SUPREME COURT OF QUEENSLAND

CITATION:	*Garrihy v Garrihy* [2013] QSC 74
PARTIES:	**LEISHA MARIE GARRIHY** (applicant) **v** **INA MARY GARRIHY** (respondent)
FILE NO/S:	9835/12
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	8 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2013
JUDGE:	Dalton J
ORDERS:	**1. Set aside the caveat filed by the respondent on 23 October 2012.** **2. Subject to the formal requirements of the registrar, grant probate of the will of Eileen Theresa Garrihy dated 31 May 2001.** **3. Order that the respondent pay the costs of and incidental to the application on a standard basis to be assessed or agreed.**
SOLICITORS:	Affinity Lawyers for the applicant Respondent in person

[1] This is a dispute between two sisters over the estate of their mother. The application is pursuant to UCPR 626(2) to remove a caveat lodged by the respondent pursuant to r 624(2)(a) forbidding the grant of probate to the applicant of the deceased's will dated 31 May 2001. The applicant also applies for probate of the will in common form, subject to the formal requirements of the registrar.

[2] The interest claimed in the estate pursuant to the caveat is, "next of kin (eldest daughter) and entitled in intestacy to a share of the estate." The notice in support of the caveat lodged by the caveator goes on to say that the caveator requires, "the alleged will of [the deceased] propounded by the applicant to be proved in solemn form". The respondent contends that her mother did not have capacity to make the

will. Her mother was suffering from dementia when she died in 2010. Interpreting the respondent's claim as a claim that the deceased lady was suffering from dementia in 2001, the applicant produced a medical certificate from her treating doctor. It stated that the doctor was her treating doctor from 2006 until her death, and that in his view she did not suffer from dementia until 2008.

[3] The deceased died on 22 July 2010. At that stage all her offspring were adults over the age of 50 years. The deceased's will was made by the Public Trustee on 31 May 2001. It appointed the applicant as executor and trustee and one of the deceased's sons as the alternative executor and trustee. The estate was left to the applicant and her two brothers. The respondent was not mentioned in the will.

[4] An earlier will had been made for the deceased by the Public Trustee on 19 April 2001. It made the same appointments and bequests. It contained errors: the testator's son Sean was called Shern; the applicant's middle name was written as Mary rather than Marie.

[5] Two of the Public Trustee's computer-driven forms to record instructions to make a will were in evidence before me. The form completed before the will of April 2001 shows the mistakes Shern and Mary recorded by the officer of the Public Trustee who took instructions from the testator. In this form is a place where the officer of the Public Trustee has the opportunity to record what assets the testator owns. There is a space where the officer can type in information about "house/land location". At that part of the form the officer has typed in, "as above". That no doubt refers to the part of the form immediately above which gives the residential address of the testator. As well, at this part of the form, is a space where the officer at the Public Trustee can fill in information as to, "Value (Joint)" or "Value (Sole)" and "Benf". No information was entered in these spaces by the officer filling out the form. On this form the applicant's year of birth is recorded as 1955 rather than 1957. At the end of this form is the note apparently recorded by the officer of the Public Trustee, "Has left daughter, Ina Mary Garrihy out as apparently she already owns her own home or two homes and Ms Garrihy feels that she does not need further benefits from her estate."

[6] The second electronic instruction form was filled out prior to the will of May 2001 being executed. That form is the same insofar as the information about "house/land location" is concerned; it spells Sean properly, records the middle name of the applicant as Maria, when in truth it should be Marie, and retains 1955 as the date of birth for applicant. The note concerning the respondent at the foot of the electronic form remains the same. The May will contains the mistake "Maria" instead of "Marie".

[7] It was contended by the respondent to this application that the mistakes in the two wills and the two electronic forms produced by the Public Trustee show that her mother did not have capacity to make a will in 2001.

[8] In my opinion, the mistakes in the April and May 2001 wills, and the two sets of electronic instructions do not raise a doubt that the deceased woman was of unsound mind at the time she made her will. The mistake as to the name Sean is no doubt attributable to the testator's Irish accent. That the officer of the Public Trustee, who can now no longer be identified, also made a mistake as to the applicant's second name, in both forms of instructions, and in both wills, is in my view insignificant.

Further, I cannot attribute any significance to the incorrect date of birth given in the instruction forms. It may be that the testator herself made a mistake; it may be that the officer of the Public Trustee misheard the testator; it may be that the officer of the Public Trustee made a typographical error. There is nothing to show that the testator ever had a chance to review the forms of instructions and detect the mistake – that is, there is no evidence whatsoever that the testator ever knew that the mistake as to birth date had been made.

[9] Lastly, that the testator did not venture a value for her home when giving instructions to the Public Trustee is in my view insignificant. It certainly does not show that the testator was suffering from a mental illness. There is no evidence as to what she told the officer from the Public Trustee in relation to this – it might well have been that she said she could hazard a guess but thought it unreliable. Indeed, there is nothing to indicate that the officer of the Public Trustee ever asked her for a value in filling out this part of the form. That the form allowed for a value for assets held in joint names, and assets held in the sole name of the testator is plain. The respondent sought to draw from the fact that no value was entered on the form that her mother was unaware whether she held the properly jointly or in her sole name. No such conclusion can be legitimately drawn from the fact that the information is not recorded on the form.

[10] In short, I can see nothing in the errors in the two wills and the two electronic forms of instructions which raise a doubt as to whether the testator was of sound mind. The choice of executor and trustee, and the choice of beneficiaries is rational. The testator had not forgotten the respondent, she was aware of her, and her potential claim on the testator's bounty, but, for reasons which read rationally, decided that the respondent was well provided for and that her small estate should be distributed between her other three adult offspring.

[11] On the hearing of the application the respondent claimed that the lack of capacity she relied upon was not due to dementia, but due to mental illness. She was unable to specify what mental illness her mother might have suffered from. She made various allegations in relation to this, but could not support any of them by any evidence at all. Not only that, she said that she would not be able to gain such evidence in the future for, having made enquiries, no one who was in a position to provide evidence would do so because they said the respondent lacked authority – for example, as attorney, administrator or executor.

[12] The height of the case raised by the respondent is as follows:

> "I say that my mother suffered from mental problems her entire life. At times she would become extremely violent and would often hit me and my father. After one assault I had to remove my father from the house as I thought he was dead but I revived him some time later.
>
> My mother used to send me obscure notes, examples of which are exhibited hereto and marked "C"."

[13] The notes referred to as exhibit C include one perfectly normal Christmas greeting and one perfectly normal letter asking for a photograph. Also included is a Christmas card which records some racist views which, although repellent, I do not regard as a sign of insanity. As well, there is a short note which is addressed to the respondent. It reads oddly, but may well not if one knew the writer, and what was going on in her life at the time. There is no indication as to when it was written, or

what were the circumstances to which it refers. I am not prepared to find that it raises a doubt within the meaning of r 626(2)(b) that at the date of making the May 2001 will the deceased was not of sound mind. Lastly, exhibit C comprises two pages from a notebook concerning the Magna Carta, the European Convention on Human Rights and King John. The notes do not appear to be part of a letter to the respondent or anyone else. There is no indication at all as to when the deceased lady wrote them and in what circumstances. The pages might be construed as something humorous in relation to the rights of smokers. The notes contain quite lengthy, complex sentences which are properly constructed and display quite sophisticated thought. I cannot see that they raise a relevant doubt as to the testator's soundness of mind when she executed the will of May 2001.

[14] The respondent swears that after her father's death she fell out with her mother and siblings because, as executor of her father's will, it was necessary that she make difficult or unpopular decisions. She says that she has asked for information about her mother's affairs dating back to 2001, such as why she moved from her home to care, etc., and received no answers. Further, she says that she has made enquiries about the mortgage which was placed on land owned by her mother and her sister, the applicant, and received no answers. The respondent has commenced, or caused to be commenced, separate proceedings in relation to this land. The respondent says that she ought to be provided with this type of information so she can assess for herself whether or not anything untoward went on so far as her mother's last years; her mother's real property, and the estate were concerned. In this regard I think her concerns are aptly described in the terms used by Atkinson J in the passage quoted below. They amount to nothing more than irrational suspicion. They are not based on any known facts or inferences drawn legitimately from known facts. They do not amount to a doubt within the meaning of r 626(2)(b).

[15] In *Barrand v Coxall*[1] Mackenzie J observed that, "The threshold which a person seeking to remove a caveat must reach is high having regard to the statutory test." He was referring to the words "raise a doubt as to whether the grant ought to be made" in r 626(2)(b) of the UCPR. In *In The Will of Bruce George Gillespie Deceased*[2] McMeekin J discusses this observation and how it is to be applied in practical circumstances, depending upon the evidence which is put before the Court in any particular case. I also note the observations of Atkinson J in *Green v Critchley*[3] to the effect that, "Mere suspicion on the part of a disappointed potential beneficiary, without more, cannot be, and in this case, is not sufficient to suggest that the deceased lacked testamentary capacity …".

[16] The applicant asked for an order that the respondent pay the costs of and incidental to the application. I make that order. I have considered whether or not, consistently with the rule in probate cases, costs should come from the estate. In this regard I am grateful for the judgment of Applegarth J in *Frizzo & Anor v Frizzo & Ors (No 2)*[4] for setting out several of the important rules relating to the award of costs in probate proceedings. In particular there is a jurisdiction in probate proceedings for unsuccessful parties to have their costs paid out of the estate but clearly enough those costs remain within the discretion of the Court and that involves an assessment by the Court of the merits of the claim brought, albeit it is unsuccessful.

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1 [1999] QSC 352, [16].
2 [2012] QSC 335, [11] and following.
3 [2004] QSC 022, [19].
4 [2011] QSC 177, [25] and following.

I refer in particular to the extracts cited at paragraphs [26], [27] and [38] of the judgment in *Frizzo* in rejecting the idea that the costs of the respondent caveator in this matter ought to come out of the estate. As I have found, the claims made by the respondent were so unsupported by evidence that I was prepared to dismiss them on an application in a summary way because they do not raise a doubt as to whether or not the grant of probate should be made.

[17] I cannot see that the respondent has raised a doubt as to whether or not a grant of probate to the applicant ought to be made. For those reasons I:

(a) set aside the caveat filed by the respondent on 23 October 2012;

(b) subject to the formal requirements of the registrar, grant probate of the will of Eileen Theresa Garrihy dated 31 May 2001;

(c) order that the respondent pay the costs of and incidental to the application on a standard basis to be assessed or agreed.