

SUPREME COURT OF QUEENSLAND

CITATION: *Wolyncevic v Cameron & Anor* [2004] QSC 354

PARTIES: **CAROLE ANN WOLYNCEVIC**
(applicant)
v
ANNE MAREE CAMERON
(first respondent)
and
PETER JAMES WOLYNCEVIC
(second respondent)

FILE NO: BS8513 of 2004

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 12 October 2004

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 11 October 2004

JUDGE: Wilson J

ORDER: (i) **that the application be heard although it was not filed before or within 6 months after the grant of probate,**

(ii) **that pursuant to s 31 of the *Succession Act 1981* the words “SHOULD however my said daughter predecease me or not survive me for the period aforesaid, then in that event, but only in that event, the provisions hereafter of this my Will shall apply”, which were inadvertently omitted from the deceased’s will dated 15 July 1998 (which Will was admitted to probate in this Honourable Court on 11 September 2001), be inserted between the words contained in clause 4 and those contained in clause 5 of the said will,**

(iii) **that there be no order as to costs.**

CATCHWORDS: SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITION – CHANGING, TRANSPOSING, OMITTING OR SUPPLYING WORDS - SUPPLYING WORDS – where provision of will omitted due to typing error – whether court will supply omitted words

COUNSEL: R Cameron for the applicant

SOLICITORS: Bridge Brideaux for the applicant

[1] **WILSON J:** Franz Max Zillmann died on 15 March 2001 aged 87 years. His wife had predeceased him. He was survived by his only child Carole Ann Wolyncevic (the applicant).

[2] The testator made a will on 15 July 1998, by which he provided -

“ ...

2. I APPOINT my daughter CAROLE ANN WOLYNCEVIC of 4 Lurneah Crescent, Ferny Hills, Brisbane in the State of Queensland, to be the sole Executrix and Trustee of this my Will.

3. SHOULD however the said CAROLE ANNE WOLYNCEVIC predecease me or be unable or unwilling to act or continue to act as my Executrix and Trustee, then, but not otherwise, I appoint her daughter ANNE MAREE CAMERON of 5 Apex Street, Balmoral, Brisbane in the State of Queensland, to be the sole Executrix and Trustee of this my Will.

4. I DEVISE AND BEQUEATH the whole of my estate, both real and personal, of whatsoever kind or nature and wheresoever situate, unto my said daughter CAROLE ANN WOLYNCEVIC for her sole use and benefit absolutely, subject to her surviving me for thirty (30) days.

5. I DEVISE AND BEQUEATH the whole of my estate both real and personal of whatsoever kind or nature and wheresoever situate unto and to the use of my Trustees upon Trust as follows:-

- (a) As to one half (½) thereof to my said granddaughter ANNE MAREE CAMERON for her sole use and benefit absolutely;
- (b) As to one half (½) thereof to my Trustee upon Trust for my grandson PETER JAMES WOLYNCEVIC subject to his surviving me and having attained the age of twenty-five (25) years.”

[3] On 11 September 2001 probate of the will was granted to the applicant.

[4] In this application the applicant seeks -

- (1) a determination whether upon the true construction of the last will of Franz Max Zillman dated 15 July 1998 and in the events that have happened Carole Ann Wolyncevic is entitled to the whole of the deceased's estate, both real and personal, of whatsoever kind or nature and wheresoever situate for her sole use and benefit absolutely in accordance with clause 4 of the said will;
- (2) alternatively, an order pursuant to s. 31 of the *Succession Act 1981* inserting in the probate copy of the will material which was accidentally or inadvertently omitted when it was made; namely, the words “*SHOULD however my said*

daughter predecease me or not survive me for the period aforesaid, then in that event, but only in that event, the provisions hereafter of this my Will shall apply” between the words contained in clause 4 and those contained in clause 5 of the will.

- [5] Anne Maree Cameron and Peter James Wolyncevic are the children of the applicant. They are both adults having been born on 1 July 1969 and 19 January 1983 respectively. Each has sworn an affidavit expressly not objecting to an order in either form and consenting to an order that has the effect of the whole estate passing to the applicant.
- [6] There is a strong presumption arising from the due execution of a will that the testator knew and approved its contents. Nevertheless, the Court has limited power to rectify mistakes in a will. By s 31 of the *Succession Act* -

“31 Power of court to rectify wills

(1) As from the commencement of this Act the court shall have the same jurisdiction to insert in the probate copy of a will material which was accidentally or inadvertently omitted from the will when it was made as it has hitherto exercised to omit from the probate copy of a will material which was accidentally or inadvertently inserted in the will when it was made.

(2) Unless the court otherwise directs, no application shall be heard by the court to have inserted in or omitted from the probate copy of a will material which was accidentally or inadvertently omitted from or inserted in the will when it was made unless proceedings for such application are instituted before or within 6 months after the date of the grant in Queensland.”

It is a power which is exercised with great caution. The best (if not only) evidence on which the Court will act is that of the person who took instructions for the will. Generally it will not receive evidence of the testator's actual intentions at an earlier stage or subsequently to the completion of the will: *Re Allen* [1988] 1 Qd R 1; *Re Hess* [1992] 1 Qd R 176.

- [7] The solicitor who prepared the will Christopher John Bridge prepared an earlier will dated 30 April 1977 which provided -

“...

2. I APPOINT my daughter CAROLE ANN WOLYNCEVIC and her husband WASYL WOLYNCEVIC of 4 Lurneah Crescent, Ferny Hills, Brisbane in the State of Queensland, to be the Executors and Trustees of this my Will (hereinafter with the survivor of them called ‘my Trustees’).

3. I DEVISE AND BEQUEATH the whole of my estate, both real and personal, of whatsoever kind or nature and wheresoever situate, unto my said daughter CAROLE ANN WOLYNCEVIC for

her sole use and benefit absolutely, subject to her surviving me for thirty (30) days.

4. SHOULD however my said daughter predecease me or not survive me for the period aforesaid, then in that event, but only in that event, the provisions hereinafter of this my Will shall apply.

5. I APPOINT my granddaughter ANNE MAREE CAMERON of 44 Goondoola Street, Redbank Plains in the State of Queensland, to be the Executrix and Trustee of this my Will (hereinafter called "my Trustee")."

[8] Mr Bridge has sworn as follows -

- "5. Prior to his death the deceased gave me instructions to amend his earlier will dated 30 April 1997 by Wasyl Wolyncevic as a co-executor and trustee. [sic] This was because his daughter had, at that time, separated from Wasyl Wolyncevic. It was always the Deceased's intention that the first and second respondent's were to receive the whole of his estate, both real and personal, of whatsoever kind or nature and wheresoever situate for their sole use and benefit absolutely in equal shares in the event, and only in the event, that his daughter, Carole Ann Wolyncevic, predeceased him or did not survive him for more than 30 days. Prior to his death the Deceased gave me clear instructions that his daughter was to otherwise receive the whole of his estate, both real and personal, of whatsoever kind or nature and wheresoever situate for her sole use and benefit.
6. The only amendment that the Deceased wanted me to make to his earlier will was to remove Wasyl Wolyncevic as a co-executor and trustee and substitute Anne Maree Cameron as an alternate executrix and trustee should her mother predecease him or be unable or unwilling to act or to continue as executrix and trustee.
7. Due to a typing error, which error was not discovered until as recent as early July 2004 when the Applicant received a requisition notice from the Department of Natural Resources & Mines, the words "*SHOULD however my said daughter predecease me or not survive me for the period aforesaid, then in that event, but only in that event, the provisions hereafter of this my Will shall apply*" were accidentally or inadvertently omitted from the Will and should have been included in a separate clause between clause 4 and clause 5 of the said Will."

[9] Although more than 3 years have passed since the grant of probate, this is an appropriate case for a direction pursuant to s. 31(2) of the *Succession Act* that the Court hear the application.

- [10] I am satisfied that the omission of the words "*SHOULD however my said daughter predecease me or not survive me for the period aforesaid, then in that event, but only in that event, the provisions hereafter of this my Will shall apply*" was accidental and inadvertent, and contrary to the testator's instructions and intention.
- [11] The orders of the Court will be –
- (i) a direction that the application be heard although it was not filed before or within 6 months after the grant of probate,
 - (ii) that pursuant to s 31 of the *Succession Act 1981* the words "*SHOULD however my said daughter predecease me or not survive me for the period aforesaid, then in that event, but only in that event, the provisions hereafter of this my Will shall apply*", which were inadvertently omitted from the deceased's will dated 15 July 1998 (which Will was admitted to probate in this Honourable Court on 11 September 2001), be inserted between the words contained in clause 4 and those contained in clause 5 of the said will,
 - (iii) that there be no order as to costs.