

SUPREME COURT OF QUEENSLAND

CITATION: *Lemon v Lemon & Anor* [2014] QSC 123

PARTIES: **SHERIDAN LEMON**

(applicant)

v

BRIDGETTE STACEY LEMON

(first respondent)

BROOKE AMANDA LEMON

(second respondent)

FILE NO/S: BS4383/14

DIVISION: Trial

PROCEEDING: Application on the papers

DELIVERED ON: 2 June 2014

DELIVERED AT: Brisbane

HEARING DATE: 28 May 2014

JUDGE: Alan Wilson J

ORDER: **The order of the court is that:**

- 1. Subject to the formal requirements of the Registrar, a grant of probate of a copy of the Will of Eunice Brealey, late of Beenleigh Nursing Home, 45 York Street, Beenleigh in the State of Queensland dated 16 June 1989 issue to Sheridan Lemon as sole executor limited until the original will or more authenticated evidence be brought into and left in the Registry.**
- 2. That the Applicant's costs of and incidental to this Application be paid out of the estate of Eunice Brealey on an indemnity basis.**

CATCHWORDS: SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – GRANTS OF PROBATE AND LETTERS OF ADMINISTRATION - LIMITED, SPECIAL AND CONDITIONAL GRANTS OF PROBATE AND ADMINISTRATION – PROBATE OF LOST WILL – where the applicant has applied on the papers for probate, in solemn form, of a photocopy of the will of her late mother – where the applicant is the sole executor of the will – where the original will has been lost – whether the applicant should be

granted probate in solemn form

Succession Act 1981 (Qld)

Allan v Morrison [1900] AC 604

Frizzo & Anor v Frizzo & Ors [2011] QSC 107

Price v Tickle & Ors [2011] QSC 206

Re: Cardie [2013] QSC 265

COUNSEL: The matter was heard and determined on the papers under Ch 13 Pt 6 of the *Uniform Civil Procedure Rules 1999*.

SOLICITORS: McLaughlin & Associates Lawyers for the applicant and respondents

- [1] **Wilson J:** Ms Sheridan Lemon has applied on the papers for probate, in solemn form, of a photocopy of the will of her late mother, Eunice Brealey. Mrs Brealey died in a nursing home at Beenleigh on 8 October 2012. She was predeceased by her husband Robert Brealey who died on 22 March 2007. Mrs Lemon is the only child of their marriage and the copy will names her to be sole executor. The respondents are Mrs Lemon's daughters. They do not oppose the application.
- [2] There is evidence satisfying the procedural requirements enabling the application to be heard and determined without an oral hearing. Submissions have been received on Mrs Lemon's behalf.
- [3] It has been accepted in Queensland that for a copy of a lost will to be admitted to probate five matters must be established.¹
- [4] It must be shown that there was actually a will – here, the evidence of the solicitor achieves that end. Second, it must be established that the document revoked all previous wills – on its face, this will contained a provision to that effect. Third, the presumption that the will has been destroyed with an intention to revoke it must be overcome; fourth, there must be evidence of its terms; and, fifth, there must be evidence of due execution.
- [5] The evidence establishes to the requisite standard that on the date on the copy, 16 June 1989, Mrs Brealey executed an original will in a way which satisfied the provisions of the *Succession Act 1981 (Qld)*. While the solicitor who prepared and oversaw the execution of the will has no direct memory of it, she recognises her signature and that of her secretary as the witnesses, and gives evidence of her regular practice around the execution of clients' wills. She is also able to swear that according to her records the original document was given to Mrs Brealey in the next year.
- [6] Relevantly, the document on its face provided for the revocation of all prior wills.

¹ *Frizzo & Anor v Frizzo & Ors* [2011] QSC 107; *Price v Tickle & Ors* [2011] QSC 206; and *Re: Cardie* [2013] QSC 265.

- [7] There is a long-standing presumption that when a will is not produced it has been destroyed with the intention to revoke it.² The evidence of Mrs Lemon, her husband Robert, and her daughter Bridgette is, persuasively, to the contrary effect.
- [8] After the will was executed Mrs Brealey spoke to them, and Bridgette in particular, in terms signifying the will was extant and operative, and reflected her wishes. In January 2000 Bridgette saw the wills of both her grandmother and her grandfather, Robert Brealey, and believes she was shown original copies.
- [9] Sadly, after 2002 Mrs Brealey suffered from Alzheimer's disease and dementia. Mr Robert Brealey cared for her in the home they shared until 2005, when she moved into a nursing home. She remained in care until her death. In 2006 Mr Brealey suffered a stroke and, from that time until his death in 2007, lived with Mrs Lemon and her husband.
- [10] The probable explanation for the disappearance of Mrs Brealey's original will is its inadvertent destruction by Mr Robert Brealey. After Mrs Brealey was admitted to a nursing home she left all her documents with him.
- [11] When Mrs Lemon went to her parents' home at Daisy Hill following Mr Brealey's stroke, she discovered to her surprise that he had disposed of much of the contents, including furniture. Both Mrs Lemon and her husband say that Mr Robert Brealey had always been "... *minimalist in terms of possessions*" and that tendency persisted while he was living with them – for example in that period he apparently disposed, to their surprise and concern, of family photographs with considerable family sentimental value.
- [12] Mrs Lemon says that throughout 2006 her father's "...*mental health deteriorated and his compulsion to throw things out appeared, from my observations, to increase*".
- [13] The third question is, then, the only one with which the court must be concerned. There is no evidence that Mrs Brealey ever made another will, or deposited the original of this will with anyone else. Her personal circumstances and that of her husband support an inference that he disposed of the original at a time when it remained his wife's intended final will, without her consent or instruction (and, in fact, at a time when she probably lacked sufficient capacity either to make a will, or revoke one).
- [14] It is not, I think, too adventurous to also infer that his disposal of it occurred in circumstances where (intending no disrespect) he was not of full mental capacity, or was suffering from some illness which compelled him to dispose of possessions and denied him a full appreciation of the document, its importance and the need to preserve it.
- [15] I am satisfied those circumstances rebut the presumption of revocation.
- [16] It is also relevant, and gives comfort, that the terms of the will evidenced by the copy are clear and comprehensive and entirely unsurprising in light of Mrs Brealey's family circumstances.

² *Allan v Morrison* [1900] AC 604.

- [17] The application and the draft order provided with the papers seek probate of the copy in solemn form. I do not think that is the appropriate order. This is not a case involving challenges to testamentary capacity, or the legitimacy of the document itself.
- [18] I am prepared to order that the copy be admitted to probate limited until the original will or more authenticated evidence of it should be brought into and left in the Registry; and, subject to any other formal requirements of the Registrar, it is appropriate that Mrs Lemon's costs of and incidental to the application be paid out of Mrs Brealey's estate on an indemnity basis.