SUPREME COURT OF QUEENSLAND

CITATION:	*Donahue v Morleys Funerals Pty Ltd & Anor* [2016] QSC 137
PARTIES:	**NORMA DONAHUE** (applicant) **v** **MORLEYS FUNERALS PTY LTD** (first respondent) **KYLIE BARSLEY** (second respondent)
FILE NO:	BS4695 of 2016
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	8 June 2016 (ex tempore)
DELIVERED AT:	Brisbane
HEARING DATE:	8 June 2016
JUDGE:	Mullins J
ORDER:	**Order as per amended draft initialled and placed with the file.**
CATCHWORDS:	SUCCESSION – PERSONAL REPRESENTATIVES – RIGHTS, POWERS AND DUTIES – DISPOSAL OF BODY – where the deceased's mother objected to cremation of the deceased's remains – where the deceased's de facto spouse claimed it was the deceased's intention to be cremated – where there was a document purporting to be the deceased's will – whether the deceased signed the purported will – whether the will amounted to a written instruction by the deceased that his remains be cremated
COUNSEL:	A G Rae for the applicant M Klibbe (*Sol*) for the first respondent A H Sinclair for the second respondent
SOLICITORS:	McInnes Wilson Lawyers for the applicant Cooper Grace Ward as town agents for Roberts Nehmer McKee for the first respondent Rennick Lawyers for the second respondent

HER HONOUR: Mr Donahue died in tragic circumstances. There is now a dispute between the applicant, who is his mother, and the second respondent, who is his de

facto spouse, as to whether he should be buried or cremated. It is very sad for all concerned that their grieving has been complicated by the disputes amongst family members.

The deceased was a son, a husband, a father and a stepfather. It appears that he was an indigenous man and his mother leads family members who, for cultural and family reasons, seek to have the deceased buried at Mareeba.

The second respondent had been in a de facto relationship with the deceased for about six years and she is firm in the view that she put before the coroner and before this court that it was the deceased's expressed intention that he be cremated and not buried.

What is relevant for the purpose of determining whether there is an instruction from the deceased about whether there will be a cremation or not is whether there are signed, written instructions.

The application which I have heard today has focussed on documentary evidence produced by both parties relevant to determining whether the document that is entitled "Last will and testament" in the name of the deceased and has a signature of the deceased's name, witnessed by Ms Griffin and Mr Lomas on 12 April 2013, is, in fact, the deceased's will in the terms in which it was signed and whether it contains an unequivocal instruction that the deceased be cremated.

The second respondent was not required for cross-examination, despite the fact the applicant does make allegations against the second respondent in respect of the bona fides of the document that is put forward as the deceased's will.

In comprehensive written submissions Ms Rae of counsel for the applicant points to all of the discrepancies in the second respondent's material that raises suspicions about the authenticity of the will in the terms in which it is produced to the court and the signature on the will. I found the submissions compelling, to a degree, but they had to be considered in the light of further material that was produced during the course of the hearing.

The will purports to be executed in the presence of two witnesses, Ms Griffin and Mr Lomas. Exhibit 1 is the statutory declaration of Mr Lomas which confirms an occasion in 2013 when he was in the company of the deceased when he was asked to witness a will for the deceased which had been completed for him by the second respondent in accordance with the instructions that the deceased gave the second respondent.

Mr Lomas states in his statutory declaration:

> *At no time did Kylie write anything other than what Quinton had instructed. I know this as I was present at the time.*

Ms Griffin can also recall the occasion of the signing of wills by the second respondent and the deceased. Ms Griffin can also recall that the deceased had made a statement to the effect that he was "claustrophobic" and that "he wanted to be cremated".

I pointed out during the hearing that Ms Griffin did not make her affidavit by reference to the terms of the document that was actually signed. During an adjournment, a further affidavit was obtained from Ms Griffin in which she was shown the document that is entitled "will" relating to the deceased dated 12 April 2013 and she confirms that it is the will that she witnessed on that date and there had been no alterations or additions made to the will, except for an exhibit stamp on the back of the document.

I found the evidence from the attesting witnesses compelling. It appears that the deceased may not have had a great level of literacy. A point is made by the applicant that the surname Donahue is not spelt correctly in the signing of the will. It looks as if the letter "a" has been omitted. That may very well just be the signature rather than the spelling.

I was concerned that there appears to be a tail at the end of the last letter of the first name in the signature on the will. Another document was produced this afternoon that is exhibited to the affidavit of the solicitor for the second respondent which was obtained by him from the second respondent and it appears to be a document obtained from the Parole Office which has the signature of the deceased dated 21 March 2016 where there is a tail at the end of the first name.

That signature again is different, slightly, from the signature on the will but, also, the other signatures that are produced. In particular, there is no doubt about the signatures that were obtained from the Townsville Correctional Centre and those signatures of the defendant are different again.

The allegation of the applicant is that it is the second respondent who signed the deceased's name on the will. The signature, however, is consistent with the signature for the deceased on a tenancy agreement signed some two years later and consistent with the deceased's signature on a passport application for a relation.

Bearing in mind that the deceased was not an overly literate man, it is perhaps not surprising that there are variations in his signature. In the light of the state of the evidence, I feel compelled by the evidence of the attesting witnesses and am satisfied, despite the discrepancies in the signature, that the signature on the document entitled, "Last will and testament" dated 12 April 2013 was, in fact, the signature of the deceased.

There is no suggestion there was a later will or that the will was somehow revoked by the deceased. The will is in the form of one obtained from a will kit and has been completed in the second respondent's handwriting except for the signature of the deceased and the witnesses' signatures and their descriptions. In relation to funeral directions, although the words "buried" and "cremated" are both circled, it is apparent from the handwritten references otherwise in the will that the intention or instruction that is expressed by the deceased in the document is to be cremated. That makes sense of the direction that he wanted his ashes kept for at least 12 months in the family home after his death and the qualification that the second respondent could overrule his wish to be cremated.

There is a reference to "cremated is my wish" in juxtaposition with the words "or burial" with an explanation "due to personal fears". Although there is some equivocation by including the words "or burial", overall, it seems that the deceased was conveying an instruction that he wished to be cremated.

I infer that the estate of the deceased contains little by way of value in assets. The dispute between the applicant and the second respondent arises in respect of the disposal of the deceased's body. I considered whether I should not act on the basis of the documentary evidence and leave the matter to be determined after steps were taken by the second respondent to obtain a grant of probate of the will, giving the applicant the opportunity to caveat against that grant and force the second respondent to prove the will in solemn form, where in a contested proceeding in this court the question of the authenticity of the will and the signature on the will could be tested.

I decided that in the light of the approach the parties have taken to this matter, endeavouring to have it resolved on the basis of the documents rather than viva voce evidence, that, on balance, I should proceed to decide the matter without further delaying the resolution of the issue as to what should happen to the deceased's body. In case the applicant changes her mind about the testing of all of the evidence in a full proceeding, I have decided to stay the outcome of this proceeding by 14 days to give the applicant an opportunity to appeal my decision, if she is so advised. The first respondent attended at the outset of the proceeding, indicating a willingness to abide by the order of the court, and not to seek any order for costs if the matter were disposed of today.

I, therefore, have decided on the preponderance of the evidence before me today, that the applicant cannot succeed and I am making an order in terms of the amended draft initialled by me which dismisses the application, declares the document signed by the deceased, dated 12 April 2013, to be a direction in writing that his remains be cremated and also orders that, on or after 22 June 2016, the first respondent may cremate the body of the deceased and give his ashes to the second respondent. That is consistent with the finding I have made for the purpose of this proceeding, that the document, dated, 12 April 2013, should be treated as the last will of the deceased which authorises the second respondent to be the executor and, therefore, to act accordingly as the personal representative of the applicant.