

SUPREME COURT OF QUEENSLAND

CITATION: *Carey v Carey* [2015] QSC 197

PARTIES: **PATRICIA MARGARET CAREY**
(applicant)
v
TONY CURTIS CAREY
(respondent)

FILE NO/S: SC No 4974 of 2015

DIVISION: Trial Division

PROCEEDING: Application on the papers

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 12 June 2015

DELIVERED AT: Brisbane

JUDGE: Douglas J

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

- 1. Declare that, on 8 November 1976, the late Elizabeth Lillian Carey wrote and executed a document which was in the words, figures and symbols following, or in the words figures and symbols to the like effect:**
 - a. I Elizabeth Lillian Carey of 17 Erbacher Street, Centenary Heights QLD 4350 do hereby revoke all my previous wills and declare this to be my final will and testament.**
 - b. I give my house at 17 Erbacher Street, Centenary Heights QLD 4350 to Patricia Margaret Carey and Tony Curtis Carey, absolutely, as tenants in common, in the following proportions:**
 - i. As to Patricia Margaret Carey, two thirds (2/3); and**
 - ii. As to Tony Curtis Carey, one third (1/3).**
 - c. I give divide the residue of my estate equally among Patricia Margaret Carey and Tony Curtis Carey as tenants in common.**
- 2. Declare that, at the date of late Elizabeth Lillian Carey passing, the said Will had not been revoked.**
- 3. Order that, subject to the formal requirements of the Registrar, a grant of probate of the will of Elizabeth Lillian Carey of 17 Erbacher Street,**

Centenary Heights QLD 4350 issued to Patricia Margaret Carey as sole executor, limited until the original will or more authenticated evidence be brought into and left in the Registry, in the following terms:

- a. **I Elizabeth Lillian Carey of 17 Erbacher Street, Centenary Heights QLD 4350 do hereby revoke all my previous wills and declare this to be my final will and testament.**
 - b. **I give my house at 17 Erbacher Street, Centenary Heights QLD 4350 to Patricia Margaret Carey and Tony Curtis Carey, absolutely, as tenants in common, in the following proportions:**
 - i. **As to Patricia Margaret Carey, two thirds (2/3); and**
 - ii. **As to Tony Curtis Carey, one third (1/3).**
 - c. **I give divide the residue of my estate equally among Patricia Margaret Carey and Tony Curtis Carey as tenants in common.**
- 4. That the Applicant's cost of and incidental to this Application be paid out of the estate of Elizabeth Lillian Carey on an indemnity basis.**

CATCHWORDS: SUCCESSION – MAKING OF A WILL – TESTAMENTARY INSTRUMENTS – WHEN LOST, MISLAID, DESTROYED OR NOT AVAILABLE – EVIDENCE – where it was likely that the file together with the will for the deceased was destroyed after 10 years as nothing had been heard from the children of the deceased – where the evidence of the children of the deceased was that she had made three wills – where the deceased's son recalled a final will being read to him at a law firm after the death of the deceased – where the deceased's son recalled that he would receive one third of the deceased's house and his sister would receive two thirds and that each of them would receive a small proportion of money that their mother possessed as the residue of her estate – where the will register showed that the deceased's son and daughter were the executors – where the deceased's daughter wished to sell the deceased's house and could not because it was still registered in the deceased's name and probate had not been issued – where the deceased's son had disclaimed his role as executor of the estate and had also disclaimed any interest in the remaining property of the estate – whether probate should be granted of the deceased's son's memory of the will as it was recited to him

Succession Act 1981 (Qld)

Uniform Civil Procedure Rules 1999 (Qld), r 490

Cahill v Rhodes [2002] NSWSC 561, applied

Frizzo v Frizzo [2011] QSC 107, applied

Sugden v Lord St Leonards (1876) 1 PD 154, applied

SOLICITORS: Creevey Russell Lawyers for the applicant

- [1] This is an application on the papers for probate of a lost will. Elizabeth Carey died on 15 August 1989 leaving two children and having made a will with Greenhow & Yeates Solicitors on 8 November 1976. That firm later merged with another firm of solicitors called Aden Lawyers. The Greenhow & Yeates will register has survived and records a will made for Elizabeth Carey on 8 November 1976. In the “Remark” column of the register there is a notation “G&Y handling Est”.
- [2] That indicated to Mr Maker, the former sole practitioner in Greenhow & Yeates, that the firm had made a will for the deceased on 8 November 1976 and that it opened an estate file for the deceased after her death. He assumes that the file together with the will of the deceased was destroyed after 10 years as nothing further had been heard from the children of the deceased.
- [3] The evidence of the children is that their mother had made three wills. The first was made on 3 October 1973 with the Public Trustee and a copy of that was exhibited in the material provided to the court.
- [4] The deceased had told Patricia Carey that she had made a subsequent will leaving a house to Patricia Carey and some money to her brother, the deceased’s son, Tony Carey. She did not ever see the second will but after the deceased’s death learned of the third will. Tony Carey learned of the third will which, to his knowledge, was his mother’s last will, after he went to the office of Greenhow & Yeates in Toowoomba after his mother’s death. His recollection is that a staff member of the firm read the will to him. He cannot remember who the executors were but the will register shows that his sister and he were the executors.
- [5] His recollection of what he was told by the staff member at Greenhow & Yeates was that he would receive one third of the deceased’s house and his sister would receive two thirds and that each of them would receive a small proportion of money that their mother possessed as the residue of her estate.
- [6] It seems clear from the evidence of the children of the deceased that the residue of the estate was distributed between them but nothing was done to transfer title to the house from their mother’s name to their names.
- [7] Patricia Carey now wishes to sell the house and cannot do so because it is still registered in her mother’s name and probate has not issued. Tony Carey has disclaimed his role as executor of the estate and has also disclaimed any interest in the remaining property of

the estate. The issue is, therefore, whether probate should be granted of his memory of the will as it was recited to him, sometime in the latter part of 1989 after the death of the deceased on 15 August 1989: see, e.g., *Sugden v Lord St Leonards* (1876) 1 PD 154.

- [8] There is no contest in this application on the papers about the evidentiary basis for the application.
- [9] The court has power to admit the terms of the lost will to probate where it can be proved:
- (a) that there was a will in existence;
 - (b) that it revoked all previous wills;
 - (c) that the presumption that it was not lost or destroyed by its maker has been overcome;
 - (d) that there is evidence of its terms; and
 - (e) there is evidence of due execution and compliance with legislation enabling a document to be admitted to probate: *Cahill v Rhodes* [2002] NSWSC 561 at [55] and *Frizzo v Frizzo* [2011] QSC 107 at [161].
- [10] The evidence of the former partner of Greenhow & Yeates, Mr Maker, establishes to my satisfaction that a will was prepared by a solicitor, entered into a will register, placed into safe custody and kept until the deceased had died so that it existed after her death.
- [11] Based on his evidence of his practice and the firm's practice in the making of wills, I can safely assume that the will revoked previous wills and disposed of the whole of the estate of the deceased.
- [12] The presumption of revocation does not apply as the evidence satisfies me that the will was in the custody of Greenhow & Yeates when the deceased died.
- [13] The terms of the will can be proved through the memory of Mr Carey and his credibility is not in doubt and enhanced by his willingness to disclaim any further interest in the remaining property of the estate.
- [14] Again, the evidence of Mr Maker assists me to conclude that the will was duly executed in accordance with the practice of the firm so that I am satisfied that the formal requirements of making the will under the *Succession Act* 1981 (Qld) have most likely been complied with.
- [15] Other attempts have been made to locate the will unsuccessfully.
- [16] In the circumstances where Mr Tony Carey consents to the proposed order and has sworn an affidavit in these proceedings, it seems unnecessary that notice be given pursuant to

r 490 of the *Uniform Civil Procedure Rules 1999*. It is also appropriate to appoint Patricia Carey as the sole executor given Tony Carey's disclaimer of that role and consent to his sister being appointed as the sole executor. Accordingly, I shall make an order in terms of the draft which I have initialled and placed with the file.