SUPREME COURT OF QUEENSLAND

CITATION:	*Price v Tickle & Ors* [2011] QSC 206
PARTIES:	**Edwin Price** (Applicant) **V** **Beris Bonita Tickle** (Respondent) And **Shirley Wilmot Ruth Petersen** (Second Respondent) And **Roseanne Ball** (Third Respondent) And **Rodney Ball** (Fourth Respondent)
FILE NO/S:	S723 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Rockhampton
DELIVERED ON:	3 August 2011
DELIVERED AT:	Supreme Court Rockhampton
HEARING DATE:	11 July 2011
JUDGE:	McMeekin J
ORDER:	**1. That the applicant take no further step in the administration of the deceased's estate until further order.** **2. That Mr Gerard Houlihan, solicitor of Messrs Rees R & Sydney Jones, file a further affidavit on or before 4pm on 12th August 2011, deposing to his knowledge of matters touching on the question of whether the 2002 Will contained a clause revoking all former Wills.**

3. That the matter stand adjourned to the 19th August 2011.

4. That the Applicant's costs incurred in bringing this Application be paid out of the estate on the indemnity basis.

CATCHWORDS: SUCCESSION - WILLS PROBATE AND ADMINISTRATION - Where more than one Will exists - Where most recent Will can not be located - Whether previous wills should be presumed revoked

Succession Act 1981 (Qld)

Trusts Act 1973 (Qld)

Curley v Duff (1985) 2 NSWLR 716

Harrison v Mills [1976] 1 NSWLR 42

Hartigan Nominees Pty Ltd v Rydge (1992) 29 NSWLR 405

In the Estate of Ann Faith Bryan [1907] P 125

In the Estate of Gwilym Williams (1989) unreported - Supreme Court of South Australia

Lippe v Hedderwick (1922) 31 CLR 148

Sugden v Lord St Leonards; Finch v Finch (1867) LR 1 P&D 371

Togito Pty Ltd v Pioneer Investments (Aust) Pty Ltd & Anor [2011] QCA 167

Western Australian Trustee Executor & Agency Co Ltd (WA) v O'Connor (1955) 57 WALR 25

Whiteley v Clune (No 2) The Estate Of Brett Whiteley (1993) unreported – Supreme Court of New South Wales

COUNSEL: Mr A Arnold for the Applicant

Respondent in person

SOLICITORS: Madden Solicitors for the Applicant

Respondent in person

[1] **McMeekin J:** Edwin Price is the remaining[1] executor of the estate of Desmond Ronald Ball deceased under a will dated 23rd December 1994 ("the 1994 Will"). He applies, pursuant to s 96 or 98 of the *Trusts Act* 1973, for the direction of the Court as to the further administration of the estate.

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[1] One of the respondents, Beris Bonita Tickle, was named executor in the 1994 will but renounced her entitlement.

[2] The difficulty that has arisen is that evidence has emerged that the deceased executed two wills subsequent to the 1994 Will – one in 2002 and one in 2005. There is no doubt that the 2002 Will existed. It was prepared by solicitors and kept by them in safe custody until released from their custody to the deceased probably on 3rd December 2005. No copy of that Will has been located despite extensive searches. The evidence suggests – there is no express statement - that by its terms it revoked the 1994 Will and left the whole of the deceased's estate equally to his only two grandchildren, Roseanne Ball and Elise Ball, the latter born in 1995 and so after the execution of the 1994 Will.

[3] As to the possible 2005 Will a number of witnesses have sworn statutory declarations in which they provide evidence which at least strongly suggests that a Will was executed in that year. The evidence indicates that under the terms of this Will the whole of the estate was to be left to the deceased's granddaughter, Roseanne Ball. Again no copy of that Will can be located.

[4] The deceased died on 5th October 2007 aged 81 years. There is no suggestion that he was not, at all material times, of sound mind.

[5] The estate is a small one consisting of a modest house property, presently vacant. It is desirable to limit the expenditure of funds on any further search for the lost wills if further enquiry seems pointless.

[6] Mr Ron Ball, a son of the deceased, appeared in person in response to the application. Mr Ball could not suggest any line of enquiry that has not already been pursued. No other respondent – and all potentially interested parties were made respondents – has appeared.

[7] I am satisfied that the solicitors engaged by Mr Price have made all proper and reasonable enquiries in an attempt to locate the missing Will or Wills.

[8] The application was advanced by counsel for Mr Price on the basis that the two subsequent Wills had been made, neither could be located, that it followed that there should be a presumption that both had been destroyed by the testator with the intention of revoking them, and that it further followed that that left the 1994 Will in place and Mr Price as executor. With respect that final conclusion does not follow and I have doubts about the premises that underlie the submission.

[9] For the present purposes I will assume the existence, at least at some time, of the two later and missing Wills.

Relevant Principles

[10] As to the premise underlying the submission the law is not quite as straight forward as the submission seemed to suggest. Powell J said in *Whiteley v Clune (No 2) The Estate Of Brett Whiteley* (unreported – Supreme Court of New South Wales - 102594 of 1993 -11th, 12th May 1993, 13 May 1993 - BC9301902) that the generally accepted approach to lost Wills was as follows:

> "It seems at first to have been suggested that the presumption, which arises where a Will or Codicil is last traced into a testator's possession, and is not forthcoming at his death after reasonable search and inquiry, that the testator has destroyed it animo revocandi was a presumption of law (see

> *Patten v Poulton* (1856) 1 Sw and Tr 55, 60 per Sir Cresswell Cresswell). However, that view seems not to have survived the 1820s, when Sir John Nicholl (*Colvin v Fraser* (1829) 2 Hagg 325) and, later, Parke B (as Lord Wensleydale then was) (*Welsh v Phillips* (1836) 1 Moo PC 299) pointed out that the presumption was one of fact, which could be rebutted by appropriate evidence.
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> So, too, the view expressed in the older cases (*Davis v Davis* (1824) 2 Add 223; *Colvin v Fraser* (supra); *Lillie v Lillie* (1829) 3 Hagg 184) that the evidence produced in rebuttal must be such as produces "a moral conviction", and that expressed in later cases (*Woodward v Goulstone* (1886) LR 11 App Cas 469, 475 per Lord Herschell; *Harris v Knight* (1890) LR 15 PD 170, 179 per Lindley LJ (as he then was)) that the evidence "must be so clear and satisfactory as to remove, not all possible, but all reasonable, doubts", has, in more recent authority (*In the Estate of Wipperman: Wissler v Wipperman* [1953] 2 WLR 706; [1953] 1 AER 764; (1955) P 50; Tristram and Coote's *Probate Practice* 21 Ed (1960) 641; Williams Mortimer and Sunnucks: *Executors Administrators and Probate* 16 Ed (1982) 187, 249) been supplanted by the view that the standard of proof is that applicable in order (sic) civil cases.
>
> The present position would now seem to be as follows: - 1. although, where a Will is traced into the possession of the testator and is not forthcoming on his death, there is a presumption that he destroyed it *animo revocandi*, the presumption may be rebutted; 2. the strength of the presumption depends upon the character of the testator's custody over it (*Sugden v Lord St Leonards* (1876) LR 1 PD 154; *Allan v Morrison* [1900] AC 604; *McCauley v McCauley* (1910) 10 CLR 434); 3. where the Will makes a careful, and complete, disposition of the testator's property, and there are no other circumstances to point to a probable destruction, *animo revocandi*, by the testator, the presumption is so slight that it may be said not to exist (*Sugden v Lord St Leonards* (supra); *Finch v Finch* (1867) LR 1 P and D 371); 4. where a Will is lost or destroyed, and the presumption of destruction, *animo revocandi*, either, does not arise, or, is rebutted, its contents may be proved by parol evidence. The "rules" laid down in *Sugden v Lord St Leonards* (supra) are as follows: - a. the contents of any lost instrument, including a will, may be proved by secondary evidence; b. written and oral declarations of a testator made before, or after, the execution of the will are admissible as secondary evidence of its contents; c. the evidence of a single witness, although interested, is admissible to prove the contents if his veracity and credibility are unimpeached; d. Probate may be granted of so much of the contents as may be proved, even though proof is not available of the entirely. It should, however, be noted that, at least insofar as (b) and (d) are concerned, *Sugden v Lord St Leonards* (supra), although not overruled, has not escaped criticism (*Woodward v Goulstone* (supra); *Atkinson v Morris* [1897] P 40) so that it is improbable that the "rules" will be extended."

[11] I take that as a correct exposition of the law. Thus the assumption that the inability to locate a Will necessarily leads to the assumption of destruction *animo revocandi* is not necessarily true. Evidence as to "the character of the testator's custody over"

the lost Will and whether it made a "careful, and complete, disposition of the testator's property" are important and relevant matters.

[12] The second implicit premise underlying the submission is that the 2002 Will has been revoked. Whilst that may be right there has not been any close examination of the proposition as yet. At common law there is no presumption that a missing Will necessarily revokes earlier testamentary instruments (*Western Australian Trustee Executor & Agency Co Ltd (WA) v O'Connor* (1955) 57 WALR 25), however the *Succession Act* 1981 has altered that law.

[13] That Act provides that Wills may be revoked "only" in the circumstances set out in s 13 which provides, so far as is relevant, as follows:

> **"13 How a will may be revoked**
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> A will or part of a will may be revoked only—
>
> (a) …
>
> (b) …
>
> (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
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> (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."

[14] I have no direct evidence from Mr Gerard Houlihan, the solicitor who drew the 2002 Will, that it contained a revocation clause in the usual form. It would be surprising if it did not, given Mr Houlihan's considerable experience.

[15] There is no evidence as to the complete terms of the 2005 Will. Nor is there evidence that the 2005 Will was drawn using a pro forma document that might be assumed to contain a revocation clause in the usual terms. There is no evidence to the effect that the deceased himself was familiar with the law relating to the revocation of wills. In the circumstances there is no reason to presume that the deceased included such a clause in his Will.

[16] However s13 does not expressly provide in subsection (c) that the "later will" contain an express revocation clause. At common law a later Will could revoke an earlier Will by implication even if the entire estate was not disposed of: *In the Estate of Ann Faith Bryan* [1907] P 125. I see no reason to imply words into the statute that are not there to displace this common sense rule.

[17] Thus a later Will which has the effect of putting in place dispositions that are entirely inconsistent with the previous dispositions would be sufficient revocation in my view. Assuming that the evidence presently available was to be accepted both the 2002 Will and the 2005 Will would satisfy that test. However given that direct evidence can be easily obtained from Mr Houlihan as to the terms of the 2002 Will,

or at least the probable terms of it, then the better course seems to me to hear from him to see if there is any doubt about the matter.

[18] The third implicit proposition in the argument advanced is that either the 1994 Will has not been revoked or that despite that revocation the 1994 Will can be revived by the presumed later destruction of the 2002 and 2005 Wills. For reasons already expressed I doubt that the factual premise is right and I do not think the legal conclusion that the 1994 Will is therefore revived is right either.

[19] As to the conclusion the *Succession Act* 1981 deals with the revival of revoked wills in s17 as follows:

> **"17 How a revoked will may be revived**
> (1) A will or part of a will that has been revoked is revived by re-execution or by execution of a will that shows an intention to revive the will or part.
> (2) A revival of a will that was partly revoked and later revoked as to the balance only revives the part of the will most recently revoked.
> (3) Subsection (2) does not apply if a contrary intention appears in the document that revives the will.
> (4) A will that has been revoked and is later entirely or partly revived is taken to have been executed on the day on which the will is revived."

[20] There has been no revival here "by re-execution or by execution of a will that shows an intention to revive the will". Quite to the contrary, the evidence shows that the deceased had no intention of reviving the dispositions contained in his 1994 Will.

[21] Thus whatever else be the result, assuming subsequent revocation at least by the 2002 Will, the testamentary instrument that Mr Price relies on for his authority as executor is now gone.

[22] Given the modesty of the estate I would ordinarily wish to declare, with as little further debate and expense as possible, for or against the apparent subsequent Wills if I thought that it could, in justice, be done. There are a number of matters that make that approach inappropriate here. First, it is not ordinarily appropriate on an application of this type for the court to determine controversies between parties to a trust: *Harrison v Mills* [1976] 1 NSWLR 42, *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405; *Togito Pty Ltd v Pioneer Investments (Aust) Pty Ltd & Anor* [2011] QCA 167 at [57] per Chesterman JA.

[23] Secondly, Mr Ron Ball left the court room believing that his daughter was likely to be protected one way or another. He might wish to be heard at greater length, and he might wish to challenge evidence advanced against her interests (Elise being still an infant), if that were not so.

[24] Thirdly, there has been no proper forensic examination of the evidence pertaining to the 2005 Will. I gather from Mr Ron Ball that there may be some animosity within the family. Without such forensic examination, and without cross examination of the deponents, or at least a conscious decision not to cross examine by those interested with full knowledge of the potential ramifications, I cannot form any view as to the credibility of the witnesses.

[25] Fourthly, the principles relating to the admission of lost Wills into probate have not been examined by the parties and they have not addressed their minds to the complexities here. It needs to be borne in mind that "[i]t is of high public importance that doubtful wills should not pass easily into proof by reason of the cost of opposing them."[2]

[26] As to the admission to probate of a lost will, in *Curley v Duff* (1985) 2 NSWLR 716, at 718-719, Young J (as he then was) said:

> "As I understand it, five matters must be established when it is sought to have probate of a lost Will. First, it must be established that there actually was a Will (see *Re Molloy* [1969] 1 NSWR 400), secondly, it must be shown that that Will revoked all previous Wills, thirdly, that the presumption that when a Will is not produced it has been destroyed must be overcome (see *Allan v Morrison* [1900] AC 604), fourthly, there must be evidence of its terms, and fifthly, evidence of due execution (see *Gair v Bowers* (1909) 9 CLR 510)."

[27] Consistent with that approach it seems to me that there are several critical questions that need to be addressed here:

(a) Was a will executed by the deceased in 2005?

(b) If so:

  (i) Were the formalities required by the statute followed? If not can and should the power invested in the Court by s18 of the *Succession Act* 1981 be invoked to dispense with those requirements?

  (ii) What were its terms? Did it plainly revoke the 2002 Will?

  (iii) Can the presumption that when a Will is not produced it has been destroyed by the testator *animo revocandi* be overcome in relation to either the 2002 Will or the 2005 Will?

(c) If the presumption in relation to the 2005 Will cannot be overcome does that leave the 2002 Will in place?

(d) If there is an intestacy, who is entitled, and who should administer the estate?

[28] Obviously if the declarants gathered by Ms Tickle are accepted then the response to question (a) is that a document at least purporting to be a testamentary instrument was prepared and executed by the deceased. However that claim has not been tested and I gathered from the comments made by Mr Ron Ball that he might wish to test it.

[29] The questions in (b)(i) are posed because the evidence seems strongly to suggest that the formalities were not followed – there was only one attesting witness (see s 10(3) of the *Succession Act* 1981). Assuming that to be so then that is not fatal but I have heard no argument on the application of s 18 of the *Succession Act*, which gives the Court power to admit a will to probate, despite the formalities not being complied with, to a lost will. See *In the Estate of Gwilym Williams* (Unreported, Supreme Court of South Australia, 27 June 1989, Bollen J) *Whiteley v Clune & Anor; The Estate of Brett Whiteley* (Unreported, Supreme Court of New South Wales, 13 May 1993, Powell J). If the formalities were not followed, and s 18

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2 *Mitchell v Gard* (1863) 164 ER 1280 at 1281–1282 per Sir J P Wilde

cannot or should not apply, then what of the 2002 Will? If it be assumed to have been destroyed by the testator, is the context of that presumed destruction the deceased's assumption that he had made a valid will earlier in 2005? The question that would then arise is whether the deceased intended to revoke the 2002 Will irrespective of whether he had made a valid subsequent Will or whether he intended to revoke it only on the assumption that there was such a valid and subsequent Will? See *Lippe v Hedderwick* (1922) 31 CLR 148.

[30] While the various declarants have deposed to the deceased wishing to favour Roseanne it is not entirely clear to me whether they have turned their minds to whether there were other terms in the will. It is important that the Court have the best information available concerning all terms if a lost Will is to be admitted to probate.

[31] The question in (b)(iii) is fundamental and has not been expressly addressed in the statutory declarations although some statements address the issue of the deceased's state of mind in his last months albeit not as precisely as one would like to see. The all important issue of the "the character of the testator's custody over" the lost Will is not addressed at all. I know nothing of the deceased's habits or methods. Where he was likely to keep his important private documents is not explored and why it is that such an important document might be mislaid without him destroying it has not been addressed cf. the facts considered in *Sugden v Lord St Leonards; Finch v Finch* (1867) LR 1 P&D 371.

[32] The question in (c) may become relevant if the presumption in relation to the 2005 will cannot be rebutted.

[33] The question in (d) is posed simply to ensure that I have all relevant information and to give the parties the opportunity to have a say in the person appointed to administer the estate, if the deceased died intestate. I have no information concerning Roseanne's position and wishes.

[34] There remains the difficulty of who is to have carriage of the matter. I note that the persons having an interest in these matters are the two grandchildren and the two sons of the deceased. The sons Ross and Ron Ball would take equally on an intestacy, assuming they are the only issue of the deceased. Elise would take one half of the estate under the 2002 Will. Roseanne would take the other half. Roseanne would take the whole of the estate if the declarants concerning the 2005 Will were accepted.

[35] I note that Mr Ron Ball is perfectly content to have Mr Price act as executor, he having trust in Mr Price's integrity. However Mr Price has no personal interest and it seems unlikely that he has any present authority. The first step it seems to me is to determine the validity of the claimed 2005 Will. According to the declarants the executrices of the 2005 Will were Ms Beris Tickle and Ms Shirley Petersen. They together with Roseanne Ball are the only person having an interest in propounding that Will. Elise Ball has an interest in opposing that Will and propounding the 2002 Will. According to Mr Houlihan, Ms Tickle and a Mr William Milrea were the executrix and executor respectively of the 2002 Will. The best way in which these matters can be resolved is for the executrices of the claimed 2005 Will, with Ms Roseanne Ball, to bring proceedings to propound the 2005 Will and for Ms Elise Ball, Mr William Milrea, Mr Ron Ball and Mr Ross Ball to be named as defendants.

[36] I am yet to hear from any of the proposed plaintiffs. I do not know if they wish to propound the 2005 Will. I do not know the attitude of the defendants. I will adjourn the application to enable the interested parties to be heard as to the appropriate directions that ought to be given. It would be advisable for them to obtain legal advice and representation.

[37] I assume that Mr Houlihan can prepare an affidavit without any great imposition on his time.

[38] I direct as follows:

(a) that the applicant take no further step in the administration of the deceased's estate until further order;

(b) that Mr Gerard Houlihan, solicitor of Messrs Rees R & Sydney Jones, file a further affidavit on or before 4pm on 12th August 2011, deposing to his knowledge of matters touching on the question of whether the 2002 Will contained a clause revoking all former Wills;

(c) that the matter stand adjourned to the 19th August 2011.

[39] It is appropriate that Mr Price be protected as to the costs that he has incurred in bringing this application. I order that his costs be paid out of the estate on the indemnity basis.