SUPREME COURT OF QUEENSLAND

CITATION:	*Marino (as executor of the Wills of Alfio and Giuseppe Scandurra, deceased) v Cobavie & Anor* [2020] QSC 137
PARTIES:	**In SC No 406 of 2019:** **CHARLES ANTHONY MARINO (AS EXECUTOR OF THE WILL OF ALFIO SCANDURRA, DECEASED)** (applicant) **v** **ROBERT CLIVE COBAVIE** (first respondent) **MARIO JAMES COBAVIE** (second respondent) **In SC No 407 of 2019:** **CHARLES ANTHONY MARINO (AS EXECUTOR OF THE WILL OF GIUSEPPE SCANDURRA, DECEASED)** (applicant) **v** **ROBERT CLIVE COBAVIE** (first respondent) **MARIO JAMES COBAVIE** (second respondent)
FILE NO/S:	SC No 406 of 2019; SC No 407 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX TEMPORE ON:	27 March 2020
DELIVERED AT:	Cairns
HEARING DATE:	27 March 2020
JUDGE:	Henry J
ORDER:	**In SC 406 of 2019:** **1. The Court pronounces for the force and validity of the Will of Alfio Scandurra, deceased dated 9 August 2018.** **2. Subject to the formal requirements of the Registrar, that probate be granted to Charles Anthony Marino of the Will of Alfio Scandurra, deceased dated 9 August**

2018.

3. **The Applicant's costs of and incidental to the proceeding be paid out of the deceased's estate on an indemnity basis.**

In SC 407 of 2019:

1. **The Court pronounces for the force and validity of the Will of Giuseppe Scandurra, deceased dated 9 August 2018.**

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CATCHWORDS: SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – SOUNDNESS OF MIND, MEMORY AND UNDERSTANDING – where two brothers died within 17 days of each other – where the executor seeks a grant of probate in relation to each will – where a report from an aged care and memory clinician suggested that one of the brothers did not appear to have capacity to appoint an enduring power of attorney ("EPOA") – where there is evidence the brothers entertained eccentric opinions and supernatural beliefs – where there is evidence that the experienced solicitor taking the will did not have doubts as to testamentary capacity – where each brother was assessed by a general practitioner ("GP") within a month of the execution of the will who did not have doubts as to testamentary capacity – where there is also evidence that in the brothers' everyday lives and financial affairs they behaved rationally – whether each brother had testamentary capacity at the time of making their wills

Loupos v Demirgelis [2008] NSWSC 1207, cited
Petrovski v Nasev; The Estate of Janakievska [2011] NSWSC 1275, cited
Re Griffith; Easter v Griffith (1995) 217 ALR 284, applied
Tobin v Ezekiel (2012) 83 NSWLR 757; [2012] NSWCA 285, cited

COUNSEL: J Sheridan for the applicant
No appearance for the first and second respondents

SOLICITORS: Marino Lawyers for the applicant
No appearance for the first and second respondents

HENRY J: Giuseppe Scandurra died on 23 December 2018 aged 89. His brother, Alfio, died 17 days later aged 75. Their last wills were prepared by an experienced solicitor, and both wills were properly executed on 9 August 2018. They were each beneficiaries of the other's estate, but under the survivorship provisions thereof, Giuseppe's estate is to be passed equally to his nieces, Marina Crowell and Monica Scandurra, and Alfio's estate is to be passed to the Cancer Council of Queensland.

Under the brothers' previous wills, their nephews, Robert and Mario, were to be beneficiaries of the brothers' estates. The nephews lodged caveats against the grant of probate, which caused the executor to file a claim – in respect of each brother – seeking the court pronounce for the force and validity of the wills of 9 August 2018.

No defence was filed to the claim. However, it appears some form of negotiations occurred between the parties. It culminated in a communication from solicitors for the nephews, recording an acceptance of an offer as follows:

> "1. Our client will not file a defence and hereby provides an undertaking that they will not lodge any further caveat against the due administration of the estate of the deceased Giuseppe Scandurra and Alfio Scandurra for the wills dated 9 August 2018.
>
> 2. The estate, through the executor, will file an application in the Supreme Court of Queensland seeking a declaration as to the testamentary capacity of the deceased, Giuseppe Scandurra and Alfio Scandurra.
>
> a. The executor will bring to the attention to the Supreme Court of Queensland the evidence of Dr Franks and maintain the argument that the last will of Giuseppe Scandurra was a valid one.
>
> 3. Subject to court order, Marino Lawyers will seek that their costs be paid out of the estate on an indemnity basis for fees incurred in relation to the estates.
>
> 4. If the caveats in respect of both estates have not lapsed, our clients will attend their prompt removal."

That appears to have prompted an application in the proceeding for orders akin to those which were sought in the claim which initiated the proceeding. Substantial affidavit evidence has been filed. No party other than the applicant elected to appear at today's hearing of the application, although the solicitor acting for the brothers attended as a courtesy to the court.

It should be noted at the outset that the wills are, on their face, rational and that the experienced solicitor who took them was satisfied on thorough inquiry that neither brother lacked capacity and that each well understood the effect both of their instructions and of their resulting wills.

It should likewise be noted that each brother was assessed by a GP within a month of the execution of the wills and the GP considers that they had testamentary capacity.

However, an element of concern touching upon testamentary capacity arguably arose. It is addressed amidst the various evidence that has been placed before me by way of affidavit.

In medical records dated 18 September 2018, Dr Franks, an aged care and memory clinician, opined:

> "I think it is unlikely that Joe [a reference to Giuseppe] currently has capacity to appoint an EPOA or to sign an EPOA document. Given that he is probably at his baseline cognitively I suspect that he has not had such capacity for some time."

An addendum report was obtained dated 15 December 2019, in which he clarified:

> "The purpose of the last sentence [i.e. the above-quoted sentence] was simply to raise awareness of the possibility that Mr Scandurra had recently appointed an attorney without regard for his capacity to do so at the time."

It is self-evident that Dr Franks did not embark upon a precise determination of the extent of cognitive impairment. But more to the point, he could not have retrospectively made any assessment of Giuseppe's capacity at the earlier relevant time, namely, when he made his will.

As to Alfio, his general practitioner, Dr Catton, who, it will be recalled, was satisfied of his testamentary capacity, did make entries in medical records pertaining to Alfio, which related to a series of miscellaneous assertions, which suggested a possibility in the diagnosis section of his notes of "paranoid schizophrenia mild".

His records refer to Alfio speaking of a person having affected him when he put his hands on his shoulder and in a sense then not being able to eat properly and not feeling good. He also complained about a possible poisoning and thinking that the man put a spell on him and "has the devil". The reference to "poisoning" may have stemmed from an earlier occasion when he had been accidentally sprayed on the farm. Incidents of accidental fertiliser spraying on the person in a rural context, of course, are hardly unheard of. There are some other entries about possible poisoning from spray and how Alfio felt better after he had placed some honey on the affected location of his body, which were, presumably, irrelevant.

There was also a reference to Alfio speaking of the devil and that he had started vomiting after a woman had come to visit him and had touched him and, he believed, had demonised him, though he was not alleged to have been hearing voices. It is worth noting of these entries, that they were several years prior to the era of the execution of the will. Dr Catton enlarges in his affidavit upon really the unremarkable nature of these miscellaneous entries, it not being uncommon in the conduct of his practice in Innisfail to receive complaints from patients about exposure to fertiliser or poisons in a farming context and not unusual with patients that he has to deal with having beliefs in supernatural concepts. Indeed, as much can be said of anyone who believes in a religion. In particular, he notes people of Italian

Catholic background of little literacy sometimes exhibit the sorts of beliefs about the supernatural referred to by Alfio.

For my part, those aspects of the evidence touching, arguably, upon the issue of testamentary capacity are relatively minor objectively. I should note though that there is before me also some evidence in the form of a statutory declaration by Charles Podliano, who appears to have known the brothers and, for that matter, the nephews, and, so far as I can tell, appears to have been conscious of a breakdown in the relationship between them. In his statutory declaration given to solicitors for the nephews, he provides an opinion about their lack of capacity. I do not give any particular weight to a lay person simply asserting an opinion, but in the statutory declaration he does identify some evidentiary aspects in support of the foundation for that view.

For example, he notes in relation to Giuseppe that he formed the opinion, based on his numerous conversations with Joe, where he would be in and out in terms of timing and references to conversations, events and people. He went on to say:

> "I noticed that Joe couldn't fully comprehend the things that were happening around him or the things that other people were telling him."

He goes on to talk about being at the house when there was a receiving of instructions in relation to the enduring powers of attorney. It will be appreciated I am not here concerned with the validity of those documents.

In relation to Alfio, he mentioned that he began questioning Alfio's capacity at a time when Mr Podliano was still appointed as Giuseppe's personal attorney and was visiting Giuseppe at Babinda Hospital. He speaks of Alfio then yelling at him, calling him a liar, a scheme artist and a thief and starting "rambling like mad". He expresses the view that Alfio had become heavily paranoid as a result of what another person was telling him.

To say the least, a surprising aspect of the matter in light of that statutory declaration is that Mr Podliano was apparently present in the brothers' dealings with the solicitor who took their wills, and through that process, which appears to have involved a number of occasions, does not seem to have expressed the concerns to the solicitor, which he subsequently expressed in his statutory declaration. Ultimately, I do not need to make any findings as to credit about all of that because there appears to be very substantial other evidence strongly in support of each brother having the requisite testamentary capacity at the time of the making of their wills.

Before referring to that evidence, it is to be understood that the starting point is the proponent of the will bears the onus of satisfying the court that it is the last free will of a free and capable testator, and it must be proved the testator knew and approved the will's contents at the time it was executed so that it can be said that the testator comprehended the effect of what he or she was doing – see *Tobin v Ezekiel* (2012) 83 NSWLR 757, 770–1 [44]. There is, of course, a presumption that if a will is rational on its face, the testator was mentally competent, but that is displaced if circumstances raise a doubt as to the existence of testamentary capacity, in which case, an

evidential burden shifts to the party propounding the will to show the testator was of sound disposing mind – again, see *Tobin v Ezekiel* (2012) 83 NSWLR 757, 771 [45] and the cases cited therein.

The exercise now in play then involves focus upon capacity and an appreciation that the authorities do not require perfect mental balance and clarity, so long as the testator retains sufficient intelligence to understand and appreciate the testamentary act in its different bearings – see, for example, *Petrovski v Nasev*; *The Estate of Janakievska* [2011] NSWSC 1275, [246]–[252]. If there be then some degree of cognitive failure, that does not mean there is no capacity to make a will, and the focus ought be on the extent of the cognitive failure in making the relevant assessment – see, for example, *Loupos v Demirgelis* [2008] NSWSC 1207, [55]. It is to be borne in mind, consistently with the observations, for example, of Kirby P in *Re Griffith*; *Easter v Griffith* (1995) 217 ALR 284, 295, cited in *Petrovski* referred to earlier, that:

> "The court should not overlook the fact many wills are made by people of advanced years. In such people, slowness, illness, feebleness and eccentricity will sometimes be apparent – more so than in most persons of younger age. But these are not ordinarily sufficient, if proved, to disentitle the testator of the right to dispose of his or her property by will…"

Turning then to the factual matrix in this case, as against the, in my respectful view, minor evidence provoking any concern regarding testamentary capacity, there is, as I have already mentioned, the evidence of the solicitor who took the relevant instructions and of the GP, providing powerful evidence that both brothers had the requisite testamentary capacity at the time of making the wills. It does not stand alone.

Carla Roberts, who long knew both brothers, acknowledges while they were eccentric, particularly in their views about alternative medicines and the like, that in their everyday lives, tending to a variety of tasks, they remained, apparently, rational and functional.

Johnny Oliveri was a close friend of both brothers for a lengthy period and regularly visited them, including when they were in hospital. He recalled Giuseppe talking to him before making the last will in August about leaving his two nephews out of the will. In respect of both brothers in all of his many dealings with them, he says:

> "I never, for one minute, thought that either of them did not have the ability to understand their own finances."

Jody-Maree Oliveri is another longstanding friend of both of them. She too in her many observations of the brothers and many conversations with them did not at any point have the impression that they had any difficulty in rationalising or thinking clearly. The detail given by both her and Johnny Oliveri about the extent of their interaction and observations leaves me quite comfortable in combination with the evidence of the GP and, most particularly, of the solicitor, who went to some trouble and care in the taking of the wills, in concluding that both wills were the last wills of

free and capable testators, adequately possessed of the requisite testamentary capacity.

There are draft orders before me in each case, by which I would pronounce for the force and validity of the wills and, subject to the Registrar's requirements, grant probate, awarding costs on an indemnity basis to the applicant. Those orders should be made.

I order as per the draft orders signed by me and placed with the papers.