SUPREME COURT OF QUEENSLAND

CITATION:	*Lando v Sutton* [2011] QSC 339
PARTIES:	**SABINA LANDO** (Plaintiff) v **SANTA MANI SUTTON** (Defendant)
FILE NO/S:	1607/11
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	3 October 2011 (extemporaneous)
DELIVERED AT:	Brisbane
HEARING DATE:	3 October 2011
JUDGE:	Philippides J
ORDER:	**Order as per draft.**
CATCHWORDS:	APPLICATION – DEFAULT JUDGMENT – PROBATE – Court's jurisdiction to grant probate per s 6 Succession Act 1981 (Qld) – where deceased had three known Wills – where plaintiff named as executor in 1998 Will and defendant named as executor in 2003 Will – where submitted that the 2003 Will should not be propounded as the testator lacked testamentary capacity due to a series of strokes and dementia – whether a grant of probate for the 2003 or 1998 Will should be granted *Succession Act* 1981 (Qld), s 6 *Uniform Civil Procedure Rules* 1999 (Qld), r 288 *In the Estate of Szylowicz* (decd) (1978) 19 SASR 263 *In the Will of Pearce* (decd) (1945) 46 SR (NSW) 71 *In the Will of Podger* (decd) [1957] VR 275 *Mecredy v Brown* [1906] 2 IR 437 *Queensland Trustees Ltd v Finney* [1904] QWN 21 *Re King* [1917] 2 Ch 420 *Re Muirhead* [1971] P 263 *Ritchie v Malcolm* [1902] 2 IR 403 *Tiger v Handley* [1948] WN 432 *Vandeleur v Franich* [1991] 1 Qd R 481 *Wytcherley v Andrews* (1871) LR 2 PD 327

COUNSEL:	D Morgan for the applicant No appearance for the respondent
SOLICITORS:	Woods Prince Lawyers for the applicant No appearance for the respondent

HER HONOUR: This is an application for default judgment pursuant to rule 288 *Uniform Civil Procedure Rules*. I note that section 6 of the *Succession Act* 1981 is also relevant because, by that section, the Court is granted jurisdiction "in every respect as may be convenient" to grant and revoke probate and letters of administration. As mentioned, the matter proceeds by way of application for default judgment, the applicant having filed an affidavit of service which indicates that the defendant was duly served. I note that, although rule 288 UCPR contemplates relief being granted on the basis of the pleadings, it is accepted that because this is a probate matter, the Court retains a discretion to grant probate. In this case, it is submitted that the discretion should be exercised by analogy with the principles applicable to compromised probate actions and enunciated by Macrossan CJ in *Vandeleur v Franich* [1991] 1 Qd R 481.

The primary proceedings are a solemn form action concerning the estate of the late James McFarlane, who died on 21 September 2009. The testator left three Wills which are known. The last Will was made on 30 July 2003, and the second last was made on 12 November 1998. The plaintiff is the executor named in the 1998 Will and the defendant is the executrix named in the 2003 Will. The position taken by the applicant is that the 1998 Will be propounded as the last Will of the testator, it being submitted that the 2003 Will ought not to be propounded on the basis that the testator lacked testamentary capacity due to a series of strokes and dementia. The 2003 Will was prepared by solicitors. Nevertheless, there

is medical evidence, which I accept as being cogent evidence, which precludes for practical purposes, the possibility of the testator having testamentary capacity at that time.

I note by way of background that the defendant, who was the testator's attorney, was convicted of two counts of fraud concerning $371,848 of the testator's funds, the first count arising between 18 September 2002 and 15 July 2003, and the second count between 14 July 2003 and 8 April 2004. It is not suggested by the applicant that the criminal conviction binds the probate Court, but the matter is raised because the testator's capacity was in issue in those proceedings and medical evidence was led.

As I mentioned, the defendant was served with the proceedings and did not enter a defence. Accordingly, no material has been placed before the Court to contradict or counter the material relied upon by the applicant. The applicant's material includes an affidavit provided by Dr Reynolds. Dr Reynolds was the testator's GP for some 10 years until the testator's admission to a nursing home in 2003. She says that in the period between 16 July 2002 and 18 November 2002, she became aware that the testator was no longer capable of making decisions and looking after himself and that this was probably the case from 3 April 2002.

On 13 April 2004, the testator and the defendant consulted Dr Reynolds and the defendant asked for a letter stating that the testator was capable of looking after his own affairs.

However, Dr Reynolds refused the request to provide a letter to that effect because, in her view, the testator had not for some time been capable of attending to his affairs due to a series of strokes. Indeed, on the day Dr Reynolds saw the testator he did not know the date or year and incorrectly stated the day of the week. In Dr Reynolds' opinion, the testator would not have had testamentary capacity on 30 July 2003, when the 2003 Will was made.

In the criminal proceedings to which I have referred, a forensic psychiatric report by Dr Byrne (who examined the testator in 2007 and made a retrospective diagnosis in relation to capacity) was put before the Court. There was some criticism of Dr Byrne's report and retrospective diagnosis in the Court of Appeal, which was directed to his reliance on a test performed by another doctor, Dr Dunworth. Nevertheless, the opinion of Dr Byrne that the testator suffered from moderately severe dementia and quite severe expressive dysphasia was not challenged in the criminal proceedings. Of course as already mentioned, those proceedings, as the applicant accepted, do not bind this Court in its determination and are only provided by background. In any event, I accept Dr Reynolds' opinion which is not only cogent, but quite emphatic in relation to lack of capacity and I accept it without qualification.

As the applicant conceded, despite the provisions of rule 288, the Court cannot merely rubber-stamp a probate application and ignore valid wills or give effect to invalid wills. But it

was contended that the general approach in *Vandeleur v Franich* was applicable in a case such as the present one. The approach of the Court in an application where there is a probate action compromised between the parties, and which is relied on as raising principles pertinent to the disposition of the present application, was summarised in *Williams, Mortimer and Sunnucks'* 18th edition at 441:

> "Where the Court is asked to pronounce against what purports to be the last will of the deceased, evidence must be called to show lack of due execution, incapacity or whatever ground is alleged for the invalidity of the will. It is the duty of the probate court to give effect if it can to the wishes of the testator as expressed in testamentary documents and it should not, therefore, pronounce against what it knows to be the last will in date without making an inquiry as to its validity. ... [A] Court cannot pronounce against a will by consent and therefore *a fortiori* cannot pronounce against a will in a case of default without sufficient evidence."

In *Re: Muirhead* [1971] P 263, the Court was asked to grant probate of a will ignoring a later codicil where the person who took benefit under it had been cited by the executrix and not appeared. The Court refused to make that grant but, in doing so, said at 265:

> "Sometimes it is impossible to discover the true intention of the testator, because there may be doubts about his testamentary capacity or about whether he knew and understood the contents of some document propounded, or there may be doubts about the formalities of execution. In such cases a

compromise is often reached and given effect to by the Court. Where certainty cannot be achieved, it is often better that a will which is prima facie valid should be admitted to probate than that there should be a prolonged investigation into allegations of incapacity or undue influence; and it is sometimes better that a will or codicil should be pronounced against, where there are good reasons for suspecting its validity, although by a full inquiry it might be possible to remove those suspicions. It is proper that in either of these cases, terms should be agreed ... to take account of the doubts which remain."

Likewise, in *Vandeleur v Franich*, a solemn form action before a jury, upon the conclusion of the evidence, the jury retired to answer three questions, but were unable to agree on a conclusion. The parties thereafter compromised the action on the basis that the jury answer one question and then be discharged. The defendants withdrew their defence and counter-claim and the trial Judge was asked to pronounce for the will in solemn form. Macrossan CJ held that the Court could pronounce in favour of a will, even if the evidence was in conflict, provided the trial Judge, after hearing the evidence, had not formed any conclusions of fact against the basis on which the compromise proceeded. At 484-5, the Chief Justice stated:

> "It is common enough for a compromise to be arrived at in a probate suit even after the trial has commenced. Amongst the reported cases are *Wytcherley v Andrews* (1871) LR 2 PD 327, *Tiger v Handley* [1948] WN 432, *In re King* [1917] 2 Ch

420), *Ritchie v Malcolm* [1902] 2 IR 403 and *Mecredy v Brown* [1906] 2 IR 437. It does not appear that in any of those cases evidence adverse to the validity of the will had been led at the time the respective suits were compromised.

A further consideration arises where, as part of the compromise, the court is invited to pronounce for or against the will. Only parties or persons privy to the suit will be bound by the terms of the compromise and the decree as the cases last cited show. If a pronouncement for or against the will is sought, there will need to be appropriate evidence: see *Queensland Trustees Ltd v Finney* [1904] QWN 21 and *Mortimer on Probate* (2nd ed.) at 611. If a declaration in favour of validity is sought, it seems that, as a minimum, there must be evidence of due execution: see Williams, Mortimer and Sunnucks *Executors Administrators and Probate,* (16th ed., 1982) at 401, 402. In view of the answer taken from the jury on the issue of due execution in the present case and because of the lack of contest as the cases of the parties were presented, no problem arises on this aspect in the present case, but there maybe a requirement that evidence on other aspects be provided; see e.g. *Williams Mortimer and Sunnucks* (supra) at 401-402 where, dealing with evidence on trial in the Short Probate List in England, it is said: 'Where a will is being set up, evidence of one of the attesting witnesses should be adduced. Affidavit evidence will usually be sufficient. Where the circumstances raise strong doubt as to the testamentary capacity of the deceased it is advisable to

call medical evidence, if available, to show capacity'.

Clear definitive statements as to what is required do not seem to be available and the answer may depend to an extent upon the circumstances consistently always with the application of basic principles. Pronouncing for or against a purported will is a solemn act and it will not be possible simply to ignore a substantial body of evidence to which the court's attention may have been drawn, depending upon the stage at which the parties propose a compromise. If the court, after hearing evidence, has already arrived at a firm view on a vital issue, there will at least be difficulty in asking the court to act in a contrary fashion: see the opinion expressed *In the Estate of Szylowicz (dec'd)* (1978) 19 SASR 263, 272, *In the Will of Podger, (dec'd)* [1957] VR 275, 278 and *In the Will of Pearce (dec'd)* (1945) 46 SR (NSW) 71. However, mere conflict in the evidence will not necessarily preclude the court from acting on a compromise which may be proposed - see the observations of Cairns J *In Re Muirhead* [1971] P 263 at 265 explained.

In a case of conflict the court may find it easier to pronounce in favour of rather than against the testator's expressed wishes. In the former case there may not be as firm a requirement for a fullness in the evidence in support of the course proposed. Still I do not consider it can be said that there is any hard and fast rule."

In the present case, it is submitted that in accordance with

the principles set out above, that the comprehensive medical evidence before the Court is such that it allows the Court safely to conclude that, before the 2003 Will was made, the testator did not have capacity and could not have regained capacity. However, that incapacity was also well after the 1998 Will was made and there is nothing to impugn the validity of that Will.

On the material before the Court, I am satisfied that the conclusions urged on behalf of the applicant can safely be reached. Accordingly, I make an order for a grant of probate in common form subject to the formal requirements of the Registrar. The applicant has provided a draft order and I will make an order in terms of that draft that will be initialled by me and will be placed on the Court file.