

SUPREME COURT OF QUEENSLAND

CITATION: *In the Will of William Lewis* [2010] QSC 351

PARTIES: **KARINA JOY EVANS**
(applicant)

FILE NO/S: SC No 12140 of 2009

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 17 September 2010

DELIVERED AT: Brisbane

HEARING DATE: 17 December 2009; further affidavits filed 24 June 2010

JUDGE: Margaret Wilson J

ORDER: **1. Declaration that by a handwritten testamentary document which commences "a Tempery Will of my Estate" dated 1 September 2000 William Lewis revoked all previous wills.**

2. Order that the applicant's costs of and incidental to the application be assessed on the indemnity basis and paid out of the estate.

CATCHWORDS: SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – REVOCATION – METHODS OF REVOCATION – OTHER WILLS, CODICILS OR WRITINGS – where testator executed a will prepared by his solicitors in May 2000 – where the testator then decided that he wanted to change his executor – where the testator prepared a handwritten temporary will in September 2000 – where the testator died in October 2000 – whether the testator revoked all previous wills in the will that he made in September 2000 – *Succession Act* 1981 (Qld), reprint 5, s 20(1)

SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – TESTAMENTARY INSTRUMENTS – ALTERATIONS, ADDITIONS AND INTERLINEATIONS – IN GENERAL – handwritten will – original and carbon copy – interlineations and highlighting on original – whether the interlineations and highlighting were effective to alter the will pursuant to the *Succession Act* 1981 (Qld), reprint 5, s 12

Succession Act 1981 (Qld), reprint 5, ss 9, 12, 20(1)

Re Goodes [1922] SASR 180

COUNSEL: E A Lorimer (solicitor) for the applicant.

SOLICITORS: Thynne & Macartney for the applicant.

- [1] **MARGARET WILSON J:** William Lewis ("the testator") died on or about 14 October 2000, aged 66.
- [2] The applicant seeks declarations that the testator had revoked certain testamentary instruments, and that he died intestate.

Background

- [3] The testator was married to Norma Rose Wyborn (now Norma Priest) on 1 January 1960. They were divorced in 1977. He did not remarry. He had two daughters, one of whom predeceased him. The other, Karina Joy Evans, is the applicant in this proceeding.
- [4] The testator was an invalid pensioner. He lived in Childers, where he was a patient of the Childers Medical Centre for 11 years before his death. He suffered a mild form of schizophrenia and depression. He was never hospitalised for his mental illness, but he was hospitalised for treatment of septicaemia in 1998 and for gastroscopy for investigation of weight loss in 1990. According to his general practitioner, he became more unwell in the last months of his life, suffering more confusion and some intrusive thoughts and paranoia.
- [5] I note at the outset that the testator's testamentary capacity was not in issue before me.
- [6] He left an estate consisting principally of a house property at Childers. In December 2009 that house was worth approximately \$195,000, and the liabilities of the estate were a little under \$20,000.
- [7] On 17 December 2002 Robert Vincent Goding swore an affidavit in support of an application for probate of a handwritten document signed by the testator and witnessed by Philip John Dowling and Janice Lesley Rudd on 1 September 2000, an application that was ultimately discontinued.¹
- [8] Mr Goding deposed that four days after the testator's death, a local police officer handed him things found in the testator's house – namely, a green folder and "a small school port" containing personal items, medicines, keys and papers. The police officer told Mr Goding that the green folder had been located on the kitchen table, and that inside it there was a document in which he was mentioned. The document referred to was an unsigned will prepared by Charlton Muller and Madders dated 2000, containing handwritten changes, including the selection of Mr Goding as executor. I shall return to this document in paragraph 13 below.

¹ *Goding v Caink* BS73901/02.

[9] Mr Goding died in about 2004.

Wills made between 8 February 1990 and 12 May 2000

[10] There is evidence that the testator made the following wills:

1. Date 8 February 1990
 Prepared by Charlton Muller & Jones Solicitors, Bundaberg
 Executors A partner of Charlton Muller & Jones and an accountant
 Bequests Tools and trailer to grandchildren
 \$12,500 to his daughter Karina
 \$4,000 for upkeep of his mother and maternal grandparents'
 grave
 \$4,000 for upkeep of testator's daughter's grave
 Residue: ½ Uniting Church Property Trust
 ½ University of Queensland.

2. Date 16 March 1995
 Prepared by Kingston & Stanton, Solicitors, Childers
 Executors Geoffrey Warren Caink; failing him, Danny Caink
 Bequests \$12,000 to his nephew Colin Lewis
 \$12,000 to his nephew Paul Lewis
 \$2,000 plus for upkeep of his mother and maternal
 grandparents' grave
 Residue to his daughter Karina.

3. Date 23 May 1997
 Prepared by Kingston & Stanton, Solicitors, Childers
 Executors Geoffrey Warren Caink; failing him, Danny Caink
 Bequests \$12,000 to his nephew Colin Lewis
 \$12,000 to his nephew Paul Lewis
 \$2,000 plus for upkeep of his mother and maternal
 grandparents' grave
 \$12,000 to his former wife, Norma
 Residue to his daughter Karina
 Unclaimed gifts to the Guide Dogs Association for Qld.

4. Date 12 May 2000
 Prepared by Kingston & Stanton, Solicitors, Childers
 Executors Geoffrey Warren Caink; failing him, Danny Caink
 Bequests \$16,000 to Geoffrey Warren Caink
 \$4,000 plus for upkeep of his mother and maternal
 grandparents' grave
 \$4,000 to his nephew Colin Lewis
 \$6,000 to his nephew Paul Lewis
 \$16,000 to his daughter Karina
 \$6,000 to his former wife Norma
 Furniture, tools etc to Daniel Warren Caink
 Residue to the Guide Dogs Association for Qld.

[11] On 12 May 2000 the testator executed an enduring power of attorney prepared by Kingston & Stanton in favour of Geoffrey Warren Caink and Daniel Warren Caink.

The testator's wish to appoint Goding as his executor

- [12] Then the testator decided that he did not want either of the Cains to be his executor or to benefit from his estate, and that he did not want them to be his attorneys. He wanted Mr Goding to be his attorney and his executor.
- [13] One of the papers found in the school bag was an undated draft version of the will dated 12 May 2000. That it was a draft is clear from a couple of spelling errors corrected by the testator in a dark ink and a change to what had to be done to preserve his mother and grandparents' grave – changes which were made in the copy he executed. Of present significance are another set of changes, all made in a lighter ink. He crossed through the appointment of Mr Caink as executor and the bequest of \$16,000.00 to Mr Caink, and wrote against each “nothing to Canks”. He also deleted the bequests to his nephews, Colin and Paul Lewis, increased the bequest to his daughter, Karina from \$16,000 to \$20,000, increased the bequest to his former wife from \$6,000 to \$10,000, and crossed through the bequest of furniture, tools etc to Danny Caink writing against it "nothink [sic] to Daniel." He made some other changes and at the end he made notes about whether there could be a clause that no one should have the right to contest his will, that Mr Goding and the Mayor should have access to his bank account to arrange his funeral, that his house should be rented, and that Mr Goding should see to funeral and burial arrangements.
- [14] Also amongst the testator's papers was an unsigned will prepared by Charlton Muller and Madders dated 2000. The circumstances in which those solicitors prepared this document are not in evidence. It provided as follows –

Executors	Two of the partners of Charlton Muller & Madders
Bequests	\$2,000 to Geoffrey Warren Caink, or if Mr Caink predeceased him, to Daniel Warren Caink
	\$8,000 plus for upkeep of his mother and maternal grandparents' grave
	\$4,000 to his nephew Colin Lewis
	\$6,000 to his nephew Paul Lewis
	\$20,000 to his daughter Karina
	\$10,000 to his former wife Norma
	Residue to the Guide Dogs for the Blind Association of Queensland.

The testator made handwritten changes to this document. He changed one of the executors to Mr Goding, noting that he had asked him and he had said "yes." He crossed through the bequest of \$2,000 to Mr Caink, and made notes that he was thinking of selling his house then, that the house should be rented on his death, and that he would try to leave money in the bank for rates, electricity, insurance, repairs etc.

- [15] According to Mr Goding, the testator asked him to be his executor in a conversation in about June or July 2000, and he agreed.
- [16] On 20 July 2000 the testator consulted Mr Keleher of Charlton Muller and Madders, and gave him instructions for the revocation of the power of attorney and the

preparation of a fresh will and a fresh power of attorney. He executed a revocation of the power of attorney that day.

- [17] The testator told Mr Keleher that he had recently had discussions with Mr Goding, who was willing to be his executor. He wanted Mr Goding to be his attorney, too, but he was not sure whether he had discussed that with him. They discussed a new will, including the testator's wish to leave the residue of his estate to the Isis Shire Council for the erection of a monument to the backpackers' tragedy².
- [18] Mr Keleher wrote to Mr Goding the next day to confirm his willingness to take on the two roles, and made enquiries of the Isis Shire Council about the proposed bequest to it. Mr Goding confirmed his willingness to take on the roles.
- [19] The testator consulted Mr Keleher further on 3 August 2000, when he executed a fresh enduring power of attorney in favour of Mr Goding. It was subsequently signed by Mr Goding on 8 August 2000.
- [20] When the testator consulted Mr Keleher on 3 August 2000, he gave further instructions about the preparation of a new will. He said he would discuss with Mr Goding who should be the executor failing him. When Mr Keleher pointed out that as at that date his only effective will was the one appointing Mr Caink as executor, the testator said he did not want the solicitors to prepare a "short term" will whilst he considered the question of an alternate executor. He still wanted to have discussions with the Isis Shire Council about a monument to the backpackers.

Deterioration in testator's relationship with solicitors

- [21] According to Mr Keleher, the testator wrote to him prior to 17 August 2000 critical of the action Charlton Muller and Madders were taking in relation to his will. The letter is not in evidence.
- [22] Charlton Muller & Madders' file contains a file note of a telephone conversation between the testator and "Trish", an employee of Charltons, on 17 August 2000:

"He wants to cancel temporary will.

He going on about \$90 & he not be able to afford that for only a couple of weeks.

He will write out himself that he revokes all former wills & will have signed & witnessed by 2 witnesses all at same time."

Mr Keleher has deposed to discussing the testator's letter with him, and explaining that if the firm were to continue to act there would have to be mutual trust between solicitor and client. Subsequently the testator wrote to him apologising and saying that he intended to see the Mayor of Childers on 25 August 2000. That letter of apology is not in evidence.

- [23] Those solicitors' file contains a note of a further conversation between the testator and Trish on 30 August 2000 (which was a Wednesday):

"3.9.00 his birthday & all numbers works out that he is going to have problems on that day.

² On 23 June 2000, 15 backpackers lost their lives when a hostel in Childers burnt down.

wants us to ring him on Monday.

he going to hide under his single bed (spare room) & get extra locks put on house as he affraid [sic] dogs going to get him.

he wants us to ring him on Monday to see if he still alive.

we not to do anything. he will prepare a temporary will, he will see a JP he knows in Childers."

Temporary will

- [24] When he died, the testator left two copies (an original and a carbon copy) of a handwritten, temporary will. It was a one page document, headed:

"Tempery [sic] Will of my Estate of
William Lewis
87 Churchill Street, Childers

Charlton Muller & Madders
Keleher Solicitors of
Bundaberg
Mr Keleher's Secretary"

This is a Will of my estate..."

It was signed and dated—

"WILLIAM LEWIS
1st September 2000"

PHILIP JOHN DOWLING JANICE LESLEY RUDDY

- [25] The original was written in blue ink, but for the last two and a half lines which were in black ink. The testator's signature and that of the witnesses were written in black ink. The original also bears some words added across the top of the page and in the body of the document in red ink, and highlighting of some of the words in red ink. Those additions and the highlighting are not present on the carbon copy.
- [26] Mrs Priest has identified all the writing on the page (including that in red), apart from the printing which appears under the testator's signature, the date, the word "witnesses," the signatures of the witnesses and the printed names which appear under the witnesses' signatures, as that of the testator.
- [27] Mr Dowling has identified the document he witnessed as the handwritten document minus the red interlineations. Ms Ruddy has sworn that she cannot remember any red ink on the document when she witnessed it, but that she cannot discount the possibility of its being there.
- [28] Mr Dowling was a real estate agent who had met the testator about 6 years before his death. In the ensuing years they had a passing acquaintance until 25 July 2000, when the testator asked him to list his house for sale. He has sworn as follows:

"8. I recall on the 1st September, 2000 William attended my office and said 'I need someone to witness a temporary Will because I can't get into Bundaberg and my Solicitor can't get to Childers to see me'.

9. I recall William then produced to me a handwritten document. I recall reading through the document he handed to me.

10. I recall William then asked me to witness his signature. Before signing I made a provision at the bottom of the page of that document for Mr. Lewis, myself and my employee, Janice Ruddy to sign. Prior to any signatures being put on the document I then had my employee Janice come into my office where William and I were.

11. I then saw William sign the bottom of the document above where I had printed his name and I signed and Janice signed after me.

12. I recall that we were all present and watched each other sign the document where indicated.

13. The date the document was signed appears under the signature of Mr. Lewis and I confirm that such date was the date the document was in fact signed and witnessed by myself and my employee, Janice Ruddy. Exhibited to this Affidavit and marked 'A' is a true copy of that Will.

...

16. I recall saying to Mr. Lewis as I read the document 'Bill some of the sentences don't make sense'. I recall William saying 'I'll have a look at it'. I recall that he did not say anything about changing or altering the Will.

17. I am satisfied that the writing at the conclusion of the document in black existed at the time of signing as I recall making sure that when I inserted a provision to sign there was no room for anything else to be inserted in the document.

18. I say that on 1st September, 2000 when I met with William and from my discussions with him on that day, I was satisfied that he was aware of the effect of the document he was wanting to sign and he referred to that document as 'a temporary Will'."

[29] Ms Ruddy was a property agent. She met the testator only once, on 1 September 2000. She has sworn as follows:

"6. I recall witnessing a handwritten document by William Lewis, with my employer, Philip Dowling. I recall on the day I witnessed that document I was performing my duties in my office when Mr. Dowling called me to come in to his office.

7. I entered Mr. Dowling's office and saw an elderly gentleman whose name I did not know. Although I had seen this gentleman previously walking in Childers I did not know him by name. I believe that Mr. Dowling then introduced me to this gentleman. I cannot now recall the name.

8. I recall Mr. Dowling saying words to the effect of 'This is a temporary Will and would you witness it.' I recall signing the document as a witness.

9. I recall waiting for someone to sign the document however I am unable to recall whether that was Mr. Lewis or Mr. Dowling. After waiting I was then asked to also witness the document which I did.

10. I recall that the three of us were present when the document was signed."

[30] The testator also left two undated, handwritten documents. Mrs Priest has identified the handwriting as his.

[31] One of these documents ("Letter A") is a carbon copy of a letter in these terms:

"(indecipherable) ~~To Jeff,~~ To Geoffrey Warren Caink.
To Daniel Warren Caink.

Mr Keleher.

I am sorry about saying that you had me on a run about, with my will, as I wrote a letter saying this & gave it to Mr Madders for it to be read about what I did to Mr Keleher that he asked me to do this if I wanted him to stay being my Solicitor.

That I should have complete Trust in him with my will & papers I have to sign

Some money of 1,000 to each of my Attorney's

(Signed W Lewis)
WILLIAM LEWIS

(Signed J Ruddy)
JANICE LESLEY RUDDY

(Signed PJ Dowling)
PHILIP JOHN DOWLING"

The original has not been located.

Blue carbon paper seems to have been used, as the writing on the carbon copy is all in blue, except for "Some money of 1000 to each of my Attorney's" which is in black, perhaps indicating that it was inserted after the rest of the document had been written.

[32] The other document ("Letter B") is in these terms:

"I did this thursday & address it & got it worng & it came back so I had to address it again & I have skiphema & leave things out and get confused with papers.

To Geoffery Warren Caink.
To Daniel Warren Caink.
Mr Allen Keleher

Charlton, Muller & Madders.
Keleher Solicitors Bundy
Bundaberg

WL REVOKE

I would like to ~~Revocation~~ my will & Tempery will as I know this will leave with no will for a few weeks until I have got more information on & for a new will to be drafted in the futur as soon as possible, because of my health & your ~~seter secretary~~ secretE-ry told me to do this on paper and get it sign by Two people & witness by me & them to do this and post it as soon as I can.

(Signed W Lewis)
WILLIAM LEWIS

(Signed J Ruddy)
JANICE LESLEY RUDDY

(Signed PJ Dowling)
PHILIP JOHN DOWLING"

It is an original document comprised of two pieces of paper joined with sticky tape – one bearing the text and the other the signatures of the testator and the two witnesses.

[33] Mr Dowling has sworn –

"7. I am confident that the original signatures of William Lewis, Janice Ruddy and myself on the paper which forms the bottom of Letter B are identical to the same three signatures on Letter A which I am informed is a carbon copy of an original. I note that the spacing between the signatures is identical. I think the three signatures on Letter B have been cut from Letter A.

8. I am certain that there was only one occasion on which William Lewis asked Janice Ruddy and me to witness documents and I think that the only explanation is that we witnessed both the will and the Letter A on 1 September 2000.

9. I think that the word 'REVOKE' added as a correction to Letter B is in my handwriting. I cannot recall writing the correction or ever seeing Letter B before it was enclosed with the letter from Thynne & Macartney of 7 August 2009, but I do recall that William Lewis occasionally popped into our office. He was not a regular visitor, but from time to time when he was walking in town he came to the office.

10. I have no knowledge as to the combining of the two pieces of paper to make up Letter B."

[34] Ms Ruddy has sworn –

"7. When comparing my signature on Letter A, which is the carbon copy, with my signature on Letter B, which is an original, I agree that it is the same signature. It appears that the original of Letter A has had the signatures cut off and attached to Letter B.

8. The date on which I witnessed the document exhibited to my affidavit sworn 8 July 2002 is 1 September 2000 and I believe that it is the only time that I witnessed documents for the deceased. I remember the occasion and I understood that I was witnessing a will prepared by Mr Lewis. I do not believe that there was any other time I was asked to witness his signature. I have come to the conclusion that I was asked to witness both the will and Letter A at the same time on 1 September 2000.

9. I have no knowledge as to how the two pieces of paper came to be put together to make up Letter B."

[35] Mrs Priest has sworn that the body of each Letters A and B is in the testator's handwriting. With respect to Letter B she has sworn –

"12. I say that I am uncertain as to the writing of the word '*REVOKE*' in the letter addressed to Mr Allan Keleher, which is in the line:

'I would like to ~~recoation~~ revoke my will ...'

However the initial 'W L' above the word 'Revoke' is in the handwriting of the testator."

Findings about temporary will and letters A and B

- [36] I accept the evidence of Mr Dowling and Ms Ruddy that there was only one day (1 September 2000) when they witnessed documents for the testator. I find that the document styled "Tempery will" and Letter A were both executed on that day.
- [37] I find that when the "Tempery will" was executed it did not contain the red interlineations and highlighting now appearing on the original. The testator added these later, but the document was not re-executed.
- [38] I am satisfied that Letter B was not executed by the testator in the presence of Mr Dowling and Ms Ruddy. It is possible that the testator cut the signatures off the bottom of Letter A and stuck them to Letter B, but nothing turns on this. It is possible that the testator called on Mr Dowling on a subsequent occasion and that it was Mr Dowling who substituted "revoke" for "revocation" in Letter B, but nothing turns on this.

The relief sought on this application

- [39] The testator's daughter seeks –
- (a) a declaration that the following words in the "Tempery will" constitute a revocation of all previous wills made by the testator –
"This is a Will of my estate until I can arrange one more suitable Will"; and
 - (b) a declaration that the red interlineations in the "Tempery will"
"I didn't know that God would talk through me as soon as this so this Will is to be now re don [sic] one day"
together with the words
"I would like to ~~revocation~~ revoke my will and Tempery will as I know that this will leave me with no will for a few weeks"
in Letter B constitute a valid revocation of the "Tempery will"; and
 - (c) a declaration that the testator died intestate; and
 - (d) an order granting letters of administration on intestacy to Margaret Laurelle McNamara (the applicant's solicitor).

Discussion

- [40] The testator expressly revoked all previous wills and testamentary dispositions by the will he made on 12 May 2000.
- [41] When he died in 2000, the ways in which a will might be revoked were set out in s 20(1) of the *Succession Act* 1981³–

"20(1) No will or codicil or any part thereof shall be revoked otherwise than—

- (a) as provided by section 17 or 18; or
- (b) by another will or codicil executed in manner hereinbefore required or, if not so executed, admitted to probate under section 9⁴; or

³ The form of s 20(1) is that in Reprint 5, being the reprint of the Act that contains the provisions of the Act in force as at the date of the death of the testator.

- (c) by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed; or
- (d) by the burning, tearing or otherwise destroying the same by the testator, or by some person in the testator's presence and by the testator's direction, with the intention of revoking the same."

It is paragraph (b) which is applicable in the present case.

[42] The "Tempery will" executed on 1 September 2000 did not contain an express provision revoking previous wills. However, it dealt with the entirety of the testator's estate, in a manner inconsistent with the provisions of the will of 12 May 2000, and it was executed in accordance with the requirements of s 9⁵ for the execution of a will. On the proper construction of that handwritten document as a whole, the testator intended to revoke the earlier will and to replace its dispositive provisions with those in the handwritten document.⁶

[43] What of the red interlineations and highlighting? Section 12 of the *Succession Act* 1981⁷ provided –

- "12(1) No alteration made in any will after the execution thereof shall be valid or have any effect unless such alteration is executed in like manner to that required by this Act for the execution of the will.
- (2) Each alteration made in any will after the execution thereof shall be deemed to be executed in the manner referred to in subsection (1) if the signature of the testator and the subscription of the witnesses be made—
 - (a) in the margin or on some other part of the will opposite or near or otherwise relating to such alteration; or
 - (b) at the foot or end of or opposite to a memorandum referring to such alteration and written at the end or some other part of the will.
- (3) An alteration that is invalid and of no effect made in any will shall be disregarded if the words or effect of the will before the alteration was made be apparent.
- (4) In this section—
'alteration' includes obliteration and interlineation."

[44] The interlineations and highlighting were not executed in accordance with the requirements of s 9. Accordingly, they did not take effect as alterations to the "Tempery will."

[45] Nor was Letter B executed in accordance with the requirements of s 9. It did not take effect as a revocation of the "Tempery will."

Conclusion

⁴ Section 9 (Will to be in writing and signed before 2 witnesses).

⁵ *Succession Act* 1981 (Qld), reprint 5, s 9.

⁶ *Re Goodes* [1922] SASR 180.

⁷ *Succession Act* 1981 (Qld), reprint 5, s 12.

- [46] There should be a declaration that by the handwritten "Tempery will" made on 1 September 2000 the testator revoked all previous wills. Otherwise the application should be dismissed.
- [47] I will hear the solicitors for the applicant on costs.