

SUPREME COURT OF QUEENSLAND

CITATION: *Back v Bamberry & Ors* [2010] QSC 367

PARTIES: **GREGORY WILLIAM BACK (AS EXECUTOR OF THE ESTATE OF MICHAEL KENNITH HEGGIE, DECEASED)**
(applicant)
v
JENNIFER EILEEN BAMBERRY
(first respondent)
and
JACQUELINE VANESSA BECKMAN
(second defendant)
and
GERALDINE PENELOPE OLIVER
(third defendant)

FILE NO/S: BS1079/10

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 25 August 2010

DELIVERED AT: Brisbane

HEARING DATE: 23 August 2010

JUDGE: Margaret Wilson J

ORDER: **1. That subject to the formal requirements of the registrar the will of Michael Kenneth Heggie dated 16 October 2008, ('the will') be admitted to probate in common form;**
2. that on its proper construction Clause 4 of the will reads – "4. Special Gifts - I make the following special gifts (legacies, bequests and devices): I leave my entire estate to my friend Back";
3. that on its proper construction clause 4 of the will refers to the applicant Gregory William Back;
4. that the costs of the applicant and the respondents be assessed on the indemnity basis and paid out the estate.

CATCHWORDS: SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – probate and letters of administration – alteration and revocation of grants – in what circumstances – other cases – where testator prepared will but did not sign it

– where insertions were made to will – where will was then signed and witnessed – where executor applied for probate – where testator’s sisters lodged a caveat requiring proof of the will in solemn form – where handwriting obliterated on the will of which probate is sought – where words "I leave my entire estate to my friend Back" legible – whether will had been revoked in part by obliteration of beneficiary’s name pursuant to *Succession Act* 1981 (Qld) s 13 – whether will had been altered by obliteration of beneficiary’s name pursuant to *Succession Act* 1981 (Qld) s 16

SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – construction and effect of testamentary dispositions – generally – general principles of construction – admissibility of extrinsic evidence – in general – whether phrase "to my friend Back" refers to the applicant Gregory William Back

Succession Act 1981 (Qld), ss 13, 16

COUNSEL: MA Conrick for the applicant
DJ Morgan for the respondents

SOLICITORS: Cartwrights Lawyers for the applicant
O’Reilly Lillicrap for the respondents

[1] **Margaret Wilson J:** On 23 August 2010 I ordered that:

1. Subject to the formal requirements of the registrar the will of Michael Kenneth Heggie dated 16 October 2008 ('the will') be admitted to probate in common form.
2. On its proper construction Clause 4 of the will reads –

'4. Special Gifts

I make the following special gifts (legacies, bequests and devices):

I leave my entire estate to my friend Back.'
3. On its proper construction clause 4 of the will refers to the applicant Gregory William Back.
4. The costs of the applicant and the respondents be assessed on the indemnity basis and paid out the estate."

These are my reasons for doing so.

- [2] Michael Kenneth Heggie ("the testator") died on or about 2 August 2009. At the time of his death his estate was worth a little over \$150,000. He left a will which he had made using a homemade will kit.
- [3] The applicant is his executor. He applied for probate and the respondents (sisters of the testator) lodged a caveat requiring proof of the will in solemn form.

- [4] The will kit included a printed form which allowed for the insertion of particulars of the executor, beneficiaries, funeral directions and body organ donations.
- [5] The testator completed the form with the assistance of Mrs Lorraine Back one Saturday in or about February or March 2008. She went through the form with him, paragraph by paragraph, ascertaining his wishes, and inserting relevant particulars in her handwriting. The testator did not sign the will at that time.
- [6] On 16 October 2008 he signed the will in the presence of Mr Goonan and Mr Martin. They knew the document they were witnessing was a will, but they were not aware of its contents.

[7] Clause 4 was as follows:

Printed material:

"4. Special Gifts

I make the following special gifts (legacies, bequests and devices):"

Handwritten particulars:

According to Mrs Back she inserted:

"I leave my entire estate to my friend Gregory William Back"

- [8] Some of the handwriting has been obliterated on the will of which probate is sought.
- [9] Counsel for the respondents sought to persuade me that the only handwritten words still legible in clause 4 are "I leave my entire estate to my friend". However, on my examination of the document the following words are clearly legible: "I leave my entire estate to my friend Back".
- [10] Counsel for the respondents submitted that pursuant to section 13 of the *Succession Act 1981 (Qld)* the dispositive part of the will had been revoked by the testator's obliterating the name of the sole beneficiary, or pursuant to section 16 the name of the sole beneficiary had been obliterated to the extent that it is eligible and the document admitted to probate should leave a blank space.

[11] Section 13 is in the following terms:

"13 How a will may be revoked

A will or part of a will may be revoked only—

- (a) under section 14 or 15; or
- (b) by a will or other instrument made under an order under section 19 or 21; or
- (c) by a later will; or
- (d) by a document that—
 - (i) declares an intention to revoke the will or part; and
 - (ii) is executed in the way in which a will is required to be executed under this part; or
- (e) by the testator, or someone in the testator's presence and at the testator's direction—

- (i) burning, tearing or otherwise destroying the will with the intention of the testator to revoke it; or
- (ii) writing on the will, or dealing with the will, in a way that satisfies the court, from the state of the will, that the testator intended to revoke it. (emphasis added).

[12] Given the handwriting which remains in the will, I am unpersuaded that the testator dealt with it with the intention of revoking the gift "to my friend Back". Even if the word "Back" were not legible, there would in my view still be a disposition "to my friend", and it would then be a question of construction what was meant by that. As it is, there is a question of construction what is meant by "to my friend Back".

[13] Section 16 is in these terms:

"16 How a will may be altered

- (1) An alteration to a will after it has been executed is not effective unless the alteration—
 - (a) is executed in the way a will is required to be executed under this part; or
 - (b) is authorised by an order under section 19 and is executed under section 20; or
 - (c) is authorised by an order under section 21 and is executed under section 26.
- (2) Subsection (1) does not apply to an alteration to a will made by, or at the direction of, the testator if the words or effect of the will are no longer apparent because of the alteration.
- (3) If a will is altered, it is sufficient compliance with the requirements under this section for execution of the alteration, if the signature of the testator and of the witnesses to the alteration are made—
 - (a) in the margin or on some other part of the will beside, near or otherwise relating to the alteration; or
 - (b) as authentication of a memorandum referring to the alteration and written on the will."

[14] By sub section (2) a will may be altered by the obliteration of words. But again, because of my finding that that the words "I leave my entire estate to my friend Back" are still quite legible, section 16 has no application.

[15] There is then the question of what is meant by "my friend Back". On the question of construction, the court may receive extrinsic evidence. During the course of the hearing, I said that I was satisfied that the words "I leave my entire estate to my friend Back" were quite legible. Counsel for the respondents then conceded that, on its proper construction, clause 4 refers to the applicant Gregory William Back.

[16] Accordingly, I made the orders in para [1] hereof.