

SUPREME COURT OF QUEENSLAND

CITATION: *Farrell v Boston* [2016] QSC 278

PARTIES: **MARTIN TERENCE FARRELL**
(applicant)
v
WARREN ELBRIDGE BOSTON
(respondent)

FILE NO: SC No 4637 of 2016

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 29 November 2016

DELIVERED AT: Brisbane

HEARING DATE: 26 August 2016

JUDGE: Holmes CJ

ORDER: **1. The application is dismissed.**
2. The respondent's costs of and incidental to the proceeding are to be assessed on the indemnity basis and paid out of Mrs Farrell's estate.
3. The applicant is to pay the amount of the assessed costs to the estate.

CATCHWORDS: SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – ALTERATION AND REVOCATION OF GRANTS – DISCOVERY OF WILL AND INVALIDITY OF WILL – where the respondent obtained a grant of probate in respect of a will dated 3 August 2007 (the “2007 will”) – where the applicant applies for an order that the grant of probate be set aside as made under a mistake of fact – where the applicant submits that regard was not given to a document he claims to be a later will of the deceased dated 15 March 2013 (the “2013 document”) – where the applicant claims, without evidence, that the 2007 will was executed by an imposter – whether the 2007 will is authentic - whether the 2013 document is authentic and valid – whether there was any mistake in the grant of probate

Uniform Civil Procedure Rules 1999 (Qld), r 642(1)(a)(iii)

COUNSEL: The applicant appeared on his own behalf

C Francis for the respondent

SOLICITORS: The applicant appeared on his own behalf
Steindls Lawyers and Notary for the respondent

- [1] Rule 642(1)(a)(iii) of the *Uniform Civil Procedure Rules* 1999 permits the Court to revoke a grant of probate if it was made because of a mistake of fact. Mrs Erris Maie Farrell died in October 2015. By a will dated 3 August 2007, she had named the respondent, a partner in the solicitors' firm Steindls which prepared the will, as her executor. He obtained probate of the will on 11 April 2016. The applicant, who is self-represented, applies for an order that the grant of probate be set aside as made under a mistake of fact. The mistake of fact he identifies is that regard was not had to a document which he claims is a will which Mrs Farrell (his sister-in-law) made in 2013.
- [2] An order was made for both parties to file any affidavit on which they relied. The applicant has filed one affidavit only, in which he does not depose to any fact but exhibits a document which he says is Mrs Farrell's will, dated 15 March 2013. By submission, unsupported by any affidavit material, he makes a further claim: that the 2007 will was executed by an imposter whom Mrs Farrell's nephew, Mr Kelvin Genn, the major residuary beneficiary under that will, had falsely identified as his aunt to the solicitors who drew up the will. The respondent has filed affidavits sworn by himself and by Mr Robert Boston, also a partner in the firm, Mr Kelvin Genn, and Ms Judith McIntosh, previously Steindls' estates law clerk.

The evidence

- [3] Mrs Farrell had previously made a will in 1984, when her second husband, Duane Farrell (the applicant's brother), was still alive. That will is in evidence. By it, Mrs Farrell left her estate to Duane Farrell; in the event of his prior death she gave legacies of \$40,000 each to members of her first husband's family, with the residue to her brother, John Genn (Kelvin Genn's father). Duane Farrell was named as her executor, with her brother and her husband's sister named as default executors in the event of his predeceasing her. Duane Farrell had made a will which more or less mirrored his wife's; he left his estate to her and named her as executor while, in the event of her death, he appointed his sister and his wife's brother as executors and left his estate between his sister and his brother, the applicant.
- [4] Kelvin Genn deposes in his affidavit that his father, John Genn, died in 1984, while Duane Farrell died on 18 April 2007. Later in 2007, a general practitioner having confirmed her capacity to do so, Mrs Farrell granted an enduring power of attorney in Mr Genn's favour. Mr Genn deposes that his aunt asked him to arrange for Steindls to take instructions for a will, given that both her brother and husband were now dead. He communicated with Ms McIntosh for that purpose. Mr Genn was made aware that Ms McIntosh had taken instructions and prepared a draft will; his aunt told him that she required changes to be made to it. At her request, he took her to Steindls' offices to review the amended version of the will and to execute it. At their premises, he met Ms McIntosh and the respondent. Mrs Farrell went into another room with Ms McIntosh and another woman in order to execute the will; he did not see its actual execution.

- [5] On 3 October 2007, Mrs Farrell entered a nursing home where she remained until her death in 2015. Mr Genn deposes that from 2011, his aunt, who suffered from Alzheimer's disease, became increasingly confused and deaf, and had a limited ability to recognize people.
- [6] In her affidavit, Ms McIntosh deposes that she recalls taking instructions from Mrs Farrell in June and July 2007 for the preparation of the latter's will. Mrs Farrell wished to make a new will because her husband and brother were now dead. Ms McIntosh met Mrs Farrell for that purpose on three occasions: the first, in order to take instructions for the preparation of the will; the second, at Mrs Farrell's home, to provide her with the draft she had prepared; and the third, the occasion at Steindls office when Ms McIntosh and her assistant, Ms McGoldrick, witnessed Mrs Farrell's execution of the will. In November 2007, Ms McIntosh attended on Mrs Farrell at the nursing home and witnessed her signature on a property transfer, after the sale of her house.
- [7] Ms McIntosh also deposes that shortly after Mrs Farrell's death, she received a telephone call from a person identifying himself as Martin Farrell (the applicant). In that conversation, the applicant informed her that he had his sister-in-law's last will and that he would be making a claim on the estate. When she enquired how the applicant came into possession of the will, he said words to the effect that he had obtained a will form, taken it to the nursing home and written it out for his sister-in-law.
- [8] The will which Ms McIntosh prepared, after bequests of furniture and personal effects, leaves a 34.5% share of the residue to Mr Kelvin Genn, with smaller shares to his mother and brothers and to relatives of Mrs Farrell's first husband, and, finally, a 2% share to a niece of Duane Farrell. Like the 1984 will, the document is signed on each page "E. Farrell" in handwriting which appears consistent with that on the 1984 document, although it is a less confident and flowing hand. The signatures and names of Ms McIntosh and Ms Goldrick appear as witnesses after the attestation clause. The property transfer is also signed "E. Farrell", with Ms McIntosh signing as witness.
- [9] The applicant filed an affidavit exhibiting what was said to be a copy of a will Mrs Farrell signed on 15 March 2013, and tendered the original document in evidence. He did not depose to how he obtained it or provide any evidence to the circumstances of its preparation or execution. The document is on a will form of the kind available from newsagents, with instructions for its completion attached. Those parts of the documents which are completed are handwritten in block printing. It appoints the applicant as executor and divides the estate amongst four individuals, who are apparently relatives of Duane Farrell and of the applicant. The document itself bears a signature, "Erris Farrell", in contrast with the 1984 will, 2007 will and 2007 property transfer, all of which are signed "E. Farrell". The handwriting, however, is broadly similar to that of the person signing the earlier documents, but is considerably shakier. There are two signatures below the attestation, "Walter Smith" and "Julie Collins". The sections of the form which provide for insertion of the witnesses' names and addresses are not completed.
- [10] Patient progress notes for 2013 from the nursing home in which Mrs Farrell was accommodated are in evidence. They refer to her dementia and confusion, describing incidents of her aimlessly wandering, her inability to understand instructions and her profound deafness. Mr Robert Boston has exhibited a copy of a report from a general practitioner, Dr McSweeney, who treated Mrs Farrell between 2010 and 2015. Her report is unsworn, but no objection was taken to it. Dr McSweeney confirms that Mrs Farrell

suffered from dementia and hearing loss which made communication with her difficult. She expresses the opinion that Mrs Farrell did not have testamentary capacity as at 15 March 2013, and could not have had a lucid interval during which she was able to give instructions and execute a will.

The applicant's submissions

- [11] The applicant has not at any stage sought formally to propound the 2013 document as the will of Mrs Farrell, but he argued that the failure to have regard to it amounted to a mistake of fact which warranted setting aside the grant of probate granted in respect to the 2007 will. In making submissions, he denied being present when the 2013 document was signed or knowing anything of Mr Smith or Ms Collins, the apparent witnesses. He asserted from the bar table that Mrs Farrell had given him the will, saying "That is my will". He also contended that the court should infer from Steindls' failure to produce photographic identification of Mrs Farrell, that the woman who gave instructions to Ms McIntosh, and signed the documents which she witnessed, was not in fact Mrs Farrell. He suggested that the sister of Mrs Farrell's first husband had been induced to pose as Mrs Farrell on those occasions. Effectively, then, the applicant sought to have the 2007 will treated as a forgery and the 2013 document accepted as a valid will.

Conclusions

- [12] The notion of an imposter's having signed documents in Mrs Farrell's place does not bear examination. It would require not only that a bogus Mrs Farrell was taken to Steindls' offices, but that on those occasions when Ms McIntosh visited Mrs Farrell's home and the nursing home, Mrs Farrell was somehow secreted and the other woman substituted. It seems highly improbable that such an exercise could have taken place, particularly under the noses of nursing home staff. More to the point, there is absolutely no evidence to support the applicant's extraordinary claim.
- [13] The signature on the 2007 will is consistent with that on the 1984 will, the validity of which the applicant did not challenge. The contents of the 1984 and 2007 wills were also consistent. The 1984 will left Mrs Farrell's estate, should her husband Duane Farrell predecease her, to members of her first husband's family and her brother. The 2007 will, made after the deaths of her husband and brother, left the estate to members of the first husband's family and members of the brother's family, with a very small percentage left to Duane Farrell's niece. In its effect, the later will was an update of the 1984 will to accommodate the deaths of Mrs Farrell's husband and brother.
- [14] The purported will of 2013, on the other hand, represents a completely different disposition, entirely to members of Duane Farrell's family. The applicant, as has been noted, did not put on any evidence about how that document came into being. The only evidence as to its possible provenance is that of Ms McIntosh, that an individual who identified himself as the applicant told her that he had written it out.
- [15] It is unnecessary to resolve how the 2013 document came into being. It is conceivable that the signature it bears is Mrs Farrell's. But given the contemporaneous evidence as to Mrs Farrell's debility and confusion, Dr McSweeney's view as to her incapacity, and the complete absence of any contrary evidence, the only available conclusion is that even if the document were signed by Mrs Farrell, she lacked testamentary capacity at the time, and it is not a valid will.

- [16] In the absence of any evidence of anything untoward in the making of the 2007 will and the failure to authenticate the 2013 document or establish its validity, there is no basis for inferring any mistake in the grant of probate of the 2007 will. The application must fail. The respondent is entitled to the order for costs which he seeks.

Orders

1. The application is dismissed.
2. The respondent's costs of and incidental to the proceeding are to be assessed on the indemnity basis and paid out of Mrs Farrell's estate.
3. The applicant is to pay the amount of the assessed costs to the estate.