SUPREME COURT OF QUEENSLAND

CITATION:	*Massey & Ors v Smith & Ors* [2015] QSC 86
PARTIES:	**DAPHNE EVELYN MASSEY, STEPHEN JOHN MASSEY and JENNIFER ANN BUSHBY (as Executors of the Will of MARGARET DOREEN SMITH)** (applicant) **v** **NOEL JAMES SMITH** (first respondent) **DOROTHY MARY GEHRIG** (second respondent) **PAUL GERARD SMITH** (third respondent) **CHRISTINE HENSCHKE** (fourth respondent) **TRUDI DIESTEL** (fifth respondent) **ELISE KARANDREWS** (sixth respondent)
FILE NO/S:	8548 of 2014
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 April 2015
DELIVERED AT:	Brisbane
HEARING DATE:	13 April 2015
JUDGE:	Martin J
ORDER:	**Application dismissed.**
CATCHWORDS:	SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – JURISDICTION AND DISCRETION OF THE COURT – QUEENSLAND — where the applicant seeks a declaration that a handwritten document is a codicil to the last will of the deceased – whether the deceased intended the document to constitute an alteration to her will – whether the court should exercise its discretion under s 18 of the *Succession Act* 1981 to dispense with the execution requirements – whether upon the proper construction of the handwritten document the deceased created a trust – whether the court has the power to make directions under s 96 of the *Trusts Act* 1973

Succession Act 1981, s 6, s 18
Trusts Act 1973, s 96

Harpur v Levy (2007) 16 VR 587
Hayes v National Heart Foundation of Australia [1976] 1 NSWLR 29
Re Grindrod (deceased) [2014] QSC 158

COUNSEL:	S McLeod for the applicant C Brewer for the first, third, fourth, fifth and sixth respondents
SOLICITORS:	Hayward & Co Lawyers for the applicant Crouch & Linden for the first, third, fourth, fifth and sixth respondents

[1] The applicants are the executors of the will of Margaret Doreen Smith, deceased. They seek:

(a) A declaration that a document signed by the deceased on 28 March 2011 is a codicil to the last will of the deceased pursuant to s 18 of the *Succession Act* 1981 ("the Act");
(b) A declaration that upon the proper construction of the document of 28 March 2011 the deceased created a trust of a one-fifth share in a property in Nundah; and
(c) A direction that pursuant to s 96 of the *Trusts Act* 1973 and s 6 of the Act that the applicants as the executors and trustees of the deceased's property would be justified in distributing a one-fifth share in the proceeds of sale of the Nundah property to the grandchildren of a sister of the deceased.

The will

[2] The will was executed on 27 July 2009. It provided for a number of legacies for some of the deceased's relatives and that the residue of the estate was to be divided equally amongst her brothers and sisters.

The document of 28 March 2011

[3] This document was hand-written by the deceased. It reads:

> "To: The Executors in my Estate
>
> and to: The residuary beneficiaries in my Estate
>
> I thought by now I would have sold my home at 10 Boyd St. Nundah.
>
> In the event of it not being sold in my lifetime, I express the wish that my one-fifth share in the proceeds of the sale of the house be divided equally between Daphne's Grand-children, namely:-
>
> Robert Graham Bushby

Joshua Luke Bushby

Emmy Lou Bushby

Samuel Timothy Bushby

Matthew James Massey

Caillan John Massey

I would like this to be given to them in the form of Term Deposit with The National Australia Bank at Toombul; and let it accumulate for quite a while.

If the house is sold in my lifetime; I will attend to this myself.

Dated at Brisbane this 28th day of March 2011

M W Smith

Margaret Doreen Smith"

Section 18 *Succession Act* 1981

[4] Section 18 of the Act provides:

"18 Court may dispense with execution requirements for will, alteration or revocation

(1) This section applies to a document, or a part of a document, that—

(a) purports to state the testamentary intentions of a deceased person; and

(b) has not been executed under this part.

(2) The document or the part forms a will, an alteration of a will, or a full or partial revocation of a will, of the deceased person if the court is satisfied that the person intended the document or part to form the person's will, an alteration to the person's will or a full or partial revocation of the person's will.

(3) In making a decision under subsection (2), the court may, in addition to the document or part, have regard to—

(a) any evidence relating to the way in which the document or part was executed; and

(b) any evidence of the person's testamentary intentions, including evidence of statements made by the person.

(4) Subsection (3) does not limit the matters a court may have regard to in making a decision under subsection (2).

(5) This section applies to a document, or a part of a document, whether the document came into existence within or outside the State."

[5] The 2011 document does not meet the requirement of s 10(3) or (4) of the Act as the deceased's signature has not been witnessed by two or more people. The 2011 document was sealed in an envelope and held with the deceased's will at her then solicitors.

[6] In order to determine whether or not dispensation under s 18 should be given, the court must be satisfied that the deceased intended the document to constitute an alteration to her will. Specific reference is made in s 18(3)(d) to the court being able to have regard to any evidence of the person's testamentary intentions, including evidence of statements made by the person.

[7] Of relevance in this case is that the deceased worked as a legal secretary and legal clerk. Her death certificate notes her occupation as "probate clerk". She worked as a legal secretary for 47 years. It is common ground that she was aware of and familiar with the will making process as it existed prior to her retirement in 1997. As such, she would have been aware that a document that was not witnessed by two witnesses was not valid. She would also have known what a codicil was.

[8] The capacity to dispense with the requirements for executing a will did not arise until the amendments to the Act in 2006. It is common ground that it was unlikely that the deceased would have been familiar with that change and with the "testamentary intention test".

[9] The test to be applied in an application of this type has been summarised in *Re Grindrod (deceased)*[1] where A Lyons J said:

> "[16] There are three conditions that need to be satisfied before an order can be made under s 18. These requirements were previously set out in the decision of New South Wales Court of Appeal decision of *Hatsatouris v Hatsatouris* and have been more recently examined in a number of Queensland decisions including *Proctor v Klauke*, and *Re Yu*. In *Proctor v Klauke* the three conditions were discussed as follows:
>
> > 'In relation to the matters that I am required to be satisfied about, Young CJ in Equity in *Macey v Finch* ([2002] NSWSC 933), considered the equivalent provision in the New South Wales legislation and stated that the provision required proof of three matters. Firstly, that there must be a document. Secondly, that the document must purport to state the deceased's testamentary intentions and, thirdly, the document must constitute the will of the deceased. That is, it is not to operate during his or her life time. It must be intended to constitute the deceased's will.'
>
> [17] Turning to the first requirement that there must be a document, it is clear that a document is widely defined in the Act by specific reference to the *Acts Interpretation Act* 1954 (Qld) which defines '*document'* in Schedule 1 as including "(a) any paper or other material on which there is writing". I am satisfied that the handwritten note is such a document.
>
> [18] In terms of the second requirement that document must purport to state the deceased's testamentary intentions. In *The Estate of Masters; Hill*

[1] [2014] QSC 158.

v Plummer; *Plummer v Hill* the meaning of testamentary intention was discussed in the following terms:

> 'There are in the present context, several things which are relevant in that regard. First, the document must state the deceased's 'testamentary intentions', that is, his wishes or intentions as to how, voluntarily, his property is to pass or be disposed of after his death. A will may, of course, do other things: it may, for example, appoint a legal personal representative, exercise a special power, appoint a guardian or the like: see *Halsbury's Laws of England*, par 202. But it is the disposition of the deceased's property voluntarily after his death which is, for the present purposes, the relevant characteristic of a will.'" (citations omitted)

Testamentary intentions?

[10] The terms of the 2011 document are not consistent with general dispositive language. They are consistent with the expression of a wish that property be dealt with in a particular way. In the second full paragraph the words: "I express the wish …" appear and in the third full paragraph the words: "I would like …" appear. The applicants contend that the document satisfies the testamentary intention test because "she fully expected the executors to comply with her wishes upon her death". But there is no evidence that she expressed that view at any time or that she had that expectation. The executors' evidence is that she did not speak to any of them about the contents of the document.

[11] The 2011 document was no more than an expression of desire as to the disposition of her share in the Nundah property. More importantly, by its terms it does not purport to replace the disposition envisaged in her will.

Did the deceased intend that the 2011 document should operate as a codicil?

[12] In order to operate as a codicil it must be demonstrated that the deceased intended that the 2011 document would alter the disposition of her estate as previously set out in her will. There is no evidence to suggest that the deceased had ever demonstrated, by act or words, that it was her intention that the 2011 document should operate, without anything further being done, as her codicil.

[13] The matters which militate strongly against the finding that it was intended to operate as a codicil include:

(a) The document expresses the desire of the deceased that certain things might occur with her one-fifth share in the property. It does not purport to dispose of the share, and the expression that she would like the proceeds to be shared in the form of a term deposit and that "it accumulate for quite a while", is more consistent with the expression of a desire rather than an intention to alter the terms of the will.

(b) The deceased's history and knowledge of the requirements of a valid will; and especially that such a document needed to be correctly witnessed.

(c) Having worked in a law firm in this area of the law, raises the question why anyone with that knowledge would not attend to the formal requirements if they wanted it to be effective.
(d) There is evidence that one of her sisters told her that if she needed to update her will she should call a solicitor and ask them to come to her home. She did not do that.

The 2011 document is not a codicil

[14] The evidence does not support a finding that the 2011 document was executed with testamentary intention or with any intention that it operate as a codicil to her earlier will.

Was there a declaration of trust?

[15] This was but faintly argued for the applicants. In order that the protection of s 96 of the *Trusts Act* 1973 can be availed of, there must, of course, be a trust.

[16] At one stage during argument it appeared that the applicants might be submitting that the words used in the 2011 document could be construed in a way which would create what is sometimes called a precatory trust. Sometimes, where words such as "wish", "request", "will and desire", or "recommend" have been used in testamentary documents they have been held, depending on the facts of each case, to constitute an express trust.

[17] One of the problems which arises for the applicants in this case is that the will disposes of the interest in the Nundah property in a particular way, whereas the 2011 document, on the applicants' case, would see it disposed of it in an entirely different way. In the light of having found that the 2011 document does not constitute a codicil to the will there is considerable difficulty in categorising the 2011 document as a precatory trust. It was explained in *Hayes v National Heart Foundation of Australia*[2] that the court must be able to conclude that the imposition of a trust obligation was intended. That is to be done upon reading the instrument of disposition as a whole. That does not avail the applicants in this case because the 2011 document was not an instrument of disposition.

[18] The 2011 document does not constitute a trust *inter vivos*. It is clear that the wish of the deceased was not intended to take immediate effect. A declaration of trust, which is not made for consideration, that is intended to operate only from some appointed future time, is in effective. The intention to create a trust in the future is unenforceable in the absence of consideration because equity will not assist a volunteer to complete the trust.[3]

[19] As no trust has been demonstrated to exist, no power may be exercised under the *Trusts Act* 1973.

Orders

[20] The application is dismissed. I will hear the parties on costs.

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2 [1976] 1 NSWLR 29.
3 *Harpur v Levy* (2007) 16 VR 587.