SUPREME COURT OF QUEENSLAND

CITATION:	*Re Gloria May Limpus Deceased* [2013] QSC 66
PARTIES:	**IN THE WILL OF GLORIA MAY LIMPUS Deceased**
FILE NO/S:	BS 404/13
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	20 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2013
JUDGE:	Philippides J
ORDER:	**1. Subject to the formal requirements of the Registrar, probate in common form be granted to Rosemary Elisabeth Lawrence of 359 Old Goombungee Road, Cawdor Qld 4352 of the document dated 17 August 2012, being exhibit "A" to the affidavit of Rosemary Elisabeth Lawrence filed on 11 January 2013, as the true and original last will of the deceased.** **2. That the applicant's costs of and incidental to this application be paid out of the estate.**
CATCHWORDS:	PROBATE – instructions for will – whether documents should be admitted to probate – whether evidence of animus testandi
COUNSEL:	C Brewer for the applicant
SOLICITORS:	Chris Sheath & Associates for the applicant

Background

[1] This is a common form probate application. It was referred to a judge by the probate registrar as a result of a requisition dated 1 February 2013.

[2] The requisition indicates that the registrar's concern is that the document purporting to be the last will of the deceased is actually a signed Will Instruction Sheet: see exhibit A to the affidavit of Rosemary Lawrence. That document is indeed headed "Will instructions" and the registrar's particular concern is as to whether the document was executed with a testamentary intention.

[3] In relation to the document, the requisition states (in part):

> "It is comprised of seven pages and page one is headed Will instructions. It contains the deceased's instructions in respect of her will. On page six the deceased has executed those instructions in the presence of two witnesses and on page seven an appointment date for execution of the will is noted as being on 24 August 2012 at 2.00pm. … the deceased died … the day before the deceased was due to execute her will on 24 August 2012.
>
> Pursuant to s 10 of the *Succession Act* 1981, a will must be in writing and be signed by the testator in the presence of two witnesses. This purported document satisfies those requirements. However, s 10(7) of the *Succession Act* 1981 states that the signature of the testator must be made with the intention of executing the will."

Relevant legislation and principles

[4] Section 10 of the *Succession Act* 1981 sets out the formal requirements for the execution of a will in Queensland. It relevantly provides:

"**10 How a will must be executed**

(1) This section sets out the way a will must be executed.

(2) A will must be—

(a) in writing; and

(b) signed by—

(i) the testator; or

(ii) someone else, in the presence of and at the direction of the testator.

(3) The signature must be made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time.

(4) At least 2 of the witnesses must attest and sign the will in the presence of the testator, but not necessarily in the presence of each other.

(5) However, none of the witnesses need to know that the document attested and signed is a will.

(6) The signatures need not be at the foot of the will.

(7) The signature of the testator must be made with the intention of executing the will.

…

(9) A will need not have an attestation clause.

…"

[5] The applicant submitted that there is considerable authority under English law that instructions for a will may, if duly executed, be admitted to probate and in that regard, referred to a number of specialist texts.

[6] In *Theobald on Wills,* it is stated in respect of "instructions for a will" that:[1]

> "A duly executed instrument, described as instructions for a will, may have effect as a will, if it appears that it was intended to take effect in the absence of a more formal instrument."[2]

[7] On that topic the learned authors of *Jarman on Wills* state as follows:[3]

> "Instructions for a will
>
> A paper merely expressing an intention to instruct a solicitor to prepare a will making a particular disposition of property, will not be admitted to probate in the absence of evidence of intention that such paper should have a testamentary operation.[4] But instruments headed 'Plan of a will'[5], or 'Heads of a will'[6], or 'Sketch of my will'[7], or 'Memorandum of my intended will'[8], or 'Notes of an intended settlement'[9], have been held to operate as valid testamentary dispositions, if duly executed[10]. But probate was refused of an instrument duly executed and attested as a will, but headed 'This is not meant as a legal will, but as a guide'[11]."

[8] Likewise, *Williams on Wills* states:[12]

> "**Instructions for will.** These can be admitted only if executed as a will[13] and must be something more than mere heads of instructions.[14]"

[9] The matters has been considered in New Zealand in the decisions of *In re Gilmour* [1948] NZLR 687 and *In re Barnes (Deceased), Public Trustee v Barnes* [1954] NZLR 714.

[10] In *In re Barnes* the testator signed, in his solicitor's office, a document headed "Instructions for the will of [the testator]" and the signatures of two witnesses were appended to it. The testator was informed that a will in proper form could be

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1 JR Martyn, M Oldham, A Learmonth and C Ford, *Theobald on Wills,* 17th edition, Sweet & Maxwell, 2010 at p 6.

2 Citing *Bone v Spear* (1811) 1 Phillim 345; *Torre v Castle* (1835) 1 Curt 303; 2 Moore PC 133; *Barwick v Mullings* (1829) 2 Hag 225; *Hattatt v Hattatt* (1832) 4 Hag 211; *Whyte v Pollok* (1882) 7 App Cas 400; *Brennan, In the Goods of* [1932] IR 633; *Meynell, Re* [1949] WN 273; see *Ferguson-Davie v Ferguson-Davie* (1890) 15 PD 109; *Chapman, Re* [1999] 5 CL 566.

3 R Jennings, *Jarman on Wills,* 8th edition, Sweet & Maxwell, 1951 at p 36.

4 *Coventry v Williams,* 3 Curt 787.

5 *Matthews v Warner,* 4 Ves 186; 5 Ves 23.

6 *Bone and Newsam v Spear,* 1 Phillim 345.

7 *Hattatt v Hattatt,* 4 Hag 211.

8 *Barwick v Mullings,* 2 Hagg 225, and other cases cited *post,* Chap VII.

9 *Whyte v Pollok,* 7 App Cas 400.

10 *Re Hyslop,* [1894] 3 Ch 522.

11 *Ferguson-Davie v Ferguson-Davie,* 15 PD 109. But cf *Re Meynell* [1949] WN 273, where duly executed and attested instructions were admitted to probate.

12 CH Sherrin, RFD Barlow and RA Wallington, *Williams on Wills,* 8th edition, Butterworths, 2012, at [10.7].

13 *Guardhouse v Blackburn* (1866) LR 1 P & D 109; *Re Barnes* [1954] NZLR 714, explaining *Re Gilmour* [1948] NZLR 687; *Re Treloar* (1984) 36 SASR 41.

14 *Torre v Castle* (1836) 1 Curt 303. The fact that it is called 'Heads' or 'notes' will not prevent its being a will unless, either upon the face or by extrinsic evidence, it is shown that it was intended only as a memorandum of a future will: *Whyte v Pollok* (1882) 7 App Cas 400; *Re Meynell* (1949) 93 Sol Jo 466; *White v White* (1908) 28 NZLR 129; *George v Daily* (1997) 143 DLR (4th) 273.

prepared ready for execution the same afternoon by 5.00 pm, but he said he could not wait. He died more than a year later, without having executed any other testamentary document. The evidence showed that, during the last weeks of his life, he intended to make a new final will, and the making of such will would have included the revocation of the "instructions" document.

[11] Turner J held that, on the evidence, the testator executed the document meaning that it should operate as his effective will unless before his death he should execute in its stead a more formal document, embodying the same provisions, which his solicitor was to prepare. There was no need to rely on the presumption that the document, duly executed, was intended to be a will, as the testator's solicitor's evidence was sufficient to help to convince the court that the testator executed the document intending that it would operate as a will until some more formal document should be prepared and executed. Having considered the decision of *In re Gilmour* [1948] NZLR 687, Turner J said (at 718):

> "In the present case, like Gresson J [in *In re Gilmour*], I am put upon inquiry by the use of the term 'instructions for a will', by the lack of form of the document, and by the absence of any words designating it as a final testamentary instrument. Like Gresson J, I listened to such extrinsic evidence as was available as to the circumstances in which the document came to be executed; but, unlike him, I was presented with direct and cogent evidence – that of [the testator's solicitor]. It clearly appears from this evidence that the document was signed so as to operate as a will until a more formal document should be signed."

[12] *In re Barnes* was considered by the Supreme Court of Western Australian in *Re Ogley (dec'd); Ex parte The Public Trustee* [2004] WASC 277. In that case, Mr Johnstone, a Wills Manager with the Public Trust Office completed a form headed "Will Instructions" with information provided by Mr Ogley's wife. The form was a standard form used by the Public Trustee to take down instructions from a testator with the intent that a formal will will be drawn up at a later date. Mr Johnstone then met with Mr Ogley, who was suffering from cancer and expected to have three to six months to live, and read through the instructions and explained to him what was in those instructions in some detail. Mr Ogley confirmed that what was written was in accordance with his wishes. Mr Ogley, Mrs Ogley and Mr Johnstone signed the form at the bottom of the final page and it was dated by Mr Johnstone. The signatures of Mr and Mrs Ogley were then witnessed. The Registrar declined to grant probate in common form because he was not satisfied that the deceased intended the document in question to be his will. An appeal against that decision was allowed and probate in common form was granted.

[13] In determining the matter, Sanderson M referred to the South Australian decision of *Estate of Treloar* (1984) 36 SASR 41, to *In re Barnes*, and to some of the early English authorities, and said:

> "[13] The circumstances in which a Will can be contained in instructions were discussed by Legoe J in the *Estate of Treloar* (1984) 36 SASR 41. His Honour refers to Tristam & Coote, Theobald and Halsbury's Laws of England, in setting out the circumstances when instructions for a Will may have effect as a Will: see pp 43-44. These include:

(a) if it can be shown that the instructions represented how the testator intended to dispose of the estate;

(b) if the instrument was intended to take effect in the absence of a more formal document;

(c) if the document should be depository and operate provisionally until a more formal will was prepared.

[14] In the *Goods of Fisher* (1869) 20 LTR 684, Lord Penzance directs that a presumption arises when instructions are executed that it is intended will take effect as a Will, even where in future a more regular form is intended. In *Re Meynill; Meynill v Meynill* (1940) WN 273, Barnard J accepts that the presumption arises where formalities have not been complied with. In *In re Barnes (Dec)* [1954] NZLR 714 Turner J expressed the view that if the document has been executed animo testandi and the formalities observed, it becomes the last Will and testament of the deceased and was not revoked by any 'mere change of intention'. It is to be noted that the authorities suggest that a Will is not to be regarded as contained in instructions in the absence of evidence of animus testandi: see *Lister v Smith* (1863) 3 Sw & Tr 282; *Torre v Castle* (1836) 1 Curt 303; *Whyte v Pollok* (1882) 7 App Cas 400."

[14] Nevertheless, Sanderson M cautioned:

"Having said all of that, it is clear that each case must be decided on its merit 'because so much depends on the particular circumstances': see *Hines v Hines* [1999] WASC 111 per Owen J at 25. In that same case his Honour pointed out (at 26) that determining whether the document is a testamentary instrument is a less difficult task when independent evidence is available."

[15] Sanderson M concluded at [18] that, while the evidence was "thin", he was satisfied that it established that the deceased intended that the signed instructions would be an "interim will". The deceased, by his conduct, had indicated that he had signed a will and was satisfied that what he was signing was consistent with the way he intended to dispose of his property. Sanderson M further observed at [19]:

"It must be borne in mind in an application such as this that it is the Court's role to facilitate, rather than hinder a deceased's intention to settle his affairs. That is what Lord O'Hagan said so long ago [in *Whyte v Pollok* (1882) 7 App Cas 400] and it is as true today as it was then. In my view, there is no justification for coming to any conclusion other than that the signed instructions contain the Will of the deceased."

Submissions

[16] Counsel for the applicant was unable to find any Queensland decision on point. However, it was submitted that on the basis of the authorities referred to above, it may be discerned that the key issue is not the form of the instrument but rather whether:

(a) it has been executed as a will; and

(b) there is evidence that the testator intended it to take effect as a will (i.e. evidence of *animus testandi*).

(a) Execution

[17] As to the first matter, the will instructions sheet has been signed by the testator in the presence of two witnesses. That was apparent on the face of the document and is confirmed by the affidavit of Mr Sheath (paras 101-107). I accept that that is not a matter that gives rise to any difficulty in the present case.

(b) Did the testator intend the document to take effect as a will?

[18] Counsel for the applicant referred to the evidence of Mr Sheath, an accredited specialist in succession law, who has drafted hundreds of wills in his thirteen years in practice. His evidence was very detailed in relation to his appointment with the deceased to take the instructions for her will. Mr Sheath used a Will Instruction Sheet provided by Lexon Insurance to Queensland solicitors. A notation on the second last page, directly under the heading "Sign off" states:

> "Note: The client should execute these instructions in the presence of two (2) witnesses so their instructions are legally binding."

[19] Mr Sheath's affidavit evidence was to the following effect (at paras 91-107):

(a) He advised the deceased that he wanted her to sign the Will Instruction Sheet so that if something was to happen to her before she signed her Will, the Will Instruction Sheet may form her Will. She said that was fine;

(b) The deceased read the document in his presence;

(c) He explained to the deceased the need for two witnesses and also the old substantial compliance test and the new testamentary intention test (under s 18 of the *Succession Act*) and explained the difference between the two tests to her;

(d) He advised the deceased that the signing of the Will Instruction Sheet may revoke an earlier Will and drew her attention to the revocation clause towards the top of the first page of the document;

(e) He recalled explaining to the deceased that he understood, through a representative of Lexon Insurance, that the Will Instruction Sheets had previously been admitted to probate in other matters;

(f) He organised for a neighbour to come in to act as a second witness;

(g) The deceased again read the Will Instruction Sheet in the presence of Mr Sheath and the other witnesses;

(h) The deceased confirmed that she was happy with those instructions;

(i) The deceased then signed the Will Instruction Sheet in his presence and in the presence of the neighbour.

[20] In those circumstances, it was submitted that there was clear evidence that the deceased, when signing the Will Instruction Sheet, intended the document to be her will. I accept those submissions and am satisfied on the basis of the evidence before the court that there was an intention on the deceased's part when the document was signed that it take effect as a will.

[21] Accordingly, the document should be admitted to probate.

Orders

[22] The following orders are made:

1. Subject to the formal requirements of the Registrar, probate in common form be granted to Rosemary Elisabeth Lawrence of 359 Old Goombungee Road, Cawdor Qld 4352 of the document dated 17 August 2012, being exhibit "A" to the affidavit of Rosemary Elisabeth Lawrence filed on 11 January 2013, as the true and original last will of the deceased.
2. That the applicant's costs of and incidental to this application be paid out of the estate.