SUPREME COURT OF QUEENSLAND

CITATION:	*Re Toulitch (Deceased)* [2016] QSC 219
PARTIES:	**NANCY HELEN WATSON** (applicant)
FILE NO/S:	No 34 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers.
JUDGE:	Peter Lyons J
ORDER:	**A grant of probate in common form should be made.**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – TESTAMENTARY CAPACITY – SOUNDNESS OF MIND, MEMORY AND UNDERSTANDING – GENERALLY – where testator executed Will on 1 October 2009 – where hospital clinical record of 29 October 2009 recorded tachycardia/hypotension and possible early dementia – where testator later diagnosed with dehydration, atrial fibrillation and dementia with social issues – where the Queensland Civil and Administrative Tribunal (*QCAT*) appointed the Adult Guardian as the deceased's guardian for a number of personal matters, and the Public Trustee of Queensland as the administrator for the deceased for all financial matters, on 15 December 2009 – where the Adult Guardian's appointment was revoked on 14 December 2011 by QCAT – whether testator had testamentary capacity SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – PROBATE AND LETTERS OF ADMINISTRATION – PRACTICE – QUEENSLAND – PROOF IN SOLEMN FORM – where application for probate was made in solemn form – whether grant of probate should be made in common or solemn form *Probate Act* 1867 (Qld) s 8 *Succession Act* 1981 (Qld) s 6, s 70 *Uniform Civil Procedure Rules* 1999 (Qld) Parts 7, 8 and 9 of Chapter 15, r 640

Estate Kouvakas; Lucas v Conakas [2014] NSWSC 786
Frizzo & anor v Frizzo & ors [2011] QSC 107
Re Devoy [1943] St R Qd 137
Re Dowling; sub-nom NSW Trustee and Guardian v Crossley [2013] NSWSC 1040
Read v Carmody [1998] NSWCA 182
Tsagouris v Bellaris [2010] SASC 147

Certoma, *The Law of Succession in New South Wales* (4th ed, 2010)

SOLICITORS: Vantage Point Legal for the applicant

[1] On 4 January 2016, the applicant filed an application for a grant in common form of probate of the Will of Mario Toulitch deceased, the Will being dated 1 October 2009. Earlier publication of a notice of intention to make the application had the consequence that a letter addressed to the Public Trustee of Queensland was sent to a number of persons, including the applicant's solicitor. A copy of the letter was also placed on the Court file.

[2] On the advice of a Deputy Registrar, the applicant made an application for a grant of probate of the Will in solemn form, which is the subject of these reasons. Since then, notice of the application has been published in the New Zealand Herald, a paper circulating throughout New Zealand[1].

Background

[3] There is no respondent to the application. Much of the material placed before the Court is hearsay or double hearsay. The affidavit of the applicant's solicitor[2] shows that such material has been provided to the Court after she took ethical advice. For that she is to be commended. However, it is apparent that such material has been provided, not because the applicant relies on it, or even accepts its truth (at least in some respects), but to ensure that the Court is made aware of its existence and content. I propose to include some reference to that material in my identification of background matters without necessarily accepting the truth of all that is so recorded.

[4] The deceased was born in Bosnia on 12 November 1927[3]. He left that country in the 1960s, living in France and in New Zealand for several years, before migrating to Australia[4]. In Australia, the deceased acquired property at Cleveland, where he lived (alone), and at Redland Bay, where he owned a block of land.

[5] The deceased had a brother whom, in 2009, the deceased said was in New Zealand, and with whom he had no contact[5]. On the same occasion the deceased said he had divorced

1 CFI 11, para 8.
2 CFI 10.
3 CFI 7, exs NW2 and NW6.
4 CFI 7, ex NW6
5 CFI 7, ex NW6.

his wife when he lived in New Zealand; and that he had no children. The applicant's evidence is that the deceased said he had no living relatives[6].

[6] The applicant met the deceased in 2003. They became dance partners; and subsequently, close friends. The applicant helped the deceased with cooking and with washing, and at times drove him to places where he wanted to go.

[7] The deceased's will is dated 1 October 2009. The applicant deposed that the deceased arrived at her home on that day, with a completed Will form which he then signed in the presence of the applicant, and the applicant's grandson and his partner. The applicant deposed that, on that occasion, there was nothing that would lead her to believe that the deceased was suffering from any illness or condition that would affect his thinking or understanding of what he was doing.

[8] The deceased at that time owned the two properties, but was otherwise a man of limited means and did not have any income. He lived on a loan from Centrelink. According to the applicant[7], at about the time he signed the Will, the deceased had decided to sell the block of land at Redland Bay, apparently to get funds to build a better house on the property at Cleveland. He took advice from real estate agents about the value of the block of land at Redland Bay. He then put a "for sale" sign on the block, and subsequently negotiated with buyers about the sale. After a little time, he executed a contract with people described as "some Asian buyers".

[9] The first time the applicant saw the deceased unwell was on 29 October 2009. The applicant took the deceased to the Redland Hospital Emergency Department.

[10] Somewhat inconsistently with the applicant's evidence, the hospital's clinical record of 29 October 2009 recorded that the deceased had attended with a referral from his general practitioner, described as "TACHYCARDIA/HYPOTENSION". The record also stated that the deceased had no past medical history; that he "saw this GP first time today"; and that the deceased had been feeling unwell for a few months. The notes include "? Early dementia".[8]

[11] The deceased was admitted to the Redland Hospital on 3 November 2009, and discharged on 2 December 2009. The principal diagnosis was dehydration and another condition. It is difficult to decipher the note, but the other condition appears to be atrial fibrillation. He was also dehydrated. On his discharge, the final diagnosis was dementia with social issues.

[12] On 15 December 2009, the Queensland Civil and Administrative Tribunal (*QCAT*) held a hearing in relation to the deceased. The Adult Guardian was appointed as the deceased's guardian for a number of personal matters; and the Public Trustee of Queensland was appointed as the administrator for the deceased for all financial matters.[9] The Tribunal's reasons recorded that a letter from a Dr Roan expressed the view that the deceased had

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6 CFI 7, para 11.
7 CFI 7, para 14.
8 See CFI 11, ex NW1.
9 See CFI 10 ex MBD1 which includes the Tribunal's reasons.

dementia, and that he did not have capacity to make decisions in regard to his financial affairs. The deceased was recorded as stating that he had some memory problems. However he also said that he did not receive the pension because of his assets, and stated that the Centrelink loan provided him with $200 per fortnight. He also stated he had signed a contract to sell his land for $1,250,000, which he had advertised by putting a sign up on the land, with his phone number. He said that the land could not be subdivided, although there had been a recent change of zoning. He had based the sale price on the sale of a property next door.

[13] A Ms Burke, apparently from the Redland Hospital, stated at the QCAT hearing that, on admission, the deceased would not eat or drink; and that the Registrar and Consultant both thought that he did not have capacity. She was concerned about the influence that others had on him. Mrs Curran, who had known the deceased for 10 years, stated that she had seen him get progressively worse. The applicant, Mr Grant, and Mrs Hinton (both apparently friends of the deceased) considered that the deceased was able to make his own decisions. It is unnecessary to record other matters which appear in the Tribunal's reasons. The Tribunal concluded that the deceased did not have capacity to make personal and financial decisions for himself. A contract had been produced to the Tribunal by Mrs Curran, consistent with the description of the deceased. The Tribunal then made the appointments previously mentioned.

[14] The block of land at Redland Bay was sold on 30 April 2010. The Public Trustee budgeted funds for the deceased to build a new home at Cleveland.

[15] The Adult Guardian provided a report of 3 November 2011.[10] It recorded that in 2010, the deceased generally managed his affairs, and dementia services were discontinued. Dr Nick John, physician and geriatrician from the Redlands Hospital, considered that the deceased was managing with planning and decision-making reasonably well, but recommended that the appointments of the Adult Guardian and Public Trustee continue. However, the Adult Guardian formed the view that the appointment of a decision-maker for personal matters was no longer required. This appointment was revoked on 14 December 2011 by QCAT.

[16] A new house was built on the deceased's property at Cleveland in about 2013. The applicant's evidence is that the deceased gave her the Will to keep at about the time he moved from the old shack which had been on the property, into the house.

[17] The deceased died on 12 November 2015. The Public Trustee estimated the value of his estate at approximately $1,300,000. The principal assets were the house at Cleveland (valued at $900,000), and a cash account maintained by the Public Trustee, with a credit balance of almost $423,000.

Due Execution of Will

[18] Beneath what appears to be the signature of the deceased, the Will records that it was signed by him in the presence of Mr Watson and Ms Graham. They have provided an

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[10] See CFI 7 ex NW4.

affidavit deposing to the fact that he executed the Will in their presence, and that they then signed the Will as witnesses.

[19] The letter to the Public Trustee queries whether the signature on the Will is authentic, by comparison with a copy of the signature on the deceased's driver's licence. Having examined both signatures, I see nothing which leads me to doubt the evidence of Mr Watson and Ms Graham.

[20] Accordingly, I find that the Will was duly executed by the deceased, on 1 October 2009.

Testamentary capacity

[21] In *Frizzo v Frizzo*[11], Applegarth J drew the following principles relating to testamentary capacity from the judgment of Powell JA in *Read v Carmody*[12],

> "1. The testatrix must be aware, and appreciate the significance, of the act in the law upon which she is about to embark;
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> 2. The testatrix must be aware, at least in general terms, of the nature, extent and value of the estate over which she has a disposing power;
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> 3. The testatrix must be aware of those who may reasonably be thought to have a claim upon her testamentary bounty, and the basis for, and nature of, the claims of such persons;
>
> 4. The testatrix must have the ability to evaluate, and discriminate between, the prospective strengths of the claims of such persons."

[22] A testator who has duly executed a Will which is rational on its face is presumed to have testamentary capacity[13]. In the present case, the presumption has evidentiary support. Not long before he made the Will, the deceased said to the applicant that he was going to leave his estate to her. She asked if there was anyone else he would like to leave it to and he replied that there was no one. On the applicant's evidence, the deceased had, on his own initiative, obtained a Will Pack from the Post Office, and completed the Will Form in it. He was conscious that it was appropriate to have a mistake, which he had made on one page, initialled by himself and the witnesses. He also appreciated the need to have the Will executed in the presence of the witnesses, and to have the witnesses sign the Will. On the applicant's evidence, there was nothing about the speech or behaviour of the deceased on that occasion that was out of the ordinary or that suggested he was suffering from any illness or condition that would affect his thinking, or his understanding of what he was doing. The deceased's conduct, on this evidence, demonstrated an appreciation of the significance of what he was doing when he executed the Will. His estate was not extensive, and there is no reason to think that he did not appreciate its nature and extent. On the applicant's evidence of their friendship and the assistance she gave him, there is some basis for thinking she might have some claim on his testamentary bounty; and on his statements, and the little that is known of his personal circumstances, there is no reason to think that he was unaware of others who might also have such a

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11 [2011] QSC 107 at [21].
12 [1998] NSWCA 182.
13 *Frizzo & anor v Frizzo & ors* [2011] QSC 107 at [23] and the cases cited at n 9.

claim. On his statements, he had divorced his wife, he had no children, he had no contact with his brother, and he had no other relatives. In those circumstances, and in the absence of any evidence to demonstrate otherwise, there is no reason to doubt his ability to evaluate the strength of competing claims on his bounty.

[23] There is some evidence which might be regarded as providing some general support for these conclusions. The deceased's conduct in relation to the sale of the block of land at Redland Bay, as recounted by the applicant, was quite rational. The price was substantial. It is not clear whether the contract which was completed on 30 April 2010 was the same as the contract which the deceased himself had entered into; but the ultimate size of his estate does not suggest otherwise.

[24] The affidavit of the witnesses to the execution of the Will describes events in a way consistent with the evidence of the applicant. That affidavit does not identify anything which would reflect adversely on the testamentary capacity of the deceased at that time.

[25] Another person who was friendly with the deceased, Mr Wilson, has provided an affidavit. While it deposes generally to the deceased's mental capacity, it is difficult to relate his evidence to the period in which the Will was executed.

[26] There is other material which raises questions about the deceased's testamentary capacity. One of them is the Redland Hospital record of the deceased's admission on 29 October 2009, with a note raising a question about early dementia. The final diagnosis after his subsequent admission in November 2009 included dementia. In addition, there are the QCAT findings, together with the evidence referred to in the Tribunal's reasons. The Tribunal's reasons also recorded some concern about the extent to which the deceased was subject to the influence of others.

[27] There is not, however, admissible evidence before me which would show that the deceased lacked testamentary capacity when he executed the Will, or even give rise to real doubt about that. Dr Nick John, a consultant physician and geriatrician, treated the deceased from May 2011. He had seen a copy of the discharge summary from Redland Hospital, of 2 December 2009. Dr John provided a letter stating that he could not extrapolate back to the mental capacity of the deceased in October and November of 2009[14]. Dr John also stated that the doctor who supervised the deceased's care when he was in hospital in late 2009 was extremely ill and was unlikely to be able to provide any assistance. Dr John noted that when the deceased was admitted to the hospital in late 2009 he was fairly delirious, often a sign of underlying cognitive problems, but the doctor stated that a significant proportion of people are cognitively entirely normal prior to a delirious episode[15]. The general practitioner who treated the deceased from 11 December 2009[16] said that he was unable to comment on the deceased's earlier condition. I also note that the Redland Hospital records stated that the deceased saw the referring general practitioner for the first time on the date of his admission (29 October 2009); and that he had no previous medical history.

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[14] See his letter of 13 June 2009, CFI 11 ex MBD7.
[15] See his letter of 20 June 2016, CFI 11 ex MBD9.
[16] See CFI 7 ex NW6.

[28] Leaving aside any difficulty about the form of the material, it is apparent from the evidence of Dr John that the deceased's condition when he attended the Redland Hospital Emergency Department on 29 October 2009, and at the time of his subsequent admission to that hospital on 3 November 2009, is not a reliable indicator of his mental capacity when he executed the Will four weeks and more earlier. In my view, this material does not warrant the rejection of the presumption and evidence of testamentary capacity, previously referred to.

[29] The findings of the Tribunal are, for that reason, also of no assistance on the question. It is therefore unnecessary to comment on the reasoning of the Tribunal.

[30] Accordingly I conclude that the applicant has demonstrated that the deceased had testamentary capacity when he executed the Will on 1 October 2009.

Knowledge and approbation

[31] The fact that the deceased himself prepared the Will, and then took steps to have people witness his execution of it, seem to me to be strong evidence that the deceased knew and approved of its contents.

Grant in solemn form or common form?

[32] On this subject, I have been considerably assisted by the judgment of Lindsay J in *Estate Kouvakas; Lucas v Conakas*[17]. In a survey rich with reference to earlier writings and cases, his Honour considered the development of probate law both in the United Kingdom and New South Wales. He noted that, as a matter of history, the distinction between a grant of probate in solemn form, and one in common form, has been linked with matters of practice and procedure, akin to the significance of forms of actions in the development of other areas of the law[18]. Thus a grant of probate in solemn form usually followed the hearing and examination of witnesses before a judge after the widow and next of kin had been cited to appear[19]. Yet neither the procedure, nor even the form of order, ultimately proved to be decisive[20]. While a grant of probate in common form is sometimes described as interlocutory[21], a grant in either form is binding unless and until it is revoked[22]; and, until then, is conclusive proof of the testamentary character of the instrument, of the appointment of the executor, and of the validity and contents of the Will[23]. A grant in either form is revocable[24]; though the circumstances in which a grant in solemn form will be revoked are more limited[25].

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17 [2014] NSWSC 786.
18 See *Kouvakas* at [148]-[150].
19 See *Kouvakas* at [153], [154], [157].
20 See *Kouvakas* at [218]-[226].
21 See *Kouvakas* at [223].
22 See *Kouvakas* at [273].
23 See *Kouvakas* at [190].
24 See *Kouvakas* at [273].
25 See *Kouvakas* at [247], [260]; and see the passage from Certoma, *The Law of Succession in New South Wales* (4th ed, 2010) para [14.370] cited in *Kouvakas* at [208]. But note the discussion by Lindsay J in *Kouvakas* at [297]-[299].

[33] It seems to me to emerge from the judgment of Lindsay J that a defining feature of a grant in solemn form may be identified from the nature of the application which results in the grant. His Honour said in *Kouvakas*,

> "239. However, it is implicit in the consideration of any application for a grant in solemn form (including an application heard on an *ex parte* basis) when the Court routinely insists that the applicant prove: (a) the identity of each person adversely affected by the application; (b) that each person adversely affected has notice of the application; and (c) that any will or codicil sought to be proved was duly executed.
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> 240. As a matter of practice those are, generally, regarded as the elements necessary to be proved for a grant in solemn form."

[34] Another feature is that a grant in solemn form is generally made only after the Court has received evidence tending to satisfy it that such a form of order "binding the whole world" should be made[26]; and accordingly, such an order is not usually made as a result of a bargain between the parties[27].

[35] Finally, his Honour recorded that the Court has a discretion whether to grant probate in common form or in solemn form[28]. That is reflected in the judgment in *Tsagouris v Bellaris*[29], cited by his Honour.

[36] The source of this Court's jurisdiction to grant probate is now s 6 of the *Succession Act 1981* (Qld). Section 70 of that Act provides as follows:

> "**70 Practice**
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> The practice of the court shall, except where otherwise provided in or under this or any other Act or by rules of court for the time being in force, be regulated so far as the circumstances of the case will admit by the practice of the court before the passing of this Act."

[37] That practice may be traced back to the practice of the Court of Probate in England[30]. In those circumstances, it is apparent that the *Uniform Civil Procedure Rules* 1999 (Qld) are drawn in a way to reflect the English practice, and in particular the practice of making a grant either in common form or solemn form[31]. The strong similarities with the history of the development of the law in New South Wales have the consequence that the principles identified by Lindsay J, referred to above, are applicable in Queensland.

[38] In the present case, the evidence does not definitively establish that each person who might be adversely affected by the grant has been identified, and given notice of the

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[26] *Kouvakas* at [237], citing *Re Dowling; sub-nom NSW Trustee and Guardian v Crossley* [2013] NSWSC 1040 at [24]-[25].

[27] *Kouvakas* at [272].

[28] *Kouvakas* at [236].

[29] [2010] SASC 147 at [37]-[39].

[30] See s 8 of the *Probate Act* 1867, discussed in *Re Devoy* [1943] St R Qd 137, 143; and see the cases annotated to this section in the 1962 consolidation of the Queensland Statutes. Section 8 was repealed by the *Succession Act* 1981 (Qld).

[31] See Parts 7, 8 and 9 of Chapter 15, and in particular r 640.

application. Although I have found the evidence before me to be sufficient to establish those matters which must be established for a grant, no person has had the opportunity to test it. In those circumstances, it seems to me that the grant should be in common form. Having been given notice of my tentative view, the solicitor for the applicant does not oppose that course.

Conclusion

[39] A grant of probate in common form should be made in favour of the applicant.