SUPREME COURT OF QUEENSLAND

CITATION:	*In The Will of Bruce George Gillespie Deceased* [2012] QSC 335
PARTIES:	**GLORIA DAWN GILLESPIE** (Applicant) **v** **GEOFFREY BRUCE GILLESPIE** (First Respondent) **And** **WILLIAM BRUCE GILLESPIE** (Second Respondent) **And** **MICHAEL PELDAN AND MORGAN LANE as trustees for THE ESTATE OF ANNETTE MIRIAM MAREE GREEN (FORMERLY ROGERS) (A BANKRUPT)** (Third Respondent)
FILE NO/S:	S222/2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	7 November 2012
DELIVERED AT:	Rockhampton
HEARING DATE:	18 October 2012
JUDGE:	McMeekin J
ORDER:	1. The caveat lodged by the first and second respondents on 3 May 2012 is set aside. 2. Probate of the last Will of Bruce George Gillespie deceased dated 3 April 2006 be granted to the applicant as executor.
CATCHWORDS:	SUCCESSION – WILLS PROBATE AND ADMINISTRATION – Probate and letters of administration – Lack of Testamentary Capacity - whether testator of sound mind during creation of will – whether any undue influence

	exercised over the testator – whether caveats should be removed
	Uniform Civil Procedure Rules 1999 (Qld) r 626
	Barrand v Coxall [1999] QSC 352
	Dore v Billinghurst [2006] QCA 494
	Golybovitch v Soshnina [2009] QSC 437
	In re Muirhead [1971] P 263
	Nock v Austin [1918] 25 CLR 519
	Woodgate v Hobbs [2011] QSC 224
COUNSEL:	C Heyworth-Smith for the applicant
	G Lynham for the first and second respondents
SOLICITORS:	Macrossan & Amiet Solicitors for the applicant
	SB Wright & Wright and Condie for the first and second respondents

[1] **McMeekin J:** Gloria Gillespie has applied for a grant of probate of a Will of Bruce George Gillespie, deceased (executed 3 April 2006). She is the executor named in the Will and the widow of the deceased. The only asset in the estate is the home in which she lived with the testator and in which she continues to live.

[2] The respondents filed caveats preventing the grant and requiring that the Will be proved in solemn form. This is an application to remove those caveats.

[3] The respondents are the children of the deceased from an earlier marriage.

[4] Ten days prior to the hearing the caveat lodged by the third respondent was withdrawn.

[5] The application is brought pursuant to r626(2)(b) *Uniform Civil Procedure Rules* 1999 ("UCPR") which provides:

> **Setting aside caveat**
> (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.
> …

[6] There is no love lost between the parties. Unfortunately this has meant that common sense has been discarded. The caveats have no purpose. The Will in question effectively leaves the deceased's estate to the applicant. So does the deceased's second last Will (executed 23 October 2005) and his third last Will (executed 21 November 2003). The 2006 Will and the 2005 Will are identical in terms. The only significant difference between the 2006 Will and the 2003 Will in its effect is that under the earlier Will the Public Trustee is the nominated executor. I suspect that, if it were to become relevant, the Public Trustee might well renounce upon the request of the applicant in the interests of saving costs of administration as the only asset in the estate is the home in which the applicant lives.

[7] It was conceded by the respondents' counsel that whatever concerns the respondents had in relation to the deceased's Wills they could not challenge the third last Will.[1] So the end result – that is the distribution of the deceased's estate - will be the same whatever view I take of the issues raised.

[8] In those circumstances I have difficulty conceiving of why I would have a doubt as to whether the grant of probate ought to be made, which is the question I have to decide.

[9] What the respondents seem to me to have overlooked is that the rule requires the Court to look at the overall situation, that is whether there should be a grant of probate, not just the particular issues that they may wish to agitate, in this case the deceased's capacity and the alleged exercise of undue influence by the applicant.

[10] Here there is no point to any prolonged investigation, or any investigation, into the capacities of the testator or the exercise of any influence over him.

[11] The respondents contend that the applicant has a high hurdle to overcome in having a caveat removed citing Mackenzie J's observation in *Barrand v Coxall* [1999] QSC 352 at [16] that the "threshold which a person seeking to remove a caveat must reach is high having regard to the statutory test".

[12] But it has always been the law that the degree of certainty that the Court might require, and conversely the degree of doubt that would need to be shown to arouse concern, varies with the circumstances. As Isaacs J observed in *Bailey v Bailey* (1924) 34 CLR 558 at 570 "the degree of vigilance to be exercised by the Court varies with the circumstances." So Cairns J said, in a different context, in *In re Muirhead*:

> "I approach the matter with the conviction that it is the duty of a Court of Probate to give effect, if it can, to the wishes of the testator expressed in testamentary documents. Sometimes it is impossible to discover the true intention of the testator, because there may be doubts about his testamentary capacity, or about whether he knew and understood the contents of some document propounded, or there may be doubts about the formalities of execution. In such cases a compromise is often reached, and given effect to by the court. **Where certainty cannot be achieved, it is often better that a**

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1 See T1-65-66

> **will which is prima facie valid should be admitted to probate than that there should be a prolonged investigation into allegations of incapacity or undue influence**; and it is sometimes better that a will or codicil should be pronounced against, where there are good reasons for suspecting its validity, although by full inquiry it might be possible to remove those suspicions."[2]

[13] Consistent with that approach are the observations of Fryberg J in *Golybovitch v Soshnina* [2009] QSC 437, a case under r 626(2): "I do not think there is any point for *(sic)* forcing the applicant to proceed by way of proof in solemn form, **particularly when one has regard to the size of the estate**".[3] His Honour there recognised that common sense considerations enter into the equation. Similarly in *Woodgate v Hobbs* [2011] QSC 224 at [8] where Fryberg J said, again in a r 626(2) case: "One must, of course, to a degree balance perfect satisfaction with considerations of delay and cost."

[14] Here there is no point to forcing the applicant to proof in solemn form and good reason why I should not – quite apart from the inutility of further proceedings the costs incurred would reduce the size of the estate, an estate that already consists only of a modest home in which the applicant resides. The end result might well be to force the applicant from her home, a home to which it is now conceded she is entitled under the testator's last will, whichever instrument might satisfy that test. I would be very reluctant to bring about such a result, a result that the respondents insist it is my duty to impose on the applicant.

[15] As will be seen, bearing in mind those wider considerations, I am of the view that there is no sufficient doubt here to warrant the applicant being required to prove the Will in solemn form.

Background

[16] Before turning to the arguments I need to explain a little of the background facts. The testator married the applicant on 8 December 2002. One week later the testator transferred to the respondents his interests in all his real estate assets – the home in which he lived and two sets of investment units. He also executed a Will on that date appointing the first respondent executor and leaving cash deposits to the applicant and the rest and residue of his estate to the respondents.

[17] On 17 July 2003 the testator made another Will in which he again appointed the first respondent executor and excluded the applicant entirely leaving all his property to his children.

[18] On 21 November 2003 the testator made another Will this time leaving his estate to the applicant. An enduring Power of Attorney was also executed revoking an earlier such Power of Attorney appointing the first respondent. On this occasion the Public Trustee was involved. The Public Trustee insisted on evidence being obtained that established the capacity of the testator. A medical certificate was obtained from Dr John McIntosh, the testator's then usual

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2 [1971] P 263 at 265E-G (emphasis added)

3 Emphasis added

general practitioner, in which he certified that the testator was "...able to understand the implications of signing an enduring power of Attorney and is of sound mind to make that decision at this time". Ms Luxford of the Public Trustee's office then recorded her own observations to the like effect.

[19] On 23 October 2005 the testator made another Will. This Will was prepared by the applicant in her own hand. She is appointed the executrix. She is "directed to pursue legal recourse to reverse the signing over" of the residence at Atkinson Street Mackay in which she and the testator lived. This was a reference to the transactions of 2002. Notably there was no such direction to pursue the recovery of the other two unit properties transferred at that time.

[20] On 3 April 2006 the last Will was executed. It is in identical terms to the 2005 Will. It too is in the hand of the applicant. It seems very likely that it was the applicant's idea to have another Will executed in identical terms. The applicant was prompted to again draft a Will and have it duly executed because of the execution by the testator two weeks before of a document forgiving the payment by the third respondent of a substantial debt.

[21] Following the testator's death on 14 August 2010 the respondents demanded that the applicant quit the Atkinson Street property. She filed proceedings in the District Court seeking that the transfer of that property to the respondents by the testator in 2002 be set aside. She was eventually successful, obtaining judgment from his Honour Judge Samios on 14 August 2012. Until the order reinstating the property to the estate the estate in fact had no assets.

The Evidence About Capacity

[22] There is no doubt that by early 2004 the testator was evidencing signs of dementia.

[23] There are several pieces of evidence which touch on his capacity to make a Will. I have mentioned the opinions of Dr McIntosh and Ms Luxford formed in November 2003.

[24] In February 2004 a psychiatrist Dr Futter prescribed a drug Aricept which had been found useful in slowing the effects of dementia. Four months later Dr Futter recorded that the testator had "improved markedly". Mini mental state examinations conducted by Dr Futter demonstrated that improvement. On 18 February 2004 the testator scored 22/30. The score is consistent with mild cognitive impairment. On 29 June 2004 he scored 27/30.

[25] In May 2005 the testator executed an Advanced Health Directive with the general practitioner recording that the applicant was "not suffering from any condition that would affect his capacity to understand the things necessary to make this directive".

[26] In August 2005 the applicant was seen by Dr Athey, a psychiatrist, on behalf of Veterans' Affairs. Dr Athey then diagnosed a significant level of dementia of the Alzheimer's type. The testator had obvious short term memory problems and some long term memory problems as well. The purpose of his examination

was to determine whether any disability was war related. He agreed that the condition could fluctuate. He thought the condition was then well past the mild stage. He described it as moderate. It was at a level, he explained, where there was not full functioning but some functioning left.[4]

[27] In October 2005 the applicant was given a mini mental state examination by a Dr Greenhill, a general practitioner, and scored 23/30, again a score that indicated mild cognitive impairment. A test performed in April 2008, again by Dr Greenhill, suggested some mild deterioration with a score of 21/30.

[28] On 16 March 2006, on the day he forgave his daughter the debt of $58,000,[5] the Justice of the Peace before whom the document was signed, Ms Vella, recorded that the testator appeared to her to be "fully lucid". Ms Vella had some conversation with the testator whilst his daughter was absent. She had no concerns about his mental capacity.[6]

[29] The third respondent who had taken the testator to Ms Vella did not swear any affidavit to the contrary although she was seeking to agitate the issue of the testator's capacity to make a Will until ten days prior to the hearing. Her continued interest in these proceedings may have been governed by the attitude of her trustees in bankruptcy but her capacity to give evidence was obviously unaffected by her bankruptcy. Presumably she could not give evidence to assist the respondents.

[30] As mentioned two weeks later the testator executed the 2006 Will.

The Evidence Led at the Application

[31] The application proceeded to a hearing that took the better part of a day.

[32] Evidence was given before me by the applicant, Mr Dillon, a friend of the testator's of some 15 years standing and a witness to the 2006 Will, Ms Vella, Dr Greenhill, and Dr Athey.

[33] The applicant thought the testator quite capable of making a Will. She swore that following the prescription of Aricept the testator's mental condition improved and was fairly stable over the years. He had difficulties with his short term memory but not so much with his long term memory that she noticed. She explained that the 2005 Will was the product of her discussions with the testator and reflected his views. For the 2006 Will she copied out the 2005 Will with the testator sitting next to her at the dining table and she showed him both Wills. The testator read or appeared to read the Will. The applicant claimed he understood it. This happened a day or two before the signing of it.

[34] Mr Dillon, while aware that his friend was liable to ruminate on the past and go off at tangents, saw nothing untoward in his friend at the time of execution of the 2006 Will. He thought that the testator seemed to know what he was doing.

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4 T1-82/30

5 A figure of $62,500 is mentioned in counsel's submissions – the document itself shows $58,000 (Ex BJV1 to the affidavit of Ms Vella)

6 Para 15 of affidavit of Ms Vella

Mr Dillon said that the testator "seemed pleased about everything". He, the witness, knew the document was a Will although no-one told him so. Presumably he could read it or some of it. The testator to his recollection turned to the signing page on the Will without direction from anyone else. It is not in issue that the testator was able to read perfectly well.

[35] Dr Greenhill thought that the testator had capacity to make a Will in April 2006. Dr Greenhill dealt with the applicant on some nine occasions, three of those before the execution of the 2006 Will. He last saw the testator before the execution of the Will in January 2006 and next saw him in August 2006. His opinion was not shaken in cross examination. It was not based solely on the mini mental state examinations, the limitations of which he well recognised. He recalled the testator and said that he had had several conversations with him. He said that he formed the opinion that whilst the testator had mild cognitive impairment his cognitive ability remained intact.[7]

[36] As mentioned Ms Vella thought that the testator was fully lucid. Her time with him was brief and she had not previously known him.

[37] Dr Athey had seen the testator only once and that in 2005. He swore an affidavit in which he deposed to the opinion that he believed that the testator had testamentary capacity in April 2006. It emerged in cross examination that he had assumed that the 2006 Will had been written in the hand of the testator. He had made an assumption as to the level of knowledge and understanding enjoyed by the testator of his own affairs based on the contents of the Will that he now thought was unwarranted. He was not prepared to maintain his opinion concerning testamentary capacity once his misunderstanding was pointed out to him. That is, he expressed no opinion supporting the application. He was not asserting that the testator lacked capacity. He conceded that a general practitioner more familiar with the testator may have been in a better position to assess his general functioning.[8]

[38] Against this background, and I have given only a brief summary of the evidence, I turn to the two issues agitated.

Undue Influence

[39] In *Dore v Billinghurst* Jerrard JA concluded: "An allegation of undue influence, in the sense in which that term is used in the probate jurisdiction, is equivalent to saying that the testator was coerced into making this Will..."[9]

[40] I observe that while it is clear that the applicant was in a position to exercise influence, and further that the testator was suffering dementia through the relevant period, and further that he was probably easily influenced, there is no reason to think that any influence exercised by the applicant, assuming for the moment that she did, was in any sense "undue".

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7 T1-44/30

8 T1-91/10

9 [2006] QCA 494 at [56]

[41] That is so for two reasons. First, because the dispositions affected by the terms of the 2006 Will reflect the decision of the testator made when he had the advantage of independent advice from the Public Trustee in 2003. Second, it is noteworthy that the instructions in the 2006 Will (and the 2005 Will) to the applicant were to seek to recover to the estate only the Atkinson Street property. The units remained with the respondents. To provide that a widow should have the home in which she has resided for years, and that the children retain the investment units, hardly indicates any operation of undue influence.

[42] There is in fact no direct evidence that the applicant did exercise influence over the testator in the relevant sense. That she had some influence over him is clear as indeed most wives do over their husbands, and conversely. Further it seems likely that the testator wanted to keep his wife content and so would often be agreeable to her suggestions. But according to the applicant he could be adamant when he wanted to be. The evidence shows that she cared for him for many years while he was apparently frail and in need of care and assistance. But no evidence is advanced to show the exercise of any influence over him in terms of directing his decision making, or coercing him into making the Will. So far as the evidence shows Mr Dillon observed no such thing and he had known the testator for some 15 years and saw the testator regularly.

[43] I note too that this issue was raised only on the day of hearing. Prior to the hearing the respondents' solicitor Mr Kern swore an affidavit deposing to his instructions raising only the issue of capacity. There was no mention of any concern about undue influence. On the first return date of the application the applicant's counsel made plain that the application to remove the caveat was brought because the only issue was one of capacity and all the evidence available indicated that the testator had capacity. Again the respondents did not raise the issue of undue influence. On that date the applicant pointed out that in lodging their caveats the respondents ought to have had good cause for doing so and should have no difficulty in advancing at short notice whatever evidence they had or could point to that raised a doubt about the matter. At the urging of the respondents' side that they needed time to prepare their case, and over the strong opposition of the applicant, I adjourned the application for several weeks. No evidence was led by the respondents at the hearing.

[44] That the applicant wrote the Will and takes under it can of course amount to circumstances arousing suspicion: *Nock v Austin* [1918] 25 CLR 519 at 528 per Isaacs J. But not, in my judgment, here.

Capacity

[45] As to capacity the issue is whether there is sufficient doubt to require that the applicant prove the Will in solemn form.[10] I have had the advantage of extensive evidence.

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[10] See the test suggested by Barker J in *Hayden v Bond* [2003] WASC 96; and *De Bruin v De Bruin* [2004] WASC 20 per Le Miere J – are there circumstances warranting investigation?

[46] It would seem that every person having evidence to give on the matter has been heard, or in the case of the respondents have had the opportunity to be heard. Each witness was thoroughly cross examined.

[47] In summary a good friend of the testator's and a witness to his Will, his general practitioner with some familiarity with him, an independent justice of the peace who had concerns to keep an eye out for any taking advantage of an elderly man, and the person who had the day to day care for and daily dealings with the testator all share the view that he had capacity or, in the case of Ms Vella, seemed "fully lucid". Independent testing by medical practitioners show only mild cognitive impairment from 2004 to 2008. Such impairment is not inconsistent with the testator having capacity. There is no evidence at all that the testator did not know the extent of his property, or was unable to comprehend and appreciate the claims to which he ought to give effect.

[48] The respondents apparently had little contact with the deceased in his latter years. They have not sought to suggest that they have any useful evidence to give. Their counsel conceded that they did not.

[49] The absence of the third respondent from the witness box suggests that her evidence could not support the respondents' position and she had dealings with the testator only 17 days before the execution of the 2006 Will.

[50] The most troubling evidence is the testator's contradictory actions in releasing the debt to the third respondent and her husband on 16 March and directing that the same debt be recovered in the Will drafted two weeks later. Given his short term memory problems it is possible that the testator did not recall his earlier actions. But it does not necessarily follow that he did not understand his actions as he performed them. An attempt to keep both his daughter and wife happy could be a motivation for both actions. That determination should of course be made at a trial not at a preliminary hearing such as this one and in different circumstances this feature of the evidence might well justify enquiry. But in my judgment here it does not. In practical terms the direction is meaningless. And as I have said the totality of the circumstances makes any further enquiry an enquiry without purpose.

[51] The respondent pointed out that Dr Athey's evidence was consistent with there being a lack of capacity. Dr Athey was not prepared to express an opinion one way or the other but that, of course, is not the same as an opinion that the testator lacked capacity. And it is relevant that the testator's presentation to Dr Athey in August 2005 was not such as to lead inevitably to the view that he lacked sufficient cognitive function to know and appreciate his dispositions. Dr Greenhill had far more contact with the testator than Dr Athey and was firm in his view.

[52] The question then is why have any further enquiry? The only suggestion that Mr Lynham could make as to the different evidence that might be given at a trial is that the respondents would seek the opinion of an expert psychiatrist to examine all the evidence and provide an opinion to the Court. Effectively that psychiatrist would be asked to offer an opinion on the ultimate issue before the Court and, so far as I am aware, on precisely the same materials now available.

I struggle to see how any such opinion would be of any assistance. If any opinion was forthcoming, and it is difficult to see why a psychiatrist who had never seen the testator would be in any better position to assist than Dr Athey, such an opinion would add little, assuming it to be admissible.

[53] In any case Chapter 11 Part 5 of the Uniform Civil Rules and Practice Direction 2 of 2005 make plain that where possible the Court should receive evidence from only one expert in any given field of expertise. If I was against the application I would necessarily give directions concerning any further hearing. While I have heard no submissions on the subject I have trouble seeing why this case is not one where only one expert would be needed and I can see no reason why Dr Athey would not be the expert to which the Court would turn for guidance.

[54] The terms of the Will do not suggest anything untoward. The Will reflects a perfectly usual approach for a testator to take to his widow and adult children. Its terms, in so far as they deal with the widow, reflect the same approach to the applicant as was expressed in 2003 when the Public Trustee was involved. A solicitor and a general practitioner each then satisfied themselves about the testator's capacity.

[55] On the present evidence I would pronounce for the Will. There is no reason to think that the evidence would be any different at any future trial.

[56] Considerations such as expense, delay, the modest size of the estate, and the inutility of doing so, count strongly against a requirement to prove the Will in solemn form.

[57] In all the circumstances I see no sufficient reason to require that the Will be so proved.

Orders

[58] Ms Heyworth-Smith, counsel for the applicant, has provided a draft order. It provides not only that the caveat be removed but that a grant of probate be made. There is no suggestion that any formal requirements need to be addressed.

[59] The Orders will be in accordance with the draft save as to costs. The applicant seeks that her costs be paid on the indemnity basis. I will hear from the parties as to the appropriate order in the light of these reasons.