SUPREME COURT OF QUEENSLAND

CITATION:	*Hussey & Anor v Bauer & Ors* [2011] QCA 91
PARTIES:	**CAROLEANN HUSSEY & HELEN RAE GERDEI** (appellants) **v** **BREN OWEN BAUER & ROD ANDREW BAUER & GAY ANN O'NEILE** (respondents)
FILE NO/S:	Appeal No 9255 of 2010 SC No 6029 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 May 2011
DELIVERED AT:	Brisbane
HEARING DATE:	23 February 2011
JUDGES:	Fraser and Chesterman JJA and Martin J Separate reasons for judgment of member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – TESTAMENTARY INSTRUMENTS – JOINT AND MUTUAL WILLS – where in 1973 Thelma Bauer became the sole registered proprietor of a property in Buderim – where in 1984 Walter Bauer became the sole registered proprietor of a unit in a complex in Mooloolaba – where Walter Bauer and Thelma Bauer each executed a will on 22 August 1984 – where the two wills were, apart from the identity of the executors and trustees, identical – where the two wills were prepared by the same firm of solicitors, executed at the same time and in the same place – where Walter Bauer died and had not revoked his 1984 will – where in 1995 Thelma Bauer executed a new will – where in 1996 Thelma Bauer executed a memorandum of transfer, transferring title in the Buderim property to her daughters as tenants in common – where in 1997 Thelma Bauer executed a further will and left the Mooloolaba unit to the appellants with the residue of her estate to the respondents – where the appellants argue that the learned trial judge erred in law when he found that Walter and Thelma Bauer had an agreement to make mutual wills – where the appellants argue that each will

contained an unfettered discretion which was incompatible with such an agreement – where the appellants argue that the learned trial judge made significant errors when considering the respondent's evidence which vitiated his finding of fact – whether the learned trial judge erred in law when he found that an agreement to make mutual wills had been made

Bigg v Queensland Trustees Limited [1990] 2 Qd R 11, cited
Birmingham v Renfrew (1937) 57 CLR 666; [1937] HCA 52, considered
Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34, cited
Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd (2003) 216 CLR 161; [2003] HCA 49, cited
Devries v Australian National Railways Commission (1993) 177 CLR 472; [1993] HCA 78, cited
G v H (1994) 181 CLR 387; (1994) 124 ALR 353; [1994] HCA 48, considered
Gianoutsos v Glykis (2006) 65 NSWLR 539; [2006] NSWCCA 137, cited
Gray v Perpetual Trustee Co Ltd (1928) 40 CLR 558; [1928] UKPCHCA 1, cited
Osborne v Estate of Frederick Osborne and Daisy Osborne [2001] VSCA 228, cited
Re Cleaver [1981] 1 WLR 939, considered
Re Goodchild [1997] 3 All ER 63; [1997] EWCA Civ 1611, cited

COUNSEL: D Cooper SC, with L Nevison, for the appellants
M Willmott SC, with R Whiteford, for the respondents

SOLICITORS: MacPherson & Kelley Lawyers for the appellants
McCullough Robertson acting as Town Agent for Dunstan Legal for the respondents

[1] **FRASER JA:** I agree that the appeal should be dismissed with costs for the reasons given by Martin J, which I have had the advantage of reading.

[2] **CHESTERMAN JA**: I agree that the appeal should be dismissed with costs for the reasons given by Martin J.

[3] **MARTIN J:** At the trial of this action the respondents alleged that their father and stepmother had agreed that each would:

(a) execute mutual wills;
(b) not dispose of certain property; and
(c) not revoke his or her own will.

Findings were made in favour of the respondents and declarations and other orders were made consequent upon those findings.

[4] The appellants argue that the learned trial judge should not have made those findings because, among other things, he did not apply the correct test and the appropriate standard of proof to the evidence before him.

The factual background

[5] Walter Bauer had three children – Bren Bauer, Rod Bauer and Gay O'Neile – by his first marriage. Those children were the plaintiffs at trial.

[6] The defendants at trial and the appellants in this court – Caroleann Hussey and Helen Gerdei – are the only children of the first marriage of Thelma Bauer.

[7] Thelma Bauer married Walter Bauer in 1967.

[8] In December 1973 Thelma Bauer became the sole registered proprietor of two lots of land in Gilbert Street in Buderim ("the Buderim property"). In about 1984, a house was built on the Buderim property which became the principal place of residence for Walter and Thelma Bauer.

[9] In 1984 Walter Bauer became the sole registered proprietor of a unit in a complex at Mooloolaba ("the Mooloolaba unit"). From then until his death in 1992, Walter Bauer leased the Mooloolaba unit to tenants and received rents from the property.

[10] Shortly after Walter Bauer became registered as the sole proprietor of the Mooloolaba unit he and Thelma Bauer executed the wills which are referred to below. At that time they had no assets of substantial value, other than the Buderim property registered in Thelma Bauer's name and the Mooloolaba unit registered in Walter Bauer's name.

[11] On 22 August 1984, Walter Bauer executed a will in which he revoked all prior wills and appointed his wife, Thelma, and his children (Bren, Rod and Gay) as his executors and trustees. So far as is relevant, the will provided:

> "3. I GIVE DEVISE BEQUEATH AND APPOINT all property both real and personal in my ownership or disposition or over which I have power of appointment unto and to the use of my Trustees upon and with and subject to the following trusts powers and provisions namely: UPON TRUST with power to sell call in and convert into money the same, but so that my Trustees shall have power to postpone such sale calling in and conversion for such period as they, without being liable to account, may think proper but only so far as advisable for the more advantageous realisation thereof.
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> 4. My Trustees shall after payment of all my just debts and funeral and testamentary expenses (and the Duties upon all successions under this Will) hold the residue of my estate UPON THE FOLLOWING TRUSTS:
>
> (a) To pay the income thereof to my wife THELMA MAY BAUER,
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> (b) After the death of my said wife to divide the capital and income of my residuary estate equally between the children of my said wife and myself, namely BREN OWEN BAUER, ROD ANDREW BAUER, GAY ANN BAUER, CAROLEANN HUSSEY and HELEN RAE GERDEI share and share alike but if any child of my said wife or of mine dies before attaining a vested interest leaving children then those children shall on attaining their majority or marry under that age take equally the share which his her or their parent would have otherwise taken.
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> …

6. My Trustees shall have the following powers and be under the following obligations:

(a) To accept the instructions of my said wife as to the handling of my estate during her lifetime or to prior surrender in her absolute discretion.

(b) To agree and settle accounts and make and accept compromises with all persons liable to account to my estate and for that purpose to execute effectual receipts releases and discharges.

(c) To determine in all cases of doubt whether any moneys coming into their hands are capital or income and to apportion blended funds and every such determination or appointment shall be final and binding on all persons beneficially interested in this my Will.

(d) To retain subject to the trusts of this my Will all or any of my assets in the form in which they shall find the same at the date of my death and such assets shall be deemed for all purposes to be authorised trustee investments and to accept or take up any bonus shares or other rights or benefits issued by any Company in which my estate may be interest or concerned and to determine whether such bonus shares or other rights are capital or income notwithstanding the decision of the company in such matter.

(e) Subject to the trusts in respect of specific parts of my estate to sell (either for cash or on terms) mortgage transfer manage repair maintain lease (for terms of lease not more than five years at a time) or otherwise deal with the whole or any part or parts of my real or personal estate and to do all acts and execute all documents necessary or expedient to carry every such transaction into full effect.

(f) To apply the whole or any part of the capital or income of the expectant or contingent share of any beneficiary under this my Will for or towards the maintenance education benefit or advancement in life for the time being of such infant beneficiary, and for such purposes either to pay the same direct or to pay the same or any part thereof to the Guardian or Guardians for the time being of such infant beneficiary without being bound to see to the application thereof."

[12] Thelma Bauer also executed a will in which she revoked her previous wills and appointed Walter Bauer and her children (Caroleann and Helen) as her executors and trustees.

[13] The two wills were:

(a) apart from the identity of the executors and trustees, identical;

(b) prepared by the same firm of solicitors;

(c) executed at the same time; and
(d) executed in the same place, namely, the firm of solicitors who had drawn the wills.

[14] In December 1992 Walter Bauer died. He had not revoked his 1984 will, nor had he dealt with the Mooloolaba unit.

[15] In March 1995, Thelma Bauer executed a new will in which she revoked all previous wills and appointed Caroleann and George Paul as her executors and trustees and left her estate to the plaintiffs and defendants in equal shares.

[16] In September 1996 Thelma Bauer executed a memorandum of transfer by which she transferred title in the Buderim property to her daughters as tenants in common for the stated consideration of "natural love and affection". That transfer was registered in April 1997.

[17] In January 1997 Thelma Bauer executed a further will in which she revoked all previous wills, appointed Caroleann Hussey and George Paul as her executors, and left the Mooloolaba unit to the appellants with the residue of her estate to the respondents.

[18] Thelma Bauer died in April 2007 without having executed any further wills.

[19] In December 2009 the appellants sold the Buderim property for $840,000. Three-fifths of the net sale proceeds – $494,847.96 – is being held in trust by the appellants' solicitors pending the outcome of these proceedings.

The pleaded case

[20] The respondents, in their statement of claim, alleged that the wills of Walter and Thelma Bauer which had been executed in August 1984 had been executed according to an understanding or arrangement made prior to their execution to the following effect:

(a) Thelma Bauer would not in her lifetime sell, encumber or otherwise dispose of the legal or beneficial title to the Buderim property;
(b) Walter Bauer would not in his lifetime sell, encumber or otherwise dispose of the legal or beneficial title to the Mooloolaba unit;
(c) each would make a will in which they would appoint the other and their respective children their executors and trustees, settle their entire net distributable estate on their executors and trustees for the other for life with remainder to the plaintiffs and the defendants in equal shares; and
(d) neither would revoke his or her will.

Findings at trial

[21] The learned trial judge found that:

(a) Walter and Thelma Bauer had agreed to make mutual wills;
(b) There was an agreement between those two persons not to revoke the wills without notice to the other party; and
(c) The agreement between Walter and Thelma Bauer was that the survivor would live in the Buderim property and receive income from the Mooloolaba unit, and that when the second of them died

then both the Mooloolaba unit and the Buderim property would be left to the five children, that is, the appellants and respondents, in equal shares.

The appellants' case

[22] The appellants argued that the learned trial judge erred in law when he found that Walter and Thelma Bauer had an agreement to make mutual wills.

[23] The appellants submitted that there were two questions to be answered:

(a) whether the testators made a contract to make mutual wills; and

(b) whether it was a term of that contract that the wills would not be revoked.

[24] In support of their argument that the findings by the learned trial judge were infected with error, the appellants submitted that the terms of the relevant wills were inconsistent with the respondents' case. It was the case of the respondents that it was a necessary consequence of the agreement between Walter and Thelma Bauer that both the Buderim property and the Mooloolaba unit would be retained:

(a) to abide the death of the latter surviving testator because of the life interests created by the agreement in those properties; and

(b) that the two properties would ultimately be sold for the benefit of the five children.

[25] Each will contained an unfettered discretion which, in the appellants' submission, was incompatible with such an agreement. Both wills contained provisions requiring that the real property of each testator be converted to money forthwith to pay testamentary debts and so on, but subject to overriding discretions:

(a) a limited discretion conferred on all the trustees to delay realisation for such time as they "may think proper but only so far as advisable for the more advantageous realisation" of the property; and

(b) an unfettered discretion conferred on the survivor by clause 6(a) to override the other trustees to give instructions "as to the handling of my estate during [his or her] lifetime or to prior surrender in [his or her] absolute discretion".

[26] That unfettered discretion, the appellants argued, is incompatible with an agreement:

(a) conferring life interests in the two properties; and

(b) requiring them to be maintained *in specie* until the death of the survivor so that the children may take the real property in equal shares.

[27] The appellants also argued that the learned trial judge made significant errors when considering the respondents' evidence and those errors vitiated his findings of fact. They point to the failure by the respondents to adduce evidence in respect of certain pleaded matters including an allegation that Walter Bauer provided the whole of the funding to acquire the Buderim land, the Mooloolaba unit and the cost of constructing the house at Buderim. This, it was said, should have been given significant weight.

[28] Secondly, it was argued that the learned trial judge failed to make any specific findings in respect of the evidence of any of the respondents and that meant that it

was not possible for this court to assess his Honour's conclusions. Finally, it was argued that the learned trial judge erred in not giving sufficient weight to the fact that the appellants were never told by the testators of their alleged agreement.

Mutual wills

[29] The characteristics of mutual wills and the means of proving their existence have been the subject of consideration in many courts. It is possible to draw from those authorities the following principles:

(a) Mutual wills arise when two persons agree to make wills in particular terms and agree that those wills are irrevocable[1] and that they will remain unaltered.[2]

(b) Substantially similar, even identical, wills are not mutual wills unless there is an agreement that they not be revoked.[3]

(c) The mere making of wills simultaneously and the similarity of their terms are not enough taken by themselves to establish the necessary agreement.[4]

(d) A will is, as a matter of probate law, revocable. But the revocation of a mutual will ordinarily results in the imposition of particular obligations:

> "It has long been established that a contract between persons to make corresponding wills gives rise to equitable obligations when one acts on the faith of such an agreement and dies leaving his will unrevoked so that the other takes property under its dispositions. It operates to impose upon the survivor an obligation regarded as specifically enforceable. It is true that he cannot be compelled to make and leave unrevoked a testamentary document and if he dies leaving a last will containing provisions inconsistent with his agreement it is nevertheless valid as a testamentary act. But the doctrines of equity attach the obligation to the property. **The effect is, I think, that the survivor becomes a constructive trustee and the terms of the trust are those of the will which he undertook would be his last will**." [5] (emphasis added)

Was the correct test applied?

[30] The learned trial judge described the correct test when, at [19], he said:

> "It is necessary for plaintiffs, when claiming to be beneficiaries under a mutual will, to prove an agreement to make mutual wills was in fact made by the testators, including an agreement not to revoke their wills. There is no requirement for a formal or written contract; equity requires an agreement, understanding or intention to execute, and not to revoke, mutual wills."

[31] His Honour then went on to consider the authorities which deal with the manner in which proof of mutual wills may be established. He referred, in particular, to the

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1 *Birmingham v Renfrew* (1937) 57 CLR 666.

2 *Re Goodchild* [1997] 3 All ER 63.

3 *Gray v Perpetual Trustee Co Ltd* (1928) 40 CLR 558.

4 *Gray v Perpetual Trustee Co Ltd* (1928) 40 CLR 558, 564-5; *Bigg v Queensland Trustees Ltd* [1990] 2 Qd R 11.

5 *Birmingham v Renfrew* at 683 per Dixon J.

cautionary statement of Latham CJ that "[t]hose who undertake to establish an agreement assume a heavy burden of proof. It is easy to allege such an agreement after the parties to it have both died, and any court should be careful in accepting the evidence of interested parties upon such a question."[6] While it can be accepted that the burden of those who propound the existence of mutual wills is heavy, such a burden must not be converted into something other than the ordinary civil burden of proof. In *Re Cleaver*[7] Nourse J said that there must be "clear and satisfactory" evidence that the wills were executed pursuant to an "agreement or understanding" that the property was to be "dealt with in a particular way for the benefit of a third person".

[32] While glosses have been applied to the burden borne by an applicant it must be remembered that it is the nature of the issue which affects the process by which reasonable satisfaction is attained.[8] As was said in *G v H*:[9]

> "It has been clear since the decision in *Briginshaw v Briginshaw* that in civil cases the standard of proof is on the balance of probabilities, with due regard being had to the nature of the issue involved so that "[t]he seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal' ((1938) 60 CLR at 362 per Dixon J; *Newis v Lark* (1571) 2 Plowd 403 at 412; *Cooper v Slade* (1858) 6 HLC 746 at 772–3; *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449–50). Thus, if there is an issue of "importance and gravity', to use the words of the trial judge, due regard must be had to its important and grave nature."[10]

[33] The appellants submit that the learned trial judge did not apply the correct test because, in [27], he said:

> "In the present case, it is clear that Walter and Thelma had an agreement to make mutual wills. So much is apparent from the fact that they executed the corresponding wills on 22 August 1984. The central question to be determined is whether they also agreed not to revoke those wills."

[34] This, it was said, demonstrated "an error of law fundamental to the resolution of this appeal". With respect to those who argued this point, no such error is demonstrated. His Honour did not rely solely on the fact that the deceased had made identical wills simultaneously. His reasoning to support that conclusion of mutual wills is to be found later in the judgment. Before dealing with that, I turn to an argument raised about the importance of the terms of the wills.

[35] The appellants argue that the "obvious and most important place to start" consideration of the test set out above is the terms of the wills. It is correct to say

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6 *Birmingham v Renfrew* at 674.

7 [1981] 1 WLR 939.

8 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362–3 (Dixon J); *Osborne v Estate of Frederick Osborne and Daisy Osborne* [2001] VSCA 228, [27]; *Customs v Labrador Liquor Wholesale* (2003) 216 CLR 161, [144]; *Gianoutsos v Glykis* (2006) 65 NSWLR 539, [48]–[49].

9 (1994) 124 ALR 353.

10 Per Deane, Dawson & Gaudron JJ at 362.

that the contents of any alleged mutual wills should be examined for indications that there was an intention to make mutual wills. But it is not always the case that it is the "most important" place to look. The question of whether an agreement to make mutual wills exists is to be answered by looking at all the circumstances and the content of the wills is just one of those circumstances. This is a case in which the circumstances surrounding the making of the wills and the conduct of the testators dictate the conclusion reached by the learned trial judge.

The evidence relied upon

[36] There was uncontested evidence that in or around 1989 Walter Bauer and Thelma Bauer visited each of the respondents and spoke to them about the fact that wills had recently been made by them. His Honour accurately recorded that the substance of each of the conversations was similar and that:[11]

> "...Walter advised each of his children that he and Thelma had made wills which provided for the testator who died first to live in the Buderim property and receive income from the Mooloolaba unit, and that when they died both the unit and the house would be left to the five children … in equal shares."

[37] His Honour recorded, at [29]:

> "Counsel for the defendants submitted that the evidence of the plaintiffs was "rehearsed" and therefore, unreliable. However, the accounts given by each of the witnesses, while substantially similar, did contain differences. Each of the witnesses was appropriately firm in their own recollection, and was not able to be swayed under searching cross-examination. The slight differences in recollection of events which occurred more than 20 years ago is to be expected and reflects each having an independent recollection of the events, rather than having a rehearsed version. I do not think the differences were sufficient to detract significantly from the consistent evidence of the gist of the conversations."

[38] It is well established that an appellate court will not interfere with a trial judge's findings based on credit, unless the trial judge failed to use or palpably misused his or her advantage.[12]

[39] There was ample evidence to support the learned trial judge's findings as set out above.[13] The appellants submitted that his Honour had failed to provide appropriate weight to the fact that no such conversations took place between the testators and the appellants. It was argued that, given the loving relationship and regular contact between the appellants and their mother and stepfather that one would expect there to have been disclosure of such an arrangement. But that is not necessarily the case. It is quite conceivable that the reason for Mr and Mrs Bauer speaking to the respondents was that there had not been a good relationship between Mrs Bauer and the respondents and that it was in order to prevent any misunderstandings that these conversations were thought to be necessary. In any case, the fact that the testators did not think it necessary to speak to the appellants about this does not diminish the importance of the evidence accepted from the respondents.

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11 At [28].

12 *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479.

13 T 17, ll 10-20; T 18, l 10; T 18, l 55- T19, l 45; T 23-26; T 31, ll 1-30; T 32, l 15-T 35 l 15; T 35-36; T 39, l 30; T 40, ll 10-20; T 49, l 15; T 52, ll 10-31.

[40] Notwithstanding the disharmony which existed between the respondents and Mrs Bauer, the evidence of the respondents is neither "glaringly improbable" nor "contrary to compelling inferences".

The terms of the wills

[41] The appellants contended that the terms of the will militated against a finding of mutuality. This arose from those clauses of the wills which required that the property of each testator be converted to money forthwith to pay testamentary debts. That requirement was subject to two overriding discretions. The first was a limited discretion conferred on the trustees to delay realisation for such time as they "may think proper but only so far as advisable for the more advantageous realisation" of the property. Secondly, each of the testators conferred an unfettered discretion on the other to override the other trustees and to give instructions "as to the handling of my estate during [his or her] lifetime or to prior surrender in [his or her] absolute discretion.

[42] The unfettered discretion referred to is consistent with a separate agreement for mutual wills. It provides for a capacity in each of the parties to those wills to ensure that the property remains intact so that the agreement may be fulfilled. The terms were otherwise necessary to deal with the management of the estate of the testator who was the second to die.

Conclusion

[43] The applicants have not demonstrated that the learned trial judge erred in either stating the appropriate test, or in the proper application of that test. I would dismiss the appeal and order that the appellants pay the respondents' costs of and incidental to the appeal on the standard basis.