SUPREME COURT OF QUEENSLAND

CITATION:	*In the Will of Brian Lindsay O'Connor* [2011] QSC 360
PARTIES:	**PHYLLIS MAY O'CONNOR** (first applicant) **ANN MARGARET O'CONNOR** (second applicant) **PATRICIA LEE KATAJALA** (third applicant)
FILE NO:	SC No 7171 of 2011
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	29 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	Application on the papers, without oral hearing
JUDGE:	Peter Lyons J
ORDER:	**1. Pursuant to section 18 of the *Succession Act* 1981 (Qld), subject to the formal requirements of the Registrar, probate is granted to Phyllis May O'Connor, Ann Margaret O'Connor and Patricia Lee Katajala as executors, of the copy of the will signed on 16 June 2007, limited until the original will or more authenticated evidence of it be brought into and left in the Registry of this court.** **2. The costs of and incidental to this application be paid from the estate of the deceased.**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – EXECUTION – INFORMAL DOCUMENT INTENDED TO BE WILL – OTHER STATES OR TERRITORIES – where will of testator was not executed in accordance with s 10 of the *Succession Act* 1981 (Qld) – whether document was intended to form the will of the testator SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – TESTAMENTARY INSTRUMENTS – WHEN LOST, MISLAID, DESTROYED OR NOT AVAILABLE – IN GENERAL – where original document purporting to be the will of the testator was lost – whether copy of document should be admitted to probate SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL –

TESTAMENTARY INSTRUMENTS – INCORPORATION OF UNATTESTED AND DETACHED PAPERS – OTHER CASES – where papers of the deceased included an unsigned and undated note gifting money to specified persons – whether the note was a codicil to the will

Succession Act 1981 (Qld), s 10, s 18

Re Goodes [1922] SASR 180, cited
Chichester v Quatrefages [1895] P 186, cited
Queensland Trustees Limited v Ellison [1918] St R Qd 107, cited
Taylor v Waters (Unreported, Supreme Court of New South Wales, Powell J, 19 June 1992), cited

SOLICITORS: de Groots for the applicants

[1] Brian Lindsay O'Connor (*the deceased*) died on 29 July 2010.

[2] The applicants are respectively his wife (*Phyllis*) and his two daughters (*Ann* and *Patricia*).

[3] The applicants seek an order admitting to probate a copy of a document signed by the deceased, but not witnessed in accordance with s 10 of the *Succession Act* 1981 (Qld) (*Succession Act*). They seek that order, notwithstanding that the application was not served on any other person. Pursuant to r 489 of the *Uniform Civil Procedure Rules* 1999 (Qld), they propose that the application be decided without an oral hearing.

[4] The document which it is sought to have admitted to probate is a handwritten document, dated 16 June 2007. The original of the document was written by the deceased, in the presence of Phyllis, on about 16 June 2007.

[5] The document commences with a statement that it is the last will and testament of the deceased. It provides for the disposal of "all my belongings". It appoints the applicants as the "execetors (*sic*) of the above arrangement …".

[6] The document bears a signature. Phyllis does not recall seeing the deceased sign the original when he wrote it, but believes it was signed by him at that time, because he then gave her the original, and she placed it in a bedside table where it remained until after the deceased's death. On that evidence, the only rational explanation for the signature on the document is that it was placed there by the deceased, when he wrote the original.

[7] When the deceased handed the document to Phyllis, he told her that it was his will.

[8] In about June 2007, the deceased gave a copy of the document to Ann, in an envelope marked "To Ann". Ann cannot find that copy.

[9] In about June 2007, the deceased telephoned Patricia, and told her he was sending her a copy of the will, that he had left the original will with Phyllis, and that he had

given another copy of the will to Ann. Probate is sought of the copy sent to Patricia.

[10] On a number of occasions before his death, the deceased told Patricia that he had made a will and given it to Phyllis, and had given copies to Ann and Patricia.

[11] The document is not witnessed. In the last few years before his death, the deceased told Phyllis that a friend who worked for a law firm had told him that a will was required to be witnessed, but that the deceased did not think this to be necessary, as he knew of a man who wrote an unwitnessed will which was found to be valid.

[12] After the deceased died, the original was, for a time, in Phyllis's bedside table. Subsequent to the death of the deceased, it was removed from the bedside table. It cannot now be found, and the applicants believe it to have been destroyed when they sorted through the deceased's papers, and destroyed a number of them.

[13] The papers of the deceased also included a note, unsigned and undated, in the handwriting of the deceased, which said that he would like a friend, Mary Maloney, to receive $5,000, and her three sons each to receive $1,000. The applicants are now unable to locate that note, or a copy of it, despite searching for it, and believe it to be amongst the papers destroyed after the deceased's death.

[14] Section 10 of the *Succession Act* requires that a will be in writing, signed by the testator, in the presence of two or more witnesses present at the same time, at least two of whom must attest and sign the will in the presence of the testator, though not necessarily in the presence of each other. The document did not satisfy this requirement. Nevertheless, under s 18(2) of that Act, such a document forms the will of a deceased person if the Court is satisfied that the person intended the document to form the person's will. The Court is permitted by s 18(3) to have regard to any evidence relating to the way in which such a document was executed, and any evidence of the person's testamentary intentions, including statements made by the person. However, s 18(4) makes it clear that s 18(3) does not limit the matters to which the court may have regard in reaching the satisfaction identified in s 18(2).

[15] It is abundantly clear from the document itself that it was intended to form the will of the deceased. That conclusion is reinforced by the deceased's statements to the applicants that the document was his will; and his provision of copies of it to Ann and Patricia. That he considered it to be sufficient is apparent from his statement to Phyllis reflecting his belief that it was not necessary for the document to be witnessed.

[16] Accordingly, I am satisfied that the deceased intended the document to form his will.

[17] The applicant's submissions deal with the question of revocation by destruction. There was no scope for a finding of revocation in that manner in this case. That is because the evidence demonstrates the document to have been in existence after the death of the deceased.

[18] The note as to the deceased's intention that there be a gift to Mary Maloney and her three sons was, on the evidence, in materially different terms to the document for which probate is sought. It does not purport to be a will. It was not signed. It expresses a wish, but does not purport to record a disposition of the whole or any part of the estate of the deceased. In my view, it is not possible to conclude that the note relating to Mary Maloney and her sons either revokes the document dated 16 June 2007, or is a codicil to it.

[19] There is no other basis in the material for concluding that the document dated 16 June 2007 was subsequently revoked.

[20] The deceased had made another handwritten will in 2003. This will, too, was not witnessed as required by s 10 of the *Succession Act*. Because the document dated 16 June 2007 deals with the entire estate, it manifests a clear intention by the deceased to revoke the earlier will, and although the revocation is to be implied, nevertheless it is effective.[1]

[21] Accordingly, I am satisfied that the deceased intended that the document dated 16 June 2007 would alone constitute his will.

[22] The contents of a lost will may be proven by extrinsic evidence, such as a copy of the will.[2] In such cases, the copy may be admitted to probate.[3]

[23] I should add that, after this matter was referred to me for determination, a copy of the application and supporting material was served on Ms Maloney, who signed a form of consent to the proposed order.

[24] Accordingly, it is appropriate to make the orders sought by the applicants.

---

1 *Re Goodes* [1922] SASR 180; *Chichester v Quatrefages* [1895] P 186; both cited in Alun A Preece, *Lee's Manual of Queensland Succession Law* (Lawbook Co Sydney: 6th ed, 2007) at 84.

2 See *Lee* at [5.210], where a number of examples are cited.

3 *Queensland Trustees Limited v Ellison* [1918] St R Qd 107; *Taylor v Waters* (Unreported, Supreme Court of New South Wales, Powell J, 19 June 1992).