SUPREME COURT OF QUEENSLAND

CITATION:	*Re Oliver (deceased)* [2016] QSC 264
PARTIES:	**IN THE WILL OF STEELE WILLIAM OLIVER** (deceased)
FILE NO/S:	No 2196 of 2016
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	18 November 2016
DELIVERED AT:	Brisbane
HEARING DATE:	10 November 2016
JUDGE:	Dalton J
ORDER:	**1. It is declared that the document dated 11 October 2011 signed by Steele William Oliver, deceased, does not constitute a valid will.** **2. Subject to the formal requirements of the Registrar, the Public Trustee of Queensland is to administer the estate of Steele William Oliver, deceased.** **3. The application filed by Daniel Frederick Oliver on 18 October 2016 is otherwise dismissed.** **4. The application filed by the Public Trustee on 26 October 2016 is otherwise dismissed.**
COUNSEL:	R D Williams for the Official Solicitor to the Public Trustee of Queensland D F Oliver appeared on his own behalf
SOLICITORS:	The Official Solicitor to the Public Trustee of Queensland D F Oliver appeared on his own behalf

[1] The Public Trustee applies for probate of the last will of Steele William Oliver. The deceased's brother, Daniel Frederick Oliver, has lodged a caveat in the probate proceedings and appeared in person to argue against a grant of probate. He asks that an administrator be appointed, and that he be the administrator.

[2] The deceased man suffered from severe and chronic schizophrenia most of his adult life. He never married and had no children. He had four siblings: two sisters and two brothers. His affairs were managed by the Public Trustee from 28 May 1990 because he was incapable of managing them himself. He was confined in hospital from the time he was 19 until his death aged 61.

[3] The Public Trustee took instructions from the deceased man and prepared a will for him which he executed on 11 October 2011. The will was prepared in accordance with instructions, to benefit one sister, and in default one brother. It was submitted by the Public Trustee that on its face the will was rational and that the *prima facie* presumption of validity arose.[1]

[4] The affidavit material is to the effect that the solicitor involved was experienced in preparing wills. She took instructions for the will at the hospital where the deceased man had been detained for many years. She swears that she does not recall the testator. She swears that it is her usual practice to satisfy herself as to testamentary capacity and therefore she "would have been satisfied" that the deceased man had testamentary capacity.

[5] The solicitor made a note:

> "Saw Mr Oliver at the [Prince Charles] hospital to make his will. His social worker Rosslyn was present at the interview as well. Mr Oliver was able to give basic details about his assets – the fact that [the Public Trustee] manages them all – he was able to advise his date of birth, his parents' names, and also his siblings' names. He is only benefitting one sister in the will, and the sub-provision is to his brother.
>
> Doctor letter re his capacity is also filed in WP."

This note is very brief. It does not reveal whether or not the deceased man gave the names of all four of his siblings; it is consistent with his only having three siblings, rather than four. There is nothing noted as to the deceased man's reasons for benefitting only one sister, and in the alternative one brother. That is, it does not appear from the note that the solicitor did investigate whether or not the deceased man was aware of those who had claims on his bounty and whether or not he had rational reasons for preferring two of his siblings. In a case where the deceased man was suffering from schizophrenia, which so often involves suffering from persecutory and paranoid delusions, this was particularly important and important to record – *Banks v Goodfellow* (1870) LR 5 QB 549, 565.

[6] The Public Trustee had a doctor fill in a form as to testamentary capacity on the day she took instructions, 14 September 2011, and on the day the will was executed, 11 October 2011. The form does not make allowance for the doctor to say what involvement they have had with the patient. In that respect I think it is plainly deficient. The form proceeds to ask five questions, the last of which swears the issue. However, the preceding four questions are based on the *Banks v Goodfellow* test. There is a very small space after each question for the doctor to write an answer. Unfortunately the doctor who completed the form on 14 September 2011 did not write helpful or responsive answers to the

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[1] *Frizzo & Anor v Frizzo & Ors* [2011] QCA 308, [24].

questions, "Would he understand the person or persons he should have regard to in making his will?" and "Would he be able to comprehend and appreciate the potential claims that may be made upon his estate after his death?" The form therefore does not allow the Court to conclude that the doctor's opinion was to the effect that the deceased man had testamentary capacity. The same doctor appears to have signed the same form on 11 October 2011. Once again his answers to questions one to four on the form do not allow the Court to conclude that the doctor's opinion was to the effect that the deceased man had capacity.

[7] The will in this case excludes two of the deceased man's siblings. Notwithstanding this, I am prepared to assume that it is rational on its face, so that a *prima facie* presumption of validity arises. In my view, Mr Daniel Oliver has presented evidence which displaces that presumption: the deceased's long-term and chronic schizophrenia which made him so incapable of dealing with his affairs that the Public Trustee had charge of them, and so incapable of living even a marginal life in the community that he was detained in a psychiatric facility for almost the entirety of his adult life. I think it is clear that the deceased man's mental state was one which fluctuated from time to time – the doctor who signed the testamentary capacity form dated 14 September 2011 swears the issue as to testamentary capacity provided that the deceased man's "function is the same as today".

[8] That point in my reasoning having been reached, I am not actually persuaded on the balance of probabilities that the deceased had capacity at the time he made the will. There is no clear evidence from the solicitor as to what enquiries she made about this, and the two medical certificates are both collateral to the real issues on which the Court needs to focus. In those circumstances it seems to me that the estate should proceed on administration. I will appoint the Public Trustee administrator of the estate in intestacy. Mr Daniel Oliver could not be appointed administrator of the estate. He is in communication with his brother Russell, although he made depreciating comments about him to me during the hearing. He is not in communication with either of his sisters. Not only that, it is clear from his correspondence with the Public Trustee that he is not able to rationally and impartially fulfil the duties of administrator.

[9] The Public Trustee asked for costs on an indemnity basis to be paid out of the estate. I am not minded to make that order in circumstances where the Public Trustee came to Court propounding a will which it could not prove because of its own default in documenting, by its solicitor and by the doctor it contacted at the time of making the will. I will make no order as to costs.

[10] My formal orders will be:

1. It is declared that the document dated 11 October 2011 signed by Steele William Oliver, deceased, does not constitute a valid will.
2. Subject to the formal requirements of the Registrar, the Public Trustee of Queensland is to administer the estate of Steele William Oliver, deceased.
3. The application filed by Daniel Frederick Oliver on 18 October 2016 is otherwise dismissed.
4. The application filed by the Public Trustee on 26 October 2016 is otherwise dismissed.