SUPREME COURT OF QUEENSLAND

CITATION:	*Public Trustee of Queensland v Tennila & Ors* [2018] QSC 84
PARTIES:	**THE PUBLIC TRUSTEE OF QUEENSLAND as Administrator of the Estate of DEREK MILLETT, deceased under Section 36 *Public Trustee Act 1978*** (applicant) **v** **PATRICIA ELIZABETH TENNILA** (first respondent) **NINA MILLETT, DAVID MILLETT AND JOHN MILLETT** (second respondents)
FILE NO:	BS871 of 2018
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	26 April 2018
DELIVERED AT:	Brisbane
HEARING DATE:	1 March 2018
JUDGE:	Mullins J
ORDER:	**1. The Court pronounces for the force and validity of the will of Derek Millett, deceased dated 6 March 2007.** **2. Subject to the formal requirements of the Registrar, an order to administer the estate of Derek Millett, deceased, according to the copy of his will dated 6 March 2007 be granted to the applicant, limited until the original of that will or more authentic evidence thereof is produced.** **3. The applicant's costs of the proceeding be paid out of the deceased's estate on the indemnity basis.**
CATCHWORDS:	SUCCESSION – MAKING OF A WILL – TESTAMENTARY CAPACITY – LOSS OR LACK OF CAPACITY AND STATUTORY WILLS – TESTAMENTARY INSTRUMENTS – KNOWLEDGE AND APPROVAL OF CONTENTS GENERALLY – where the first respondent and the deceased commenced living together on the property owned by the deceased and his son – where the deceased and his son were in dispute over the property – where the deceased made a will with the Public Trustee while the dispute with his son was unresolved – where under the will the deceased's friend was named as

executor and the first respondent was the residuary beneficiary – where the officer from the Public Trustee who made the will noted the deceased was not able to answer all the questions about his assets and relied substantially on the first respondent for answers – where the officer noted her doubt about capacity and advised the deceased to obtain a doctor's certificate – whether the deceased had testamentary capacity or knew and approved of the contents of the will

Public Trustee Act 1978 (Qld) , s 29
Uniform Civil Procedure Rules 1999 (Qld), r 22, r 629

Frizzo v Frizzo [2011] QCA 308, followed
Frizzo v Frizzo [2011] QSC 107, followed

COUNSEL: R T Whiteford for the applicant
D M Madsen (*sol*) for the first respondent

SOLICITORS: Official Solicitor to the Public Trustee of Queensland
Madsen Law for the first respondent

[1] The applicant is administering the estate of the late Derek Millett under s 36 of the *Public Trustee Act* 1978 (Qld). Mr Millett died on 7 March 2013 at the age of 79 years. He was survived by the two children of his first marriage (Nina Millett and David Millett) and the one child of his second marriage (John Millett). Mr Millett's three children are the second respondents in this proceeding. The second respondents were served with the originating application and the supporting affidavit of the applicant's director of Trusts and Estate, Ms Blackburne, which was filed on 25 January 2018. Nina and David advised the applicant they did not wish to be heard on the hearing of the application and would abide the order of the court. Nina and David live in England and did not have any ongoing relationship with Mr Millett. There is evidence of service of the documents on John and there was no appearance by him, when called.

[2] The first respondent, Ms Tennila, met Mr Millett in early 2003 and he became her friend and carer. In about August 2003, she commenced living with Mr Millett at a property in Jimboomba which he owned with his son John as joint tenants. John and his partner lived in the house on the property. Mr Millett and the first respondent lived in the demountable building on the property in modest circumstances. Ms Tennila asserts that when she moved in with Mr Millett it "marked the commencement of our living together as a couple".

[3] By 2006 a dispute arose between Mr Millett and John over the ownership of the Jimboomba property. John proposed to buy out Mr Millett's interest. In September 2006 Mr Millett consulted O'Dwyer & Bradley Solicitors who advised Mr Millett to sever the joint tenancy, pending resolution of the negotiations with John over the proposed buy out. Mr Millett's solicitors gave notice on 28 November 2006 to John pursuant to s 59 of the *Land Titles Act* 1994 (Qld) of the intention of Mr Millett to lodge a transfer to convert the joint tenancy into a tenancy in common. On 15 December 2006 John lodged a caveat over the property claiming a greater than one-half interest in the

property on the basis of financial contributions made towards the property. Mr Millett signed the transfer to effect the severance of the joint tenancy on 20 December 2006. The parties agreed in February 2007 to appoint a valuer to value the property. The valuation was obtained on 20 February 2007. John's solicitors made an offer on 28 February 2007 to buy out Mr Millett's interest for $80,000. Ms Tennila exhibits to her affidavit drafts in Mr Millett's handwriting to explain to his solicitors the background to the dispute with his son over the property in anticipation of litigation.

[4] While that dispute remained unresolved, on 6 March 2007 Mr Millett and Ms Tennila saw Ms Hansen who was employed by the applicant as a will maker at the Beenleigh Courthouse. Ms Tennila also gave instructions for her will at that time. Mr Millett had not previously made a will. It did appear a little unusual that they attended on an officer of the applicant to have wills made, when solicitors were otherwise then acting for Mr Millett. Ms Tennila explained that she had made inquiries as to where and how Mr Millett could make his will and that was why they went to the applicant's office at the Beenleigh Courthouse.

[5] Ms Tennila was present when Mr Millett gave instructions to Ms Hansen for his will. Mr Millett was retired and was in receipt of both Australian and British pensions, as he had been a soldier in the British army. His assets were modest with the most significant being his interest in the Jimboomba property. He also had funds in a credit union account into which his pensions were paid. Mr Millett had authorised Ms Tennila to access the credit union account for his living expenses.

[6] Ms Hansen recorded the instructions using the applicant's standard will making computer software which displays a questionnaire that is answered by typing in information or clicking on boxes. When the questionnaire is completed, the software allows a will to be printed which incorporates the information from the questionnaire.

[7] The software includes a section for notes. Ms Hansen's notes about Mr Millett's capacity recorded at the time of taking the instructions were:

> "As Testator has a memory problem. I have advised him to get doctors certificate as his son might be able to contest the Will due to lack of capacity. Testator was not able to answer all the questions about his assets, as his partner is in charge of the finances. He relyed (sic) heavily on his partner for answers to my questions. I advised her not to answer as, if she did, I would have to make a note about possible influence … Testator tried to compensate his forgetfulness with lots of 'funny' comments. I have doubt about his capacity but will await Dr's Certificate."

[8] Mr Millett executed his will on that day. It was in contemplation of, but not conditional on, his marrying Ms Tennila. It appointed a friend, Mr Roberts, as executor and left a beret and bugle to Mr Roberts. The will left his residuary estate to Ms Tennila or, if she did not survive him, to Ms Tennila's two children. Clause 11 of the will contains a non-provision declaration to explain that, after giving the matter consideration, the deceased decided not to make provision in this will for his son John.

[9] Mr Millett took the original will home with him to the Jimboomba property. Ms Tennila never saw it again and did not discuss it with him again. A doctor's certificate was not subsequently provided to the applicant, as requested by Ms Hansen.

[10] The transfer to sever the joint tenancy was lodged for registration on 18 April 2007. John increased his offer to $100,000 to buy out Mr Millett's interest in the property which was accepted. The parties executed the deed of settlement dated 21 June 2007.

[11] At some time, but when is not known, Mr Millett gave an unsigned copy of the will to Mr Roberts and told him that he was to have his beret and bugle and that he wanted Mr Roberts to be his executor.

[12] In a letter to the applicant dated 5 September 2014 in which Mr Roberts was responding to questions relevant to locating the original will, Mr Roberts recalls that Mr Millett joked with him about the medical certificate which he had to prove that "he really was sane after all". Ms Tennila indirectly addresses that Mr Millett obtained such a medical certificate in paragraph 39(d) of her affidavit:

> "I recollect that Derek gave to his friend Allan Roberts (the Executor named in his Will) the Doctors letter confirming Derek had capacity to make his Will and a copy of the Will. To the best of my recollection Derek did not ever give his original Will to Allan."

[13] Under the deed of settlement John had to pay the sum of $100,000 to Mr Millett within 30 days from the date of execution of the deed and Mr Millett had to vacate the property within the same time period or, if the settlement sum was paid later than 30 days from the execution of the deed, on payment of the settlement sum. That accords with Ms Tennila's recollection that Mr Millett resided with her at her home from about July or August 2007.

[14] Mr Millett had a fall outside the Mater Adult Hospital on 17 October 2007 while picking up Ms Tennila from the outpatient clinic. A CT scan of his head was performed that revealed "generalised cerebral atrophy with large ventricle and large cisterns". He was referred to his general practitioner for further treatment. Mr Millett then attended on Dr Vijay Tandon on 18 October 2007 for the first time who took over his medical care. A report from physician Dr Atkins at the Mater Hospital to Dr Tandon dated 29 November 2007 noted that Mr Millett had been referred to the Mater Hospital for "assessment of slowing of gait and cognition over the preceding months, culminating in falling". By July 2008 an ACAT social worker noted in her letter to Dr Tandon that "there are concerns around an early dementia diagnosis", although also noting that the minimal tests given to detect short term memory loss "are not in any way conclusive".

[15] Mr Millett's cognitive state did decline and, on 27 November 2008, Ms Tennila applied to the Guardianship and Administration Tribunal for orders appointing a guardian and administrator for Mr Millett. In her application Ms Tennila referred to Mr Millett being diagnosed with short term memory loss in 2007, but I would not infer that purported to date the memory loss earlier than the medical evidence. Mr Roberts made specific reference to being in possession of the unsigned copy of Mr Millett's will in the form that he completed for the Tribunal in February 2009. On 10 March 2009 the Tribunal

appointed the Adult Guardian as Mr Millett's guardian for accommodation and provision of services and the applicant as Mr Millett's financial administrator. Neurologist Dr Staples of the Mater Hospital did a report for Dr Tandon (dictated on 25 March 2009) which noted that cognitive impairment had progressed since about 18 months previously which would date identification of the signs of poor short term memory to September 2007. Mr Millett moved in September 2009 from Ms Tennila's house into a nursing home where he remained until he died.

[16] Ms Tennila thoroughly searched her home and could not find the original of the 2007 will. Ms Tennila recalls that, when it came time to vacate the Jimboomba property, they did so quickly and some of Mr Millett's belongings such as furniture, ornaments and personal effects were left behind. Ms Tennila has had various cleaners and carers in her home since 2009 and on occasions efforts were made to remove rubbish and unneeded items from her home. Ms Tennila considers it a possibility that Mr Millett's original will may have been disposed of by a cleaner on such an occasion. Ms Tennila states that Mr Millett never said anything to her that suggested he was unhappy with his will and wished to change or revoke it. The nursing home had no documents belonging to Mr Millett. The usual inquiries and advertisements have been made in an attempt to locate the will and all have been unsuccessful. Mr Roberts renounced his entitlement to apply for any grant in respect of the deceased's will.

Issue to be decided

[17] Mr Millett's estate is small. The estate currently consists of cash of about $106,500, before the costs of this proceeding. The circumstances in which the instructions were given by Mr Millett for his will by relying on Ms Tennila to answer the questions about his assets gives the applicant a doubt about the validity of Mr Millett's will either due to lack of testamentary capacity or lack of knowledge and approval of the contents of the will. The applicant does not assert that Ms Tennila exerted undue influence over the deceased.

[18] This proceeding was commenced by originating application to resolve the issue of the validity of the will. The applicant seeks an order that the court pronounce against the force and validity of Mr Millett's will dated 6 March 2007 or, alternatively, the court pronounce for the force and validity of the deceased's will dated 6 March 2007.

[19] In the normal course, a proceeding to prove or disprove a will in solemn form should be commenced by claim, as the definition of "contested proceeding" in r 629 of the *Uniform Civil Procedure Rules* 1999 (Qld) refers back to a claim as defined in r 22. There are good reasons for using the pleadings to expose what aspects of the circumstances of the making of a will may affect the validity of the will. In this matter, the parties agreed to resolve the issue on the state of the evidence that was filed in connection with the application and on the basis of inferences that could be drawn from known facts. The grounds relied on by the applicant of whether Mr Millett had testamentary capacity or knew and approved the contents of his will had been identified with precision by the applicant in correspondence with Ms Tennila. The applicant's decision to pursue the matter by way of an originating application to minimise the erosion of a small estate by costs is an understandable decision that should not preclude the matter being determined, despite the irregularity in the form of the proceeding.

Was the 2007 will a valid will?

[20] It is unfortunate that Ms Hansen did not insist on taking the instructions from the deceased for his will in the absence of Ms Tennila. I was assured by Mr Whiteford of counsel on behalf of the applicant that the practice in the applicant's office has changed since 2007.

[21] Although the deceased's will dated 6 March 2007 was duly executed, the reservation relevant to capacity and knowledge and approval of the contents of the will contained in the note made by the applicant's officer who took the instructions for the will raises a doubt on both matters. The evidential onus therefore moves to Ms Tennila to prove the validity of the will on the balance of probabilities.

[22] The principles of law on testamentary capacity as set out by Applegarth J in *Frizzo v Frizzo* [2011] QSC 107 at [21] to [25] were applied (without any disapproval) on the appeal in *Frizzo v Frizzo* [2011] QCA 308 at [24]. Ms Hansen's note is only one piece of evidence on testamentary capacity. It is submitted on behalf of the applicant that, as Ms Tennila does not contradict Ms Hansen's observations, an inference in reliance on *Jones v Dunkel* (1959) 101 CLR 298 should be drawn that her evidence about Mr Millett's ability to recall his assets would not favour her case. That approach may be relevant in a case where the evidence on capacity was finely balanced. Such an inference would be one piece of evidence in this case that does not sit well with the rest of the evidence that Mr Millett was making the will because of his dispute with his son over his major asset (about which Ms Hansen's note does not suggest he was unaware) and where his other assets were otherwise minimal. The evidence adduced by Ms Tennila as to the parameters of that dispute, Mr Millett's knowledge of it (including the outstanding offer to settle made by John) and its role in prompting Mr Millett to make a will that specifically dealt with his then current attitude towards John was sufficient to show that Mr Millett had the requisite awareness of the nature, extent and value of the estate which he could dispose of under the will. There is no issue that he was estranged from his two children who lived in England or that he was otherwise in a happy relationship with Ms Tennila at the time he made the will which made her the likely recipient of the residuary gift under his will, in the absence of gifts to his children.

[23] It seems that Ms Hansen's advice about obtaining a doctor's certificate to preclude a challenge to the will by John was acted on by Mr Millett from what he informed Mr Roberts about his possession of such a medical certificate, even though no medical certificate has emerged in the evidence. The fact that Mr Millett appeared to have some understanding about the purpose of such a medical certificate when he engaged with Mr Roberts about his will is also relevant. Ms Tennila has discharged the onus she bears to show that Mr Millett had testamentary capacity when he gave instructions for, and executed, the 6 March 2007 will.

[24] Because Ms Tennila was recorded by Ms Hansen as answering questions directed to Mr Millett, the applicant submits that raises a suspicious circumstance about whether Mr Millett had the requisite knowledge of the contents of the will and approved them. The applicant submits that a *Jones v Dunkel* inference should be drawn that Ms Tennila's evidence on whether she provided answers to Ms Hansen's questions or the extent to which Mr Millett gave the instructions would not favour her case. This was a surprising

submission in the absence of evidence from Ms Hansen as to the extent the instructions were confirmed by Mr Millett, even if answers had been first given by Ms Tennila, and the process that was undertaken at the time of execution of the will and, in particular, whether the will was read over to Mr Millett or whether he read the will himself. Even if a *Jones v Dunkel* inference were drawn against Ms Tennila, it is outweighed by sufficient evidence adduced by Ms Tennila to show that the will encompassed the wishes of Mr Millett at the time, when he was in the midst of the dispute with John. Again, it is not irrelevant that subsequent to the execution of the will Mr Millett knew that he had made a will and was able to inform Mr Roberts of his role as executor and the gifts made to him under the will. Ms Tennila has discharged the onus she bears to show that Mr Millett knew and approved of the contents of the 6 March 2007 will.

Lost will

[25] The deceased's close friend Mr Roberts was given a copy of the will that was executed on 6 March 2007 and Mr Roberts does not suggest there was any change of mind by Mr Millett in respect of that will. As the medical evidence suggests that there was an observable decline in Mr Millett's mental capacity from September 2007, the deceased would thereafter have lost capacity to revoke the 6 March 2007 will. There is no issue that the will was duly executed on 6 March 2007. It is therefore appropriate to grant the applicant an order to administer the deceased's estate in respect of a photocopy of the will, limited until the original of the will or more authentic evidence of the will is produced.

Orders

[26] Ms Tennila's solicitors submitted that it was unreasonable of the applicant, in the absence of medical evidence that cast a doubt over Mr Millett's capacity to make his will on 6 March 2007 or suspicious circumstances attending the making or execution of that will, to seek orders that the court pronounce against the force and validity of Mr Millett's will dated 6 March 2007. Ms Tennila's solicitors therefore submitted that the order for costs in favour of the applicant should be limited to those costs that related only to seeking an order in respect of the validity of the will dated 6 March 2007.

[27] In all the circumstances, it was not unreasonable of the Public Trustee to seek a ruling from the court as to the validity of the will dated 6 March 2007. The material was presented to the court in an objective way and consistent with the duty of the applicant in administering Mr Millett's estate. In addition, the applicant has the benefit of s 29(8) of the *Public Trustee Act* 1978 (Qld) which gives the applicant a statutory entitlement for costs in respect of an application for an order to administer or to propound a will in solemn form of law, unless the court otherwise orders in exceptional circumstances. I would therefore not limit the order for costs in the applicant's favour in the manner submitted on behalf of Ms Tennila's submission.

[28] The orders which should be made are:

1. The Court pronounces for the force and validity of the will of Derek Millett, deceased dated 6 March 2007.

2. Subject to the formal requirements of the Registrar, an order to administer the estate of Derek Millett, deceased, according to the copy of his will dated 6 March 2007 be granted to the applicant, limited until the original of that will or more authentic evidence thereof is produced.

3. The applicant's costs of the proceeding be paid out of the deceased's estate on the indemnity basis.