the cancer. By April 1998 she was depressed and sought a psychiatric referral. She was prescribed Zoloft and Muralex. By June 1998 the testatrix was discussing the possibility of reconciliation with the applicant with Dr Gregory. By November 1998 the testatrix was gaining weight. In March 1999 the testatrix was placed on annual check ups by her breast surgeon. By June her weight had increased again. From July/August she was obviously suffering from metastatic cancer. Dr Gregory commented generally that the testatrix was not complaining of relationship problems in the early months of 1999. Her condition had stabilised and her anti-depressant medication was not affecting her ability to think clearly or decide matters for herself.

[11] Seven deponents filed affidavits on behalf of the caveator. Alan Thompson was a long time friend of the applicant. He deposed to some relationship difficulties in 1996 but had nothing of more recent origin to contribute. A Ms Leene Parjel, a lifelong friend of the testatrix deposed to the testatrix being concerned about her relationship with the applicant between 1996 and 1998. Again she had nothing to contribute after the reconciliation. Ms Parjel's brother, Reet Butler, does not claim to have seen or spoken to the testatrix since 1995. The testatrix' daughter, Lisa Rachelle Rafferty was unable to contribute anything to the position after the reconciliation between the testatrix and the applicant. The testatrix' son, David Stevens could depose only as to a desire by the testatrix to keep the applicant happy. David Steven's fiancé, Cassandra Board, deposed to the testatrix' emotional state during April 1999. There was generally an unsatisfactory relationship between the testatrix' children and those associated with them, and the applicant. I can understand that a collapsing relationship, leading to the eventual divorce of the applicant and the testatrix, would not endear the applicant to the testatrix' separate family and that they would be suspicious of the renewal of the relationship in the circumstance of the testatrix' general ill health. After the death of the testatrix further ill feeling was built up by what was at least perceived to be an insensitive approach to the separate family's wishes in relation to the testatrix' ashes.

[12] Finally, the caveator, Stuart Rafferty, who is the son-in-law of the testatrix deposed to some of his observations of the history of the relationship between the testatrix and the applicant. Apart from commenting on an apparent submissive attitude of the testatrix to the applicant Mr Rafferty does not refer

to the important period between the recommencement of the relationship and the final illness.

[13] Having regard to the evidence of the doctor and the solicitor who made the wills I cannot see that the material filed on behalf of the caveator raises anything that would, if accepted, cast any doubt on the validity of the final will of the testatrix.

[14] The second issue related to the mutual wills.

[15] The applicant's 1999 will was revoked by his 2002 marriage to his present wife. Notwithstanding this the applicant has made a further will executed 1 June 2002 leaving his entire estate in accordance with the gift over in the will made in 1999. Whatever trust was created by the 1999 mutual wills is thus preserved by the 2002 will. If a constructive trust does arise from the making of mutual wills in 1999 and that trust is compromised by any subsequent will, it seems to me that the equitable interest created in 1999 would be preserved in priority to any subsequent testamentary or inter vivos attempt to defeat it[1]. The property at 4 Rosslyn Court has itself been sold. There is nothing in the 1999 wills which would lead me to the conclusion that the applicant was not intended to enjoy any benefit from the inherited estate during his lifetime. I can thus see no impediment to the grant of probate of the 1999 will and no basis for the caveat presently preventing the grant.

[16] The caveator has by the further submissions lodged on his behalf on 7 February, 2003 sought a declaration as to the fact of mutual wills and the declaration of a trust. It does not seem to me to be appropriate to do so. There is nothing in the material before me which suggests that the applicant is repudiating any obligation he may have to the testatrix in relation to the disposition of his own estate. The persons entitled to enforce any trust are the beneficiaries of that trust rather than the alternate executor under the 1999 will[2]. Unless some such repudiation either by revocation of the current will or by attempted inter vivos gift or otherwise is attempted the question seems to me to be moot and thus it is inappropriate for the question of mutual wills to be considered.

[17] In my view the present caveat is unsustainable and I order that it be removed.

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[1] *Birmingham v Renfrew* (1937) 57 CLR 666

[2] Julie Cassidy, *Mutual Wills,* para 7.8