SUPREME COURT OF QUEENSLAND

CITATION:	*Calabrese v Calabrese* [2010] QSC 277
PARTIES:	**VINCENZO CALABRESE** (Plaintiff) **v** **GAETANO CALABRESE** (Defendant)
FILE NO/S:	BS 2492 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	18 March 2010
JUDGE:	McMurdo J
ORDER:	**1. The plaintiff's proceedings be dismissed.** **2. The Court pronounces for the force and validity of the will of Grazia Miuccio, deceased, dated 3 September 1992 in solemn form of law.** **3. Subject to the formal requirements of the Registrar, a grant of probate of the said Will of the deceased, as contained in the copy thereof, which is Exhibit B to the affidavit of Gaetano Calabrese, filed herein on 6 April 2005 and be made to Maria Rita Moschella and Gaetano Calabrese, as the executors named therein, limited until the original Will or a more authentic copy thereof be proved.** **4. Within seven days of the grant of probate being made, the plaintiff will deliver to the defendant's solicitors all documents in his possession or power belonging to, or relating to the deceased estate and the liabilities thereof.** **5. The plaintiff is to pay the defendant's costs of these proceedings on the standard basis and the difference between the defendant's standard costs of these proceedings and his indemnity costs of these proceedings be paid to the defendant from the estate of the deceased.**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL –

EXECUTION – GENERALLY – where the deceased was born in Sicily and could not read or speak English fluently – where the deceased married and had one child, a daughter – where the deceased's daughter married the plaintiff and had two children, one being the defendant – where the deceased's daughter and the plaintiff divorced in 1980 and the deceased's daughter died in 1983 – where the deceased's husband died in 1986 – where the deceased's solicitor, who spoke her native dialect, prepared a will for the deceased in 1992 – where a second will was made in 2002 using a pre-printed will form that was completed in handwriting and written in English and at the time the deceased was living in the plaintiff's house – where the 2002 will appoints the plaintiff as the sole executor and beneficiary – where the identity of the witness is unknown – whether the 2002 will was duly executed.

SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MADKING OF A WILL – TESTAMENTARY CAPACITY – SOUNDNESS OF MIND, MEMORY AND UNDERSTANDING – GENERALLY – where the deceased made a will in 1992 and is said to have made a second will in 2002 – where medical evidence indicates that the deceased had dementia which became progressively worse from about 1997 – whether the deceased had testamentary capacity at the time the second will was made.

COUNSEL: C Mason (sol) for the plaintiff (to seek adjournment only)
R T Whiteford for the defendant

SOLICITORS: Rostron Carlyle for the plaintiff (to seek adjournment only)
Murphy Schmidt for the defendant

HIS HONOUR: This case concerns two Wills made or said to have been made by the late Grazia Miuccio, whom I shall call the deceased. She was born in Sicily on 18 September 1919. She could not read or speak English fluently. She married and had one child, a daughter Maria. Maria married the plaintiff in these proceedings in 1973. There were two children of that marriage, one being Maria Moschella born on 6 May 1974, and the other being the defendant, born on 22 April 1975. Their parents, that is the plaintiff and Maria, the deceased's daughter, divorced in 1980. Maria died in 1983. The deceased's husband died in 1986. There are two Wills in question, one made in 1992 and the other made, or said to have been made, in 2002. The plaintiff propounds the 2002 Will. The defendant propounds the 1992 Will.

Earlier today I refused an application on behalf of the plaintiff for an adjournment of the trial. After that the trial continued in the plaintiff's absence. Several documents were tendered. They include statements made by Mr Giuseppe Rinaudo, a retired solicitor, which were tendered under section 92 of the Evidence Act. They were admitted without Mr Rinaudo being present to give oral evidence because of evidence, which I accept, as to his present incapacity to give that evidence. Mr Rinaudo for many years acted as a solicitor for the deceased. He also had the advantage of speaking the particular Sicilian dialect which she used. He prepared the 1992 Will. He did not prepare the 2002 Will.

The defendant has also tendered a bundle of medical reports and records which were admissible in consequence of the

non-response of the plaintiff to a notice to admit documents. In addition, there is a report by a consultant geriatrician, Dr Berry, who was appointed by the Court to report in these proceedings on the testamentary capacity of the deceased. I shall return to the content of that report.

I turn then to the 2002 Will which the plaintiff propounds. It was made using a pre-printed Will form and it was completed in handwriting. It is in the English language. It appoints the plaintiff as the sole executor and beneficiary. According to one of the statements of Mr Rinaudo, the plaintiff told Mr Rinaudo that the deceased had made a Will in 2002. The plaintiff then said that a solicitor had told the plaintiff "what to do". There is no suggestion that there was any solicitor involved in the preparation of this Will. That statement made to Mr Rinaudo, considered with other evidence and in particular the poor health of the deceased at the time, to which I will come, her poor command of the English language and the content of the Will, together with the fact that the deceased was then living in the plaintiff's house, together contribute to an inference, which I draw, that the plaintiff prepared this Will.

I come then to the evidence of her capacity to make the 2002 Will. The evidence of the Court appointed witness, Dr Berry, is that in her opinion more probably than not the deceased then lacked capacity. That opinion is consistent with the

other medical evidence. Doctor Genevieve Hopkins was the deceased's general practitioner from 1995 to 2001. She has reported that she believed that the deceased had dementia and that "it would be extremely unlikely that the deceased had a lucid interval in which she could make a Will".

There is a report from Dr Saines, the deceased's neurologist, which includes this: "I made a diagnosis of dementia in 1997, which had worsened when I last examined the deceased in late 2000. I would not have regarded her as having testamentary capacity at the time of this last consultation. Such dementia is progressive in nature, and I can only assume she would have been less competent by April 2002. It would seem unlikely to me that the deceased would have improved over the two years from the time of my last consultation, or to have prepared a Will during a unique lucid interval. The deceased suffered from dementia, according to my clinical diagnosis".

There is much other medical evidence which supports those opinions, and it is unnecessary to detail it here. There are several letters and reports from other practitioners, all of which point to a condition of dementia which became progressively worse from about 1997.

In 2001 the deceased suffered a fractured hip, for which she was hospitalised from about May to July 2001. The extensive notes made within the hospital again support the opinions to which I have referred.

After leaving hospital in about July of 2001 the deceased went

to live at a house at Wooloowin which was then occupied by the defendant and his sister. The plaintiff also lived at that house, but at the time he was in Italy. When he returned to Australia he agreed to the deceased continuing to live there.

According to a statement of Mr Rinaudo, after 2001 he became concerned about the deceased's mental state, and she would only say "yes" to anything he said to her. As I have noted, Mr Rinaudo had the advantage of being able to converse with her in her native dialect. According to Mr Rinaudo's statement the plaintiff asked him several times to make a new Will, but he refused absent a doctor's certificate verifying capacity, which not surprisingly was not forthcoming.

In my conclusion the plaintiff's case, that is to say the propounding of the 2002 Will, should be dismissed on two bases. The first is that he has failed to prove due execution of this Will. The second is that he has failed to prove that the deceased had testamentary capacity.

As to that first matter, in my view there are suspicious circumstances which displace the presumption of due execution in this case. In summary they are as follows. First, as I have inferred, the plaintiff prepared this Will. Secondly, the Will is in the English language, and there is no evidence that it was read to the deceased in a language which she could understand. Thirdly, the identity of the witnesses is unknown. The form of Will contains printed directions to the

witnesses as to how they should write their names and addresses under their signatures. However, those directions were not followed. There is no evidence that the deceased signed the Will in the presence of the witnesses, or whether they signed in the presence of the deceased. There is also the circumstance that the plaintiff is the only beneficiary under the 2002 Will. Further, there is of course the circumstance of her mental condition.

As to testamentary capacity, the evidence is strongly in favour of a finding of incapacity. It is probably sufficient to say that capacity is not proved. There is nothing in the evidence raising anything more than a theoretical possibility that there was some lucid interval in 2002 during which this Will was made. As I have noted already, there is medical opinion indicating that that is unlikely. Accordingly, the plaintiff's case fails.

I then turn to the 1992 Will. As to it, there is no evidence suggesting incapacity in 1992.

Indeed, Dr Berry has given evidence indicating that there was capacity. This Will, as I have noted, was prepared by and executed under the supervision of Mr Rinaudo. By his evidence contained in those statements, due execution of this Will is proved. There is a complication in that the will has been lost. There is evidence, however, that the original of the Will was held in safe custody by a firm - by Mr Rinaudo's firm - and after the deceased's death, his practice was taken over by another firm to which his safe custody documents were

transferred. Searches at that firm's premises, and also at Mr Rinaudo's house, have failed to locate the original of the 1992 Will. However, as I have said, there is evidence establishing that the original was held by Mr Rinaudo after the date of death of the deceased.

The outcome is that the defendant has proved the 1992 Will.

Accordingly, apart from the question of costs, the orders will be as follows:

1. The plaintiff's proceedings be dismissed.

2. The Court pronounces for the force and validity of the will of Grazia Miuccio, deceased, dated 3 September 1992 in solemn form of law.

3. Subject to the formal requirements of the Registrar, a grant of probate of the said Will of the deceased, as contained in the copy thereof, which is Exhibit B to the affidavit of Gaetano Calabrese, filed herein on 6 April 2005 and be made to Maria Rita Moschella and Gaetano Calabrese, as the executors named therein, limited until the original Will or a more authentic copy thereof be proved.

4. Within seven days of the grant of probate being made, the plaintiff will deliver to the defendant's solicitors all documents in his possession or power belonging to, or relating to the deceased estate and the liabilities

thereof.

That leaves the matter of costs. The defendant submits that, given the suspicious circumstances surrounding the execution of the 2002 Will, and the lack of evidence of due execution and knowledge of and approval, it was not reasonable for the plaintiff to have propounded the 2002 Will. Further, it is submitted that the plaintiff should not have continued to propound the 2002 Will, at least after Dr Berry's report was provided and no attempt to challenge it was made. It is submitted that, in those circumstances, the costs of the proceeding should follow the event and the plaintiff should be ordered to pay the defendant's costs on a standard basis.

I accept those submissions. I also accept that the defendant should be entitled to be paid from the estate the difference between his costs, assessed on the standard basis, and his costs assessed on an indemnity basis.

There will be further orders then that the plaintiff pay the defendant's costs of these proceedings on the standard basis and that the difference between the defendant's standard costs of these proceedings and his indemnity costs of these proceedings be paid to the defendant from the estate of the deceased.
