

# SUPREME COURT OF QUEENSLAND

CITATION: *De Groot v Musso & another* [2011] QSC 69

PARTIES: **MARGOT ALISON DE GROOT as executor of the will of JANET MACHELL CRANBROOK deceased**  
(applicant)

**v**

**JOHN MUSSO**  
(respondent)

FILE NO/S: BS 11657 of 2010 and BS 12554 of 2010

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 5 April 2011

DELIVERED AT: Brisbane

HEARING DATE: 22 November 2010

JUDGE: Martin J

ORDER: **I order that:**

- (a) **The caveat filed on 16 October 2009 be removed.**
- (b) **Subject to the formal requirements of the Registrar, the will and codicil of the deceased dated 30 June 2009 and 26 July 2009 respectively be admitted to probate.**

CATCHWORDS: SUCCESSION – WILLS PROBATE AND ADMINISTRATION – PROBATE AND LETTERS OF ADMINISTRATION – GRANTS OF PROBATE AND LETTERS OF ADMINISTRATION - where applicant is executor of will - where respondent filed caveat requiring applicant to commence action for proof of will in solemn form – where applicant seeks removal of caveat pursuant to r 626(2)(b) *Uniform Civil Procedure Rules* (1999) – where applicant seeks probate of will and a codicil in accordance with s 6(1) *Succession Act* 1981 – where respondent argues that beneficiary exercised undue influence over the testator – where respondent argues that beneficiary engaged in unconscionable dealing with respect to the testator – whether, on the facts, the beneficiary exercised undue influence or engaged in unconscionable conduct with respect to the testator- whether the caveat should be set aside and the will

and codicil admitted to probate

*Succession Act 1981* (Qld), s6(1)

*Uniform Civil Procedure Rule 1999* (Qld), r 624, r 626

*Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447

*Garcia v NAB* (1998) 194 CLR 395

*Page v Horne* (1848) 11 Bav 227

*Louth v Diprose* (1992) 175 CLR 621

*Yerkey v Jones* (1939) 63 CLR 649

COUNSEL: B.T. Porter for the applicant  
L. Stephens for the respondent

SOLICITORS: de Groot for the applicant  
Clayton Utz for the respondent

- [1] The applicant is the executor of the will made on 30 June 2009 by the deceased, Janet Cranbrook.
- [2] The respondent, John Musso is the deceased's son. On 16 October 2009 he filed a caveat requiring the applicant to commence an action for proof of the will in solemn form.
- [3] The applicant seeks removal of the caveat pursuant to rule 626(2)(b) of the *Uniform Civil Procedure Rules 1999* ("UCPR") and probate of the Will and a codicil dated 26 July 2010, in accordance with s6(1) of the *Succession Act 1981*.

### **The relevant rules**

- [4] Rule 624 UCPR allows for the filing of a caveat in certain circumstances. So far as is relevant, it provides:
  - "(1) A person claiming to have an interest in an estate may file in the registry a caveat in the approved form.
  - (2) The caveat may be—
  - ...
  - (c) a caveat requiring proof in solemn form of any will of the deceased."
- [5] Such a caveat may be set aside under r 626 UCPR which provides:
  - "(1) If—
    - (a) a person intends to apply for a grant; and
    - (b) a caveat is in force in relation to the estate;
 the person may apply to the court, naming the caveator as a respondent, for an order setting aside the caveat.
  - (2) The court may set aside the caveat if the court considers that the evidence does not—
    - (a) show that the caveator has an interest in the estate or a reasonable prospect of establishing an interest; or
    - (b) raise doubt as to whether the grant ought to be made.

(3) If the court does not set aside the caveat under subrule (2), the court may give the directions it considers appropriate for the application to be decided speedily, including a direction to the caveator to start a proceeding within a stated time.

(4) If the caveator does not start the proceeding within the time stated in a direction given under subrule (3), the caveat stops having effect.”

## History

- [6] In order to understand the submissions made by the parties it will assist if I set out a brief chronology of the relevant incidents. The persons to whom reference will be made are:

Janet Cranbrook	Born 1938. The deceased. Mother of John Musso and Anita Coleman.
Richard Cranbrook	Born 1942. Married Janet Cranbrook in 2009.
John Musso	Son of the deceased.
Leontine Musso	Wife of John Musso.
Anita Coleman	Daughter of the deceased.
Katrina McQueeney	Solicitor employed by “de Groot’s”. She took instructions from, and drew the last will of, Janet Cranbrook.

<b>2004</b>	The deceased (then using her name from her second marriage – Helmrich) was living in a house at Flaxton. Her property assets were worth approximately \$3,500,000. Mr Cranbrook lived nearby.
<b>2006</b>	A close relationship developed between the deceased and Mr Cranbrook.
<b>October 2008</b>	The deceased was diagnosed with pancreatic cancer. She consulted Ms McQueeney to prepare a will. John Musso was to be the principal beneficiary. The will was not finalised.
<b>December 2008</b>	The deceased was told that her cancer was inoperable.
<b>Early 2009</b>	Her condition improved and appeared to stabilise.
<b>February 2009</b>	She and Mr Cranbrook decided to marry.
<b>March 2009</b>	They married. The deceased formed the view that the behaviour of Mr Musso and his wife at the wedding was insulting and dismissive of her decision to marry. She did

not see her son for about another 6 months. Their relationship deteriorated.

**June 2009**

The deceased became concerned about her health and instructed Ms McQueeney to: prepare a will under which Mr Cranbrook was the principal beneficiary, transfer her real property to him inter vivos, and arrange a contract for mutual wills which would ensure, in substance, that one-sixth of her assets would be left to her son and daughter when Mr Cranbrook died.

At a meeting with Ms McQueeney she affirmed her instructions.

Later that month Ms McQueeney attended upon the deceased at hospital. The deceased told Ms McQueeney of her complaints about her son's behaviour and gave further instructions, including replacing Mr Cranbrook with Mrs de Groot as her executor.

On 30 June she executed the will.

**July 2009**

She executed a codicil to the will.

**August 2009**

The mutual wills contract was executed.

**9 September 2009**

The deceased died.

**Respondent's submissions in support of the caveat**

- [7] It will assist in the understanding of the applicant's case if I briefly outline the bases upon which the respondent relies for the caveat. The respondent argues that:
- (a) Richard Cranbrook exercised undue influence over the deceased and that a special relationship existed between Richard Cranbrook and the deceased; and
  - (b) Richard Cranbrook's conduct satisfies the elements of unconscionable dealing set out in the case of *Commercial Bank of Australia Ltd v Amadio*<sup>1</sup> ("Amadio")
- [8] The capacity of the deceased to make the will is not contested.
- [9] In support of the contention of undue influence, it was submitted that there is a presumption of undue influence between Richard Cranbrook and the deceased, by reason of the special relationship between the parties. It was said to be akin to that considered in the case of *Page v Horne*<sup>2</sup> ("Page"), even though the gifts were made while the parties were married. In *Page* the court set aside a gift by a woman to her fiancé, observing that "no one can say what may be the extent of the influence of a man over a woman, whose consent to marriage he has obtained"<sup>3</sup>. Acknowledging modern conditions of marriage, counsel for the respondent argued that a relationship

<sup>1</sup> (1983) 151 CLR 447.

<sup>2</sup> (1848) 11 Bav 227.

<sup>3</sup> (1848) 11 Bav 227 at 235.

of undue influence may still be inferred from the nature of the relationship. In support of this contention, reliance was placed on Brennan J's reasoning in *Louth v Diprose*<sup>4</sup> ("Louth"):

"It may no longer be right to presume that a substantial gift made by a woman to her fiancé has been procured by undue influence but the cases in which such a presumption has been made demonstrate that the relationship which places a donor at a special disadvantage may have its origin in an emotional attachment of a donor to a donee."<sup>5</sup>

- [10] Counsel for the respondent also drew upon *Garcia v NAB*<sup>6</sup>, in which the majority of the High Court held, in considering the principles in *Yerkey v Jones*<sup>7</sup>, that although the role of women has changed in the preceding six decades:

"[21]... the marriage relationship is such that one, often the woman, may well leave many, perhaps all business judgments to the other spouse. In that kind of relationship, business decisions may be made with little consultation between the parties and with only the most abbreviated explanation of their purport or effect. Sometimes, with not the slightest hint of bad faith, the explanation of a particular transaction given by one or the other will be imperfect and incomplete, if not simply wrong. That that is so is not always attributed to intended deception, to any imbalance of power between the parties, or even, the vulnerability of one to exploitation because of emotional involvement. It is, at its core, often a reflection of no more or less than the trust and confidence each has in the other."

- [11] In support of the contention that the presumption of undue influence would be raised, counsel for the respondent drew upon the following factors in Mr and Mrs Cranbrook's relationship:

- (a) Because of Mr Cranbrook's alleged homosexuality there was no sexual basis for the marriage, making it an unusual marriage.
- (b) The deceased was some 70 years of age and had been diagnosed with inoperable cancer.
- (c) Mr and Mrs Cranbrook married knowing that her life expectancy was very limited.
- (d) Her reasons for disentitling her son from her will demonstrated her poor judgment and lack of insight at the time.
- (e) She was weak and frail and was taking pain medication, occasionally administered by Mr Cranbrook.
- (f) The circumstances in which the deceased gave instructions with respect to her will were suspicious.

- [12] The allegation that Mr Cranbrook was homosexual was entirely unsupported by any admissible evidence. This part of the respondent's case relied upon spurious assertions and scandalous material which, upon objection, I struck out of the relevant affidavit. It may be that Mr Musso holds the belief that Mr Cranbrook is homosexual but there was nothing to support that belief and Mr Cranbrook denied, through his solicitor (without objection), the allegation.

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<sup>4</sup> (1992) 175 CLR 621

<sup>5</sup> (1992) 175 CLR 621 at 630

<sup>6</sup> (1998) 194 CLR 395

<sup>7</sup> (1939) 63 CLR 649

[13] Counsel for the respondent also submitted that Mr Cranbrook's conduct evidences unconscionable dealing, according to the principles set out in *Amadio*.

[14] Counsel for the respondent drew upon the reasoning of Brennan J in *Louth* where his Honour explained that the inference of unconscionable dealing must arise from the facts:

“Once it is proved that substantial property has been given by a donor to a donee after the donee has exploited the donor's known position of special disadvantage, an inference may be drawn that the gift is the product of the exploitation. Such an inference must arise, however from the facts of the case; it is not a presumption which arises by operation of law. The inference may be drawn unless the donee can rely on countervailing evidence to show that the donee's exploitative conduct was not a cause of the gift. At the end of the day, however, it is for the party impeaching the gift to show that it is the product of the donee's exploitative conduct. This is the final and necessary link in the chain of proof of unconscionable conduct leading to a decree setting aside the gift.”<sup>8</sup>

[15] It was then submitted that the facts in the present case are analogous to *Louth*, and that the deceased was under a special disadvantage by reason of her infatuation with Mr Richard Cranbrook which he manipulated so that she would make gifts to him before and after her death.

#### **Applicant's submissions seeking removal of the caveat**

[16] The applicant's case was based upon the argument that all the actions of the deceased were explicable and were not the result of the exercise of any undue influence or unconscionable conduct. Three submissions were made to support the contention that the caveat should be removed:

- (a) There is no reason to doubt the deceased's capacity at the time of instruction or execution. (This was not in contest.)
- (b) The omission of the respondent from the Will is explicable on the facts.
- (c) The deceased made adequate provision for her son and daughter, through the mutual Will that she made with Mr Cranbrook.

#### **Was there undue influence or unconscionable conduct?**

[17] The omission of the respondent, Mr Musso, from the Will, after being the principal beneficiary in a draft will made in October 2008, is explicable by the rift between the deceased and her son which arose over her decision to marry Mr Cranbrook.

[18] Even though the relationship between mother and son had deteriorated, the deceased still made provision for her children by way of the mutual wills which will result in each child effectively receiving 1/6<sup>th</sup> of the residue of the deceased's estate at Mr Cranbrook's death.

[19] The argument for the respondent relies upon inferences which he says can be drawn from the conduct of his mother. But other, stronger inferences can also be drawn.

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<sup>8</sup> (1992) 175 CLR 621 at 632

The deceased was a woman who, notwithstanding her illness, demonstrated a strength of mind in her daily behaviour which is inconsistent with the respondent's case. The evidence of those who knew her fortifies the conclusion that, while she may have been "head over heels" in love with Mr Cranbrook, she was not acting in a way which was the result of either undue influence or unconscionable dealing. Her actions obviously disappointed, perhaps distressed, her children but there is insufficient evidence to support the contention that she was not acting in accordance with her own wishes. Further, when she made the changes to her will she consulted Ms McQueeney alone and made clear what her intentions were and why she was making the alterations.

- [20] The respondent's case is based upon supposition, not proof. The assertions made of undue influence and unconscionable conduct are not made out on the material and a "doubt" (as that word is used in r 626(2)) has not been raised. I am not satisfied that the respondent has established a doubt based upon any assertion of an imbalance of power between the parties, or even, the vulnerability of one to exploitation because of emotional involvement.

### **Setting Aside Caveat**

- [21] I order that:
- (a) The caveat filed on 16 October 2009 be removed.
  - (b) Subject to the formal requirements of the Registrar, the will and codicil of the deceased dated 30 June 2009 and 26 July 2009 respectively be admitted to probate.
- [22] I will hear the parties on costs.