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**TRANSCRIPT OF PROCEEDINGS**

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**SUPREME COURT OF QUEENSLAND**

**CIVIL JURISDICTION**

**BURNS J**

**No 2443 of 2018**

**RE: MARIAN MOYNE DEMOWBRAY**

**BRISBANE**

**9.16 AM, WEDNESDAY, 28 MARCH 2018**

**JUDGMENT**

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

**WARNING:** The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: Marian Demowbray died on 20 May 2017. Twelve days earlier, her friend, Louis Simon, and his partner, Fiona Stewart, gathered at her bedside in a cardiac wardroom at the Cairns Hospital. It was early in the evening. Ms Demowbray knew she was dying; she told them she would not be going home.

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Ms Stewart asked Ms Demowbray whether she had made a will. She replied that she had not. As Ms Demowbray appeared to Ms Stewart to be concerned that she would die soon, Ms Stewart suggested that they video her last will, and Ms Demowbray agreed to do this. An audio-visual recording was subsequently made on a mobile phone belonging to Mr Simon. Both Mr Simon and Ms Stewart have deposed to observations they made of Ms Demowbray to the effect that she appeared to be of sound mind throughout the duration of the recording. The only persons in the room when the recording was made were Ms Demowbray, Mr Simon and Ms Stewart. Neither Mr Simon nor Ms Stewart are beneficiaries under what is now proposed as Ms Demowbray's last will, that is, the audio-visual recording.

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On the following day, 9 May 2017, Ms Demowbray spoke to a social worker who was in attendance at the cardiac care unit at the Cairns Base Hospital. Ms Demowbray told this social worker, a Ms Abbott, that she had recorded her wishes on her friend's phone and that she meant those wishes and that recording to be her final will. She told Ms Abbott the names of her friends. Ms Abbott was concerned that the recording of Ms Demowbray's last wishes, in this way, would not have any legal effect, so she contacted the Public Trustee of Queensland to ascertain whether someone could attend at the hospital to make a will or assist Ms Demowbray to make a will complying with the formal requirements of the *Succession Act* 1981 (Qld). The Public Trustee was unable to attend, and so Ms Abbott contacted private lawyers to attend at the hospital to assist in the making of a formal will. I infer that she relayed that information to Ms Demowbray because, at some point, Ms Demowbray told her that she did not want private lawyers to attend the hospital because she did not "want to pay the high cost for the lawyer to come to the hospital to do a written will".

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On the same day Ms Abbott had discussions with a medical officer attached to the Cairns Base Hospital, Dr Kang, regarding Ms Demowbray's capacity. The medical officer confirmed that Ms Demowbray would have had capacity at the time when the recording was made on the previous day, and also at the time when she was assessed on 9 May 2017.

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A transcript of the recording was produced and placed in evidence before the court. However, it was incomplete and needed to be supplemented. That has subsequently occurred, and a final check of the accuracy of the transcript undertaken, so that there is now before the court a complete and accurate transcript of the audio-visual recording.

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As appears from the transcript and on watching and listening to the recording, Ms Demowbray appointed Patricia Mary Colvin to be the executor of her estate, and she left her house property in Ravenshoe to a woman by the name of Ellen Gossam, any

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money in her bank account with the National Australia Bank to a man by the name of Trevor Thomas McGregor, a van to a man by the name of Michael Wormald, and the rest and residue of her estate to Ellen Gossam.

- 5 If the recording is not admitted to probate, there will be an intestacy, the only beneficiary of which will be Ms Demowbray's mother, Mrs Van Straten. Mrs Van Straten was placed on notice of the making of this application but has not sought to be heard on it.
- 10 Ordinarily under the *Succession Act* a will must be in writing and signed by the testatrix in the presence of two or more witnesses who are present at the same time. However, by s 18 of the Act, the court may dispense with the formal execution requirements under the Act in the circumstances specified in that provision. Section 18 is in these terms;
- 15
- (1) *This section applies to a document, or a part of a document, that—*
    - (a) *purports to state the testamentary intentions of a deceased person; and*
    - (b) *has not been executed under this part.*
  - 20 (2) *The document or the part forms a will, an alteration of a will, or a full or partial revocation of a will, of the deceased person if the court is satisfied that the person intended the document or part to form the person's will, an alteration to the person's will or a full or partial revocation of the person's will.*
  - 25 (3) *In making a decision under subsection (2), the court may, in addition to the document or part, have regard to—*
    - (a) *any evidence relating to the way in which the document or part was executed; and*
    - 30 (b) *any evidence of the person's testamentary intentions, including evidence of statements made by the person.*
  - (4) *Subsection (3) does not limit the matters a court may have regard to in making a decision under subsection (2).*
  - 35 (5) *This section applies to a document, or a part of a document, whether the document came into existence within or outside the State.*

As will be apparent from the terms of that provision, and as was observed by Powell JA in *Hatsatouris v Hatsatouris* [2001] NSWCA 408 in relation to an analogous provision in New South Wales, on an application such as this to admit a document to probate, the court is concerned with three questions. (1) was there a document, (2) did the document purport to embody the testamentary intentions of the deceased, and (3) is there evidence to satisfy the court that at the time the document was brought into being, or at some later time, the deceased, by some act or words, demonstrated

that it was her intention that the document should, without more, operate as her will?  
And see *Lindsay v McGrath* [2016] 2 Qd R 160 at [57].

5 It is now well established that the evaluation of the evidence when considering the  
application of s 18 must be conducted with great care. What must be established on  
the balance of probabilities is that the deceased wished for the particular document to  
be her final will and wanted no further changes to it. It is not sufficient for the  
document to be merely consistent with other statements of the deceased, or that the  
10 document sets out testamentary intentions of the deceased. Documents that are  
tentative, preliminary or incomplete expressions of testamentary intention or which  
are demonstrated to have been prepared for further consideration or thought will not  
suffice: see *Lindsay v McGrath* at [60]-[62].

15 As to whether the recording is a document for the purposes of s 18 of the *Succession  
Act*, the definition of “document” found in schedule 1 of the *Acts Interpretation Act  
1954* (Qld) is incorporated. That definition includes this: “any disc, tape or other  
article or any material from which sounds, images, writings or message are capable  
of being produced or reproduced (with or without the aid of another article or  
device)”. It is clear to me that the mobile phone in question, which, I record, was  
20 received in evidence as exhibit 1, is an article from which sounds, images, writings  
or messages are capable of being produced or reproduced, and as such, the recording  
is properly characterised as a document for the purposes of s 18.

I emphasise, though, that there is nothing particularly remarkable about that finding.  
25 The courts, here and interstate, have on previous occasions made similar findings and  
in the course of doing so held that a DVD recording was a document for the purposes  
of this provision (see *Mellino v WNuk* [2013] QSC 336; *In the estate of Wilden*  
(2015) 121 SASR 516; *Re Estate of Wai Fun Chan, Deceased* [2015] NSWSC  
1107), as well as a document created on an iPhone (see *Re Yu* [2013] QSC 322) and  
30 an unsent text message (see *Re Nichol* [2017] QSC 220).

I add also that, where what may be described as a video will is admitted to probate,  
the court will, ordinarily, require that a verified transcript of the recording be  
produced to the court and that it be incorporated in some way in the order recording  
35 the grant of probate. As Lindsay J observed in *Re Estate of Chan* at [25]:

*This serves the governing purpose of the probate jurisdiction, allowing for the  
character of a grant as an instrument of title to property ... by rendering the  
will available to the public and interested parties in a conventional, accessible  
40 form.*

In such a case the grant should ordinarily include an express recital to the effect that  
the will-maker’s testamentary statement takes the form of a video recording, a  
transcript of which forms part of the grant, or is at least appended.

45 Turning then to the second question as to whether the recording embodied Ms  
Demowbray’s testamentary intentions, that is something about which there can be no

doubt. During the recording Ms Demowbray made clear that she wished to leave “Everything” to Ms Gossam, including her house property, pets and all other property. There are only two exceptions to this general bequest, and that was that any money in her bank account with the National Australia Bank was to go to “Trevor”, who had been living for some months in Ms Demowbray’s home, and a van was to go to a person called “Mick”, a friend of Ms Demowbray. The other evidence before the court establishes that “Trevor” is Trevor Thomas McGregor and “Mick” is Michael Wormald. After stating these wishes, Ms Demowbray confirmed that she was happy with what she had said and that she had nothing to add. She had preceded her bequests by saying that they were “what I want to happen”, and that it was her “last wish”. She also considered other possible claims on her estate, including her sister, whom she named, and a person she referred to as her “long-lost daughter”, which person, the evidence establishes, was adopted out by her at birth.

Turning then to the third question, that is whether the court is satisfied, at the time the recording was made, Ms Demowbray intended that it operate as her will and dispose of her property on death, again there can be no room for doubt about that. So much is clear from the circumstances surrounding the making of the recording, what is said during the recording and what is said by Ms Demowbray to Ms Abbott on the following day. I record also that I have watched and listened to the recording; it was conducted with appropriate solemnity. It was clear to me that Ms Demowbray intended that the recording should operate as her last will.

I should also add that, where a will is not duly executed under the Act, that is, in accordance with the formal requirements of the Act, there can be no presumption of testamentary capacity. The onus of proving capacity falls on the party seeking to satisfy the court that the recording constitutes the last will of the deceased, in this case, the executor named by Ms Demowbray, Ms Colvin. The relevant test in this regard may be traced back to the decision in *Banks v Goodfellow* (1870) LR 5 QB 549, but is, with respect, well summarised by Applegarth J in *Frizzo v Frizzo* [2011] QSC 107. In short, the deceased must be aware and appreciate the significance of the act on which she is about to embark, that is a final disposition of her estate. She must also be aware, at least in general terms, of the nature, extent and value of the estate over which she has a disposing power, as well as those who may reasonably be thought to have a claim on her bounty. And she must have the ability or capacity to evaluate, and discriminate between, the respective strengths of the claims or the respective claims of such persons.

In this case, there is evidence from Ms Stewart, Mr Simon and Ms Abbott as to the mental state of Ms Demowbray at the time of the recording. Ms Abbott’s account includes an assessment conducted by Dr Kang on 9 May 2017 to the effect that Ms Demowbray would have had capacity at the time of the recording. Indeed, it is to be observed that Ms Demowbray was asked that very question during the recording and responded that she was “very compos mentis”. Again, having watched and listened to the recording, I can only agree. On the whole of the evidence, there can be no doubt that she was aware at the time of the recording of what she was doing, of the composition of her estate and the competing claims that might be made in respect of

it. I am therefore satisfied that Ms Demowbray had testamentary capacity at the time when the recording was made.

5 Otherwise I am satisfied that the notice requirements have been fully met: see rr 598 and 599 of the *Uniform Civil Procedure Rules* 1999 (Qld).

For these reasons the audio-visual recording will be made the subject of a grant of probate. But there is one last matter I wish to emphasise.

10 No one should be encouraged by this or other decisions of the court to freely embark on the making of wills, other than in accordance with the formal requirements of the Act. In this case Ms Demowbray declined the offer of a private lawyer to attend at the hospital to draft a will on her behalf. She did so because she did not want to incur the cost of that exercise. But with great respect to Ms Demowbray, that is a  
15 short-sighted economy. A will complying with the Act would have been admitted to probate through the registry. Although Ms Demowbray has avoided the cost of a private lawyer attending at the hospital to draft and assist in the attestation of a formal will, perhaps a cost measured in a couple of hundred dollars, her estate will be depleted by the much more significant cost that this application will incur.

20 There will be cases where, through sheer urgency, there is no alternative, but in this case there was. It is understandable why Ms Demowbray chose to accept the offer of the recording of a video will, but that has had the result that this application needed to be made and brought before the court.

25 What I have just said was also the subject of remarks to similar effect by Lindsay J *Re Estate of Chan* [2015] NSWSC 1107. In that case his Honour said at [3]:

30 *Compliance with formal requirements for the making of a will ... may involve unwanted expense and inconvenience for a prospective will-maker but, if the task of compliance is not confronted in life, intended beneficiaries, and potential claimants on an estate, may be forced to bear a heavy burden after a will-maker's death.*

35 These reasons will incorporate the orders I am about to make. They include that a grant of probate of the audio-visual recording, being exhibit 1 in this proceeding, a transcript of which is annexed to the order, issue to the applicant, Ms Colvin, as executor, and that on the true construction of the recording it appoints Ms Colvin as executor and leaves the deceased's property at Ravenshoe to Ellen Gossam, any  
40 money in her bank account to Trevor Thomas McGregor, her van to Michael Wormald and the residue of the estate to Ellen Gossam. I will also order that exhibit 1 be returned to the applicant's solicitors at the expiration of the appeal period and that the costs of this application calculated on the indemnity basis be paid from the estate of the deceased.

45 The orders shall therefore be as follows:

1. Subject to the formal requirements of the Registrar, a grant of probate of the audio-visual recording, being exhibit 1 in this proceeding and a transcript of which is annexed to this order, issue to the applicant, as executor.
- 5 2. On the true construction of the audio-visual recording, it:
  - (a) Appoints Patricia Colvin as executor;
  - (b) Leaves:
    - 10 (i) the deceased's house property at 24 Herbert Street, Ravenshoe to Ellen Gossam;
    - 15 (ii) any money in the deceased's bank account to Trevor Thomas McGregor;
    - (iii) the deceased's van to Michael Wormald; and
    - 20 (iv) the residue of the estate to Ellen Gossam.
3. Exhibit 1 be returned to the applicant's solicitors at the expiration of the appeal period.
- 25 4. The applicant's costs of this application, calculated on the indemnity basis, be paid from the estate of the deceased.

REVISED