SUPREME COURT OF QUEENSLAND

CITATION:	*Re Estate of Robert Wilcock* [2004] QSC 473
PARTIES:	**RE ESTATE OF ROBERT WILCOCK**
FILE NO/S:	484 of 2004
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	23 December 2004
DELIVERED AT:	Cairns
HEARING DATE:	5 December 2004
JUDGE:	Jones J
ORDER:	**That probate should issue subject to the formal requirements of the Registrar.**
CATCHWORDS:	
COUNSEL:	
SOLICITORS:	Mr Robin Smith for the applicants

[1] The applicants apply for a grant of probate in common form of the Will of Robert Wilcock ("the testator") who died on 6 June 2004. The will propounded was executed on 30 December 2004 but it contains irregularities which have caused the Registrar to refer the application to the Court pursuant to r 601(2) of the *Uniform civil Procedure Rules* ("UCPR").

[2] The two matters which concerned the Registrar were firstly the fact that the document had the word "copy" impressed upon it in several places, and secondly, there were two alterations to the document which alterations would not initialled by the testator.

[3] The applicants seek to explain how these irregularities came about and argue that despite the lack of initialling to the alteration there is substantial compliance with the formalities prescribed by s 9 of the *Succession Act* 1981 ("the Act"). That section reads:-

> "**9. Will to be in writing and signed before 2 witnesses**
> A will shall not be valid unless it is in writing and executed in manner hereinafter mentioned and required (that is to say) it shall be signed at the foot or end thereof by the testator or by some other person in the testator's presence and by the testator's direction and such signature shall be made or acknowledged by the testator in the

presence of 2 or more witnesses present at the same time and such witnesses shall attest and shall subscribe the will in the presence of the testator but no form of attestation shall be necessary provided that –

(a) the court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the court is satisfied that the instrument expresses the testamentary intention of the testator; and

(b) the court may admit extrinsic evidence including evidence of statements made at any time by the testator as to the manner of execution of a testamentary instrument."

[4] The circumstances in which the document was executed are not in doubt. Four persons were present at the time – the two applicants and the two witnesses, Gordon and Anna Donaldson. The latter were long time friends of the testator and knew of his personal circumstances and changes that had occurred in his life which made necessary the alterations. The details are set out in the statutory declaration made by Gordon Donaldson on 30 July 2004[1] and are confirmed by Geoffrey Fieldes by his affidavit sworn on 17 November 2004. The following facts emerge.

[5] The document was initially drawn as a form of a will by which the testator intended to appoint the Public Trustee of Queensland as his executor and to direct the whole of his estate be given to his wife, Mavis Wilcock. Mavis Wilcock died early in the month of December 2003.

[6] The testator took that form of will and directed that two alterations be made. The first was to delete the Public Trustee and substitute the names of the present applicants as the intended executor. The second alteration was to delete the name of the now deceased Mavis Wilcock and substitute the words "be disposed of as directed by me or disposed of as they see fit". The reference to "they" was clearly a reference to the substituted executors of the will.

[7] Those alterations having been made, the testator appeared to read through the document and then he executed it in the presence of the two witnesses who then themselves signed the document and initialled the alterations.

[8] The impress of the word "copy" is adequately explained by the change in the initial purpose of the document. The use of that document rather than drawing a completely new document appears to have been done as a matter of convenience in circumstances of some time constraint.

[9] The testator's failure to place his initials beside the alterations appears to have been an oversight. I am satisfied however that the alterations were made before the testator executed the document and that he was aware of those alterations. Thus, the presumption that an alteration, interlineations and erasures in a Will were made after execution is clearly rebutted. *Re Marryat*[2]. Also as the alterations were made prior to execution there is no question of its validity being determined by the provisions of s 12 of the Act.

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1 See ex 2 to the affidavit of Geoffrey Fieldes sworn 30 September 2004

2 1964 OWN6

[10] I am satisfied in the circumstances that the altered document reflected the testator's intention. The only question then is whether the absence of the initialling to the alterations by the testator results in the document being invalid.

[11] The formalities required by s 9 of the Act are essentially four in number –

(i) That the will be in writing.

(ii) That it be signed at the foot or end thereof by the testator or some person in his presence and by his direction;

(iii) That the signature should be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(iv) That such witnesses shall attest and subscribe the Will in the presence of the testator.

[12] The purpose of a testator's signature is to authenticate the document as the testator's will[3]. Consistently with the findings made above, I am satisfied that the testator has acknowledged the alterations by his signing the will at the foot thereof after the alterations were made. If the document were left unaltered it would have had no testamentary effect. On one view, the argument would be open that there has in fact been strict compliance with the above formalities. But in any event, all the circumstances point to there being a substantial compliance with the formalities.

[13] I therefore order that probate in common form should issue subject to the formal requirements of the Registrar.

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[3] Laws of Australia 36:81