SUPREME COURT OF QUEENSLAND

CITATION:	*Hodgens v Hodgens & Anor* [2006] QSC 352
PARTIES:	**ERROL VIVIAN THOMAS HODGENS** (Applicant) **AND** **RONALD HENRY HODGENS** (First Respondent) AND **YOLANDE LYVIA KREBS** (Second Respondent)
FILE NO/S:	S860 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Townsville Supreme Court
DELIVERED ON:	17 November, 2006
DELIVERED AT:	Townsville
HEARING DATE:	9th November, 2006
JUDGES:	Cullinane J
ORDER:	**That the Applicant pay the Respondents' costs thrown away by proving the will of 21st May 1992.** **That the Applicant be entitled to recover from the estate those costs associated with proving the 1997 will which would have been incurred if the will had been admitted to probate in the ordinary course of events with such costs to include the costs of removing the caveat.**
CATCHWORDS:	COSTS - REVOCATION OF GRANT OF PROBATE – CAVEAT - LETTERS OF ADMINISTRATION – where the Applicant seeks to revoke the probate granted to an earlier Will and admit to probate a later will which is undated as to date and month. COSTS – whether the applicant should bear the costs of the revocation of the earlier will – whether the applicant or the estate bear the costs of proving the later will and removing the caveat over the earlier will.

COUNSEL: Mr C. White

Mr A.T. Moon

SOLICITORS: Stevenson & McNamara for the Applicant

Giudes & Elliott for the Respondents

[1] I have before me two applications. Ultimately the matters in issue between the parties have largely been resolved. The only outstanding matter is the question of costs.

[2] The Applicant and the Respondents are children of the deceased, Vivian Thomas Hodgens who died on 30th July 2003.

[3] There is a good deal of animosity between the members of the family, something without which what has developed would be inexplicable.

[4] Probate of a will of the deceased dated 21st May 1992 was granted to the Respondents, Ronald Henry Hodgens and Yolande Lyvia Krebs. Another member of the family is Danielle Diana Hodgens who is a legal practitioner and who at all relevant times acted for the Respondents.

[5] The Applicant, Errol Vivian Thomas Hodgens seeks an order revoking the grant of probate and an order admitting to probate a later will of the deceased which is undated as to the date and month but bears the year 1997. The Respondents sought an order appointing the Public Trustee of Queensland as administrator of the later will (the Applicant is named as the executor of the will) but this issue has now been resolved with it being agreed that a grant be made to Trust Company Limited.

[6] The Respondents seek an order against the Applicant for the costs thrown away in obtaining probate of the earlier will. The Applicant seeks an order from the estate of the costs of and incidental to the application to revoke and to admit the later will to probate. Because his siblings are the residuary beneficiaries the effect of such an order would be that its burden would fall upon them.

[7] I now turn to a brief summary of the facts.

[8] By letter dated 28th June 2002 (before the death of the deceased) Danielle Hodgens wrote to a number of solicitors in Townsville stating that both of her parents were in their eighties and residing in a nursing home in Townsville and sought advice whether the solicitors held wills of either of her parents or a power of attorney on behalf of either of them.

[9] By letter of 6th August 2003 Danielle Hodgens wrote to the Applicant. At this time the funeral had not taken place.

[10] With the letter she included a copy of what she described as the deceased's last will and testament dated 21st May 1992 and stated that she intended to instruct her solicitors, Giudes and Elliott to obtain probate of and administer that will and asked for the Applicant to advise within seven days whether he had any objections to that proposal. The letter went on:

> *"<u>More Recent Will</u>*
>
> *If you are aware of a more recent will please provide me with a copy within seven (7) days of the date of this letter.*
>
> *I hereby give you notice that there will be objections to a more recent will and on behalf of the other members of the family I request you not proceed with probate or the administration of a more recent will until this matter is resolved.*
>
> *I will be instructing Giudes & Elliott to lodge a caveat in the Supreme Court Registry objecting to the later will if there is one. ---"*

[11] The Applicant responded by a facsimile transmission of 8th August 2003 which largely dealt with matters irrelevant for present purposes. However in referring to a meeting which he requested be held of members of the family prior to the funeral he referred to one of the items of business as :

> *"To come to an agreement about protocol in relation to probate of the will.*
>
> *Certain documents will be read and available to view."*

[12] One of the Respondents, Ronald Henry Hodgens indicated that he did not wish to attend a meeting before the funeral to discuss the matters which the Applicant wished to discuss and said that these matters could be discussed later.

[13] At some time in August 2003 the Applicant in a conversation with Mr Elliott of Giudes & Elliott informed him he held a later will.

[14] Mr Elliott wrote to the Applicant by letter of 28th August 2003 in the following terms:

> *"We advise we have received a will of your late father dated 21st May 1992.*
>
> *We intend to make application to the Supreme Court for a grant of probate of this will.*
>
> *We are writing to confirm you do not hold a later will prior to making this application."*

[15] The Applicant responded to Mr Elliott's letter. His response largely dealt with the meeting which he had wished to call prior to the funeral and the way in which other members of the family responded to this. By and large it was the Applicant's claim that he did not wish to discuss matters relating to the deceased's will or associated matters before a headstone had been put in place and he said that he had promised his father that this is what would be done. In the letter to Mr Elliott he concluded:

> *"Please advise when the headstones have been done and I will then get back to you to deal with the matter of probate."*

[16] In fact the application for probate was advertised and there was no response by the Applicant. Probate of the will was granted on 17th October 2003.

[17] The Respondents had filed a caveat against any grant of probate on the 14th August 2003 as foreshadowed by Danielle Hodgens in her letter.

[18] The Applicant and the Respondents and Danielle Hodgens were cross-examined upon their affidavits before me.

[19] It was contended on behalf of the Applicant that the Respondents were aware of the existence of a later will and nonetheless proceeded to obtain probate of an earlier one or at the least they had been put on their guard that there was a later will and should not have proceeded as they did to obtain probate.

[20] The relevant time frame between the death of the deceased and the exchanges between the parties and the application for probate will be apparent from what has already been set out.

[21] I accept the evidence of the Respondents and of Danielle Hodgens that they did not know of the existence or possible existence of an earlier will prior to the death of the deceased. I also accept Danielle Hodgens' explanation for writing to solicitors in Townsville by letter of 28th June 2002 asking if they held a will or power of attorney. This was, as she explained, because she had been informed that substantial monies had been withdrawn from the deceased's account and because the Applicant claimed to hold a power of attorney entitling him to do so.

[22] The letter which Danielle Hodgens sent to the Applicant dated 6th August 2003 was, I am satisfied, sent as a result of having spoken to the manager of the funeral parlour and as a result she had formed a belief that there may have been a later will which the Applicant held.

[23] She says, and again I accept what she says, that in stating in the letter that there would be objections to a later will, she was referring to the fact that if the will was dated after a certain date there might be a challenge to it because the deceased had commenced to suffer from dementia. She gave evidence before me giving a similar explanation for the filing of the caveat and I am prepared to accept that explanation. She said that the objections would be pursued in the event that after appropriate enquiries had been made it was considered that any later will should be challenged.

[24] In the result no claim has been made that the later will was affected by any incapacity on the part of the deceased.

[25] The Responsibility for what turned out to be the unnecessary step of admitting the first will to probate falls, in my view, heavily upon the Applicant. No doubt the other members of the family including the Respondents might have learned of the later will at the meeting the Applicant called but I do not think it unreasonable that at that time they wished to avoid family frictions. There is also some tension between the Applicant's claim that he would have informed them of the later will if they had insisted on knowing it with his claim that he wished to delay any dealings about the later will until the headstone had been completed and put in place.

[26] As will be seen his response to both the letter written by Danielle Hodgens and by Mr Elliott the responses were in quite equivocal terms and he did not produce the later will in response to an invitation to do so.

[27] He was informed by Mr Elliott's letter that the Respondents intended to prove the 1992 will.

[28] The Respondents' application for probate was duly notified and advertised. The Applicant took no steps to respond to the notice. He says he was unaware of the advertisement but in my view ought to have been on the lookout for such notice, given what he had already been informed.

[29] He took no steps to prove the later will prior to the application by the Respondents and took no steps to prevent them obtaining probate of the earlier will. The Applicant should pay the costs of the Respondents thrown away by the steps taken to obtain probate of the earlier will.

[30] Once probate was granted it was necessary for the Applicant to take steps to revoke the grant. He was however, for reasons already canvassed, primarily responsible for this being necessary.

[31] On the other hand once the application to revoke was made it should have been possible for the Respondents to take the steps necessary to establish the genuineness and validity of this will within a reasonable short period.

[32] In fact it was almost three years later that they conceded that the grant should be revoked and the later will admitted to probate. As I have said there was some dispute as to who the grant should be to but this has been resolved and there is nothing to suggest it would have been an obstacle to the will being admitted to probate much earlier.

[33] The Respondents tendered "without prejudice" letters containing an offer to, in effect, let the existing grants stand, but to administer the estate in accordance with a later will. However the offer required the appointment of the Public Trustee as administrator something to which the Applicant objected. It also proposed that the Applicant pay his costs of the application to revoke. As will be seen I think he is entitled to limited costs from the estate.

[34] For reasons already set out I think that the Applicant's inaction is largely responsible for the need to make the application to revoke and the subsequent application for probate. On the other hand the Respondents' long delay in resolving the matter tells against them on any application by them for costs of the application to revoke.

[35] The family animosity seems to have prevented any early resolution of these matters as might have been expected.

[36] Counsel for the Applicant argued that had an application be made by the Applicant for probate before the earlier will was admitted to probate the Applicant would have been faced with a caveat and would have been faced with resistance on the part of the Respondents to the granting of probate.

[37] The former I think can be accepted since this is what occurred but there is nothing in my view to support the latter particularly since no claim alleging a later will was

invalid was at any time made in these proceedings. Rather the matter has simply dragged on with neither side taking any steps to bring it to a head until recently. I have already referred to what seems to me to have been the very long delay associated with the Respondents' concession that the earlier grant of probate should be revoked and the later will admitted to probate.

[38] Had the Applicant been the Applicant for probate and had a caveat been lodged he could have taken steps to have it removed and the Respondents would have been obliged to advance grounds for the lodging of the caveat and if the matter had proceeded by way of action the Respondents would have been faced at an early time with the need to investigate matters relating to the later will and would have been in my view faced with the need to concede what they subsequently conceded in the revocation proceedings at an early stage.

[39] In my view the appropriate orders in relation to costs are:

(a) that the Applicant pay the Respondents' costs thrown away by proving the will of 21st May 1992.

(b) I order the Applicant be entitled to recover from the estate those costs associated with proving the 1997 will which would have been incurred if the will had been admitted to probate in the ordinary course of events with such costs to include the costs of removing the caveat.