

SUPREME COURT OF QUEENSLAND

CITATION: *In the Will of Leonie Lyle Warren deceased* [2014] QSC 101

PARTIES: **Graham John Warren and Ross Gregory Warren**
(applicants)

FILE NO/S: BS 4590 of 2013

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 21 May 2014

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGE: Peter Lyons J

ORDER: **1. The application is granted.**

CATCHWORDS: SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – GRANTS OF PROBATE AND LETTERS OF ADMINISTRATION – LIMITED, SPECIAL AND CONDITIONAL GRANTS OF PROBATE AND ADMINISTRATION – PROBATE OF LOST WILL – where the deceased made a duly executed will – where the will was subsequently lost – where a photocopy of the executed and properly witnessed will was discovered after the deceased’s death – whether the court should grant probate over the photocopy of the will

SUCCESSION – MAKING OF A WILL – REVOCATION – METHODS OF REVOCATION – DESTRUCTION OR MUTILATION, OR STRIKING OUT PORTIONS – PRESUMPTION OF DESTRUCTION OF LOST WILL INTENDED TO BE REVOKED – REBUTTAL OF PRESUMPTION – where the deceased made a duly executed and witnessed will that was held in the possession of her solicitors and then the solicitors for the applicants – where the will was subsequently lost – where the deceased spoke of that will consistent with it being the deceased’s last will – where a photocopy of that will remained among the deceased’s papers in an envelope which identified it as the deceased’s last will – whether the presumption of revocation in the case of a lost will applies – alternatively whether the presumption is rebutted

Uniform Civil Procedure Rules 1999 (Qld), r 375, r 601(1)(c), r 598

Cahill v Rhodes [2002] NSWSC 561, followed

Frizzo v Frizzo [2011] QSC 107, followed

SOLICITORS: Creevey Russell Lawyers for the applicants

- [1] **PETER LYONS J:** The application which commenced these proceedings sought, as filed, probate of a document described as "the unsigned will of (Leonie Lyle Warren) (*the deceased*) dated 1 November 1999". The document appears to be a computer print out in the form of a will, with places for signing by the testatrix and two witnesses (*unsigned copy*). The printed document included a date, 1 November 1999. The application was brought on the basis that a document in identical form had been executed by the deceased, and properly witnessed; but was subsequently lost.
- [2] An application was then made for the determination of the application for probate, without an oral hearing. I caused my Associate to make some enquiries relating to further evidence. Ultimately, that resulted in the discovery of a document, which appears to be a photocopy of an executed and properly witnessed will of the deceased, also dated 1 November 1999 (*photocopy will*). The contents of the unsigned copy and the photocopy will appear to be identical. The applicants now wish to apply for probate of the photocopy will. They have accordingly applied for leave to amend their application for probate.
- [3] I am prepared to grant the applicants leave to amend the application, to seek probate of the photocopy will¹.
- [4] It is convenient first to recite matters demonstrated by the evidence. In October 1999, the deceased consulted Ms McNamara, a solicitor, and at that time a partner of the firm of Biggs & Biggs, and gave her instructions for a will. Ms McNamara prepared a document in the form of a will, and sent it by post to the deceased. On 1 November 1999, the deceased attended at the offices of Biggs & Biggs, where she saw another solicitor, Ms Jardine. The deceased executed the original of the photocopy will in Ms Jardine's presence, and Ms Jardine witnessed the deceased's signature. The photocopy will also shows the signature of a second witness, who cannot be located.
- [5] On 1 August 2008, Biggs & Biggs merged with Thynne & Macartney, solicitors, and Ms McNamara became a partner of the latter firm. Until then, the will had been held in safe custody by Biggs & Biggs; and after the merger, it was held in safe custody by Thynne & Macartney.
- [6] The deceased had two sons, Graham and Ross, who are the applicants in these proceedings. In 2011, as attorney for the deceased, Graham engaged Creevey Russell Lawyers to act on her behalf, and authorised Thynne & Macartney to transfer the documents held for her in safe custody to Creevey Russell Lawyers. Documents, including the will, were sent by Thynne & Macartney under cover of a letter dated 22 June 2011, and were received the following day. However the will was subsequently lost. The unsigned copy was then obtained from Thynne & Macartney, resulting in the application.

¹ See r 375 of the *Uniform Civil Procedure Rules 1999* (Qld) (*UCPR*).

- [7] In December 2013 Graham's wife, Imelda, carried out a search of documents described as "the deceased's papers", and located the photocopy will. An affidavit was subsequently obtained from Ms Jardine confirming her signature as a witness to the will, and her practice in relation to witnessing the execution of wills, which provides the basis for some facts which I have set out earlier.
- [8] The jurisdiction of the court to grant probate of a copy of a will is well established² and is recognised in the *UCPR*³. In *Frizzo v Frizzo*⁴ Applegarth J accepted a statement from *Cahill v Rhodes*⁵ identifying five matters to be established in relation to such an application. They may be identified, for present purposes, as follows:-
- (a) whether there was a will;
 - (b) that the document revoked all previous wills;
 - (c) the presumption that, when a will has not been produced it has been destroyed, and thus revoked, must be overcome;
 - (d) the terms of the will;
 - (e) the will was duly executed.
- [9] It is clear that there is a will which the deceased duly executed. So much is made apparent by the photocopy will. That is also confirmed by the fact that Biggs & Biggs retained it in safe custody, subsequently sending it to Thynne & Macartney; and that Thynne & Macartney sent it to Creevey Russell Lawyers. Ms Jardine's evidence also supports this conclusion.
- [10] The will revoked all previous wills.
- [11] A testator may revoke a will, by destroying it, with the intention of revoking it⁶. Reference is sometimes made to a presumption, said to be that when a will has not been produced, it is presumed that it has been destroyed, and, it would seem, revoked⁷. In my view, the relevant presumption is more accurately stated in Lee⁸ as follows:
- "... the law presumes that, if a will last traced to the possession of the deceased testator cannot be found, it was destroyed by the testator with the intention of revoking it."
- [12] Here the will was last traced to the possession of Creevey Russell Lawyers. It seems to me that the presumption does not arise. In any event, the evidence demonstrates that the absence of the will is accounted for by its being lost by Creevey Russell Lawyers, which would be sufficient to rebut the presumption, if it arose. I also note that the will was in existence in June 2011, subsequent to the time when Graham commenced to act as attorney for the deceased. The evidence also demonstrated that the deceased spoke to the applicants on occasion about the will, as if it continued to exist; and communicated to them her intentions for the disposition of her property on her death, consistent with the contents of the will. Ms

² See Alun A Preece, *Lee's Manual of Queensland Succession Law* (Lawbook Co, 7th ed, 2013) (*Lee*) at [5.250], and cases there cited; see also *Re Clayton (dec'd)* [1957] QWN 35.

³ See r 601(1)(c).

⁴ [2011] QSC 107 at [161].

⁵ [2002] NSWSC 561 (*Cahill*) at [55].

⁶ Lee at [5.200].

⁷ See for example *Cahill* at [55].

⁸ At [5.220].

McNamara gave evidence that the deceased did not seek any advice relating to the revocation or alteration of the will. Similar evidence came from Ms Roberts, a solicitor employed by Creevey Russell Lawyers. The fact that the photocopy will remained among the deceased's papers, and in an envelope which identified it as a copy of the deceased's last will, also supports the conclusion that it was not revoked.

- [13] The photocopy will demonstrates the terms of the will.
- [14] Accordingly, this is an appropriate case to grant probate of the photocopy will, until the original will or more authenticated evidence be brought into and left in the Registry.
- [15] Since the contents of the photocopy will are identical with the contents of the unsigned copy, I would be prepared to dispense with further compliance with the requirements of r 598 of the UCPR.