# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Re Buchanan* [2016] QSC 214 |
| PARTIES: | **ANTHONY JOHN BUCHANAN and ANDREA MAREE NEWTON**<br>(applicants) |
| FILE NO/S: | No 9374 of 2016 |
| DIVISION: | Trial |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 28 September 2016 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | On the papers. |
| JUDGE: | Peter Lyons J |
| ORDER: | **The application should be granted.** |
| CATCHWORDS: | SUCCESSION – MAKING OF A WILL – TESTAMENTARY CHARACTER – where the deceased made a Will dated 11 February 2011 – where copy of Will with alterations dated 25 April 2016 was found in deceased's possessions – where alterations were signed by testator but not witnessed in accordance with s 10 of the *Succession Act* 1981 (Qld) – where s 18 of the *Succession Act* 1981 (Qld) permits the court to admit a document to probate if satisfied it embodies the testamentary intentions of the deceased, despite non-compliance with legislative requirements – whether the alterations signed by the deceased embody the deceased's testamentary intention – whether the alterations on the copy of the Will dated 11 February 2011 form part of the deceased's Will<br><br>*Succession Act* 1981 (Qld), s 10, s 18<br><br>*Frizzo & Anor v Frizzo & Ors* [2011] QSC 107<br>*Hatsatouris v Hatsatouris* [2001] NSWCA 408<br>*In the Estate of the late Ronald Robert Irvin; Evans v Gibbs* [2015] NSWSC 432<br>*Konui v Tasi* [2015] QSC 74<br>*Lindsay v McGrath* [2015] QCA 206<br>*Oreski v Ikak* [2008] WASCA 220<br>*Read v Carmody* [1998] NSWCA 182<br>*Teasel v Hooke* [2014] NSWSC 1839 |

*The Estate of Masters; Hill v Plummer, Plummer v Hill* (1994) 33 NSWLR 446

SOLICITORS: Connor Hunter Law Firm for the applicants

[1] This is an application made without an oral hearing for a determination under s 18 of the *Succession Act* 1981 (Qld) that handwritten provisions on the Will of John Edward Buchanan (deceased) form part of that Will.

[2] The deceased died on 13 July 2016. He was then 87 years of age.

[3] For more than 60 years, the deceased had been married to Alma May Buchanan. She died on 1 December 2010.

[4] The deceased is survived by one child, Anthony John Buchanan (*Anthony*) who is now 57 years of age.

[5] The deceased executed a formal Will dated 11 February 2011. It appears to have been prepared by Connor Hunter Law Firm, and was executed at its premises on 11 February 2011. One of the witnesses to the execution of the Will was David Lovebrant, a solicitor with that firm. The firm kept the original Will, and provided a copy (apparently a photocopy) to the deceased.

[6] The Will appointed Anthony and Andrea Maree Newton (*Ms Newton*), for so long as she remained a director/solicitor with the firm, as executors and trustees. Under it, the residue of the estate was left to Anthony.

[7] After the deceased's death, Anthony found at the deceased's house a tin box on which was written, "Will and Important Paperwork". In that box, Anthony found a copy of the deceased's Will, with provisions written on page 3. They appear immediately beneath the signatures of the deceased and the witnesses to the Will. The provisions were as follows:-

> "Please give all money in Commonwealth Bank pension security account (the number is then set out) to Mrs Wilma Mary Cushen of 76 Beach St Cleveland.
>
> Work bench with vice with any power or hand tools to Troy Robbins of 23 Werong Cr Cleveland."

[8] Immediately below these words appeared the word "SIGNED" and the signature of the deceased, followed by the date 25 April 2016. However, it has not been executed in accordance with s 10 of the *Succession Act* 1981 (Qld), the signature being unwitnessed. The applicants seek a declaration that these words constitute an alteration of the deceased's Will.

**Section 18 of the *Succession Act***

[9] That section is in the following terms

> "**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 agreed 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."

[10] In *Lindsay v McGrath*[1] Boddice J cited with approval the following statement of Powell JA in *Hatsatouris v Hatsatouris*[2] about the analogous provision now found in s 8 of the *Succession Act* 2006 (NSW),

> "It is, and has long been, my view that the questions arising on applications raising a question as to the applicability of s 18A are essentially questions of fact, the particular questions of fact to be answered being:
>
> (a) was there a document,
>
> (b) did that document purport to embody the testamentary intentions of the relevant Deceased?
>
> (c) did the evidence satisfy the Court that, either, at the time of the subject document being brought into being, or, at some later time, the relevant Deceased, by some act or words, demonstrated that it was her, or his, then intention that the subject document should, without more on her, or his, part operate as her, or his, Will?"

[11] Of paragraph (c), Boddice J said[3],

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1 [2015] QCA 206.
2 [2001] NSWCA 408 at [56].
3 *Lindsay* at [59].

> "The third requirement requires the Court to be satisfied on the evidence that the deceased, either at the time of drafting the document or subsequently, formed the intention that the particular document operate as his or her Will. That requirement does not involve establishing that the deceased consciously set his or her mind to the legal formalities of making a Will.[4] However, it is not enough that the document set out the deceased's testamentary intentions. What must be established, by evidence, is that the deceased intended the document to operate to dispose of the deceased's property upon death.[5]"

[12] The language of paragraph (c) in the statement of Powell JA in *Hatsatouris* might be read as adding to the requirements to be satisfied in order to obtain relief under s 18 of the *Succession Act*. In *Teasel v Hooke*[6] Lindsay J said,

> "What (the words in s 8 of the *Succession Act* 2006 (NSW)) do is direct attention to a consideration of whether the particular document was intended to operate as a will: to have present operation as such, not to serve merely as a draft, diary note or the like."

[13] With reference to the statement of Lindsay J, Stevenson J said in *In the Estate of the late Ronald Robert Irvin*; *Evans v Gibbs*[7],

> "The relevant enquiry is whether the deceased intended that the document in question itself, and not some later iteration of it then within the contemplation of the deceased, would 'form' that is to say 'be' the deceased's will".

[14] There is no reason to think that relief would be granted under s 18 in respect of a document made at a time when the person to whose estate it relates lacked testamentary capacity. In *Konui v Tasi*[8] Boddice J expressed the view that the presumption, mentioned earlier in these reasons, that a person who has duly executed a Will which is rationale on its face, then had testamentary capacity, did not extend to a document which was not a duly executed Will. In those circumstances, it seems to me appropriate to consider the evidence of the deceased's testamentary capacity on 9 December 2015, particularly in light of his age.

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4 *The Estate of Masters; Hill v Plummer, Plummer v Hill* (1994) 33 NSWLR 446 per Kirby P (as his Honour then was) at 452.
5 *Oreski v Ikak* [2008] WASCA 220 at [54].
6 [2014] NSWSC 1839 at [28].
7 [2015] NSWSC 432 at [29].
8 [2015] QSC 74 at [43].

[15] In *Frizzo*[9], Applegarth J drew the following principles relating to testamentary capacity from the judgment of Powell JA in *Read v Carmody*[10],

> "1. The testatrix must be aware, and appreciate the significance, of the act in the law upon which she is about to embark;
>
> 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;
>
> 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."

**Consideration**

[16] The relevant provisions are recorded in a document. The language used by the deceased demonstrates an intention to make dispositions of some of his property to Ms Cushen and Mr Robbins. Given the nature of the property, it is somewhat unlikely that these dispositions were intended to take effect during the life of the deceased. The fact that they were recorded on the deceased's copy of the Will, a little below his signature on that document, and that the document was retained in a tin bearing the words previously mentioned, are in my view strong indications that the intended disposition was testamentary, that is to say, to take effect on the deceased's death.

[17] Similar considerations, together with the formality of the signature in the manner to which I have referred, satisfy me that the provisions written on the Will were intended to take effect as an alteration of the deceased's Will.

[18] It is appropriate to consider whether the deceased had testamentary capacity on 25 April 2016. There is nothing in the material which, in truth, suggests the contrary. There is no evidence to suggest that this capacity was impaired by the deceased's age at this time.

[19] Anthony gave evidence that Mrs Cushen was a friend of the deceased's who lived in his house for four years before his death, keeping him company and helping through his last four years.

[20] The language of the handwritten provisions reveals both an appreciation of the extent of his estate, and, at least in the case of Mrs Cushen, an appreciation of a possible claim on his testamentary bounty.

[21] In the circumstances, I am satisfied that the deceased had testamentary capacity on 25 April 2016.

[22] Accordingly, I am satisfied that the photocopy of the deceased's Will of 11 February 2011, on which appear the handwritten provisions, constitutes, by the handwritten

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9 At [21].
10 [1998] NSWCA 182.

provisions, an alteration of the deceased's Will, for the purposes of s 18 of the *Succession Act*.

**Conclusion**

[23] The application should be granted, and the declaration sought by the applicants should be made.