

Dissecting Decisions

WILLS & ESTATES

“The Thorn Birds Between Two Roses”: Conflicting Wills

By Sandy Donaldson & Marianna Danby

Australia's famous author of “*The Thorn Birds*”, Colleen McCullough (who died in 2015) provided a great source of entertainment through her writing for generations. It is now her life narrative that captures our attention, as it seems that she continues to provide us with another story after her passing. She left behind several documents purporting to capture her last testamentary intention. The courts heard about her own life and the private turmoils she endured which were described in the judgment handed down in May this year.

From a legal point of view, her final story provides us with several lessons which I will briefly reflect on in this article.

The First Will

To set the scene, Colleen had bequeathed her estate to her husband Ric in a will made in 2005.

Later on, there were two more documents prepared which at the outset purported to be her last Will and Testament. Each bequeathed her entire estate to a different beneficiary.

The Oklahoma Will

The first document, prepared by her solicitor, Ms Piria Coleman, was signed by Colleen on 12 July 2014 in a Hilton hotel room in Sydney. This document left the entirety of her estate to the University of Oklahoma Foundation Inc. (the ‘**Foundation**’). The executors to this will were her long-time friend, Ms Anthony and a Mr Merlino. Mr Merlino renounced probate and it

was Ms Anthony who took over the proceedings, initially commenced by the University of Oklahoma, asserting that this document, also known as ‘**the Oklahoma Will**’ was her final testamentary wish.

The Third Will

The next document again bequeathed her entire estate to her husband of 30 plus years. This document was initialled rather than signed by Colleen on 24 October 2014. This document was created by taking the Oklahoma Will (only three months after it was signed) and amending it by removing the depository page which had bequeathed her estate to the Oklahoma University and replacing that page to insert Mr Robinson as the sole beneficiary. Ms Coleman did this on Colleen's request (**the Third Will**).

The Purported Codicil

There was another document, with the question “*Do you Colleen McCullough Robinson want your last will and testament (sic) to be that which you drafted in private with your solicitor Piria Coleman*” and an answer of “*Yes I do*”. This document was witnessed by two people and is referred to as a Purported Codicil dated 14 January 2015 by the Judge.

The Unsigned Mirror Will

Ric later had insisted that the couple make mirror wills and a final Will was made and placed before Colleen in January 2015 (just two weeks before

she passed away), but the Judge found that Colleen did not sign this will.

The conflicting evidence

Throughout the court case, witnesses came forward to attest to Ms McCullough's intentions. The Judge stated that “*[i]f the track of the truth in this matter is to be found, it is narrow and poorly lit*”.

There were allegations of duress, forgery, statements that the formation of the wills were steeped in coercion and suspicious circumstances and that this all occurred within the throes of marital discord in 2014. There was confusion over the state of Colleen's marriage and her physical reliance on her husband's assistance in late 2014 to early 2015. One line of thought is that Colleen created a pretence of a Will in his favour designed to fool Ric. There were allegations of the unorthodox approach Colleen's solicitor (Ms Coleman) took, as she preferred to see her role in the matter as the protector of Colleen and her Oklahoma Will, rather than strictly as a legal representative engaged by Colleen to draft her testamentary wishes.

On one side, witnesses attested that Ms McCullough wished to exclude her husband as a beneficiary to her will as she considered that he had already benefitted from her throughout the course of their married life, as he had not worked a day in his life due to the royalties they enjoyed from her successful career as one of Australia's prominent authors. Royalty payments

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may span for the life of the author and continue for 70 more years from the date of the author's death, the term of copyright in the author's works. Therefore, Colleen's royalty payments potentially equate to a significant amount of money continuing to flow into her estate to the benefit of her beneficiaries.

The relationship of Colleen and Ric

Colleen had grievances about she and her husband living beyond their means which were somewhat aired in an undelivered letter dated 21 October 2014, destined for Ric, but the letter was never sent.

Evidence presented in Court framed Ric as taking advantage of Ms McCullough's ill health, isolation, fatigue and her dependence upon him "so as to dominate, overbear and overburden her". It also asserted that he had taken a mistress between 2010 and 2014, which accentuated the monetary difficulties, driving a wedge further between him and his wife. During the trial, however, key witnesses admitted to gross exaggeration and or failed to answer questions, creating an ambience of unreliability. Ric then stated in his defence that Mrs McCullough was even supportive of him forming a new relationship.

The result

Although Colleen's mental state was not an issue in the case, it seems that it was her emotional state which took an 8 day trial to uncover.

The Judge held that Ric was to be the beneficiary of his wife's estate and the Oklahoma Will was not proven to be valid. Her testamentary intention was established. The Judge observed that there was no evidence from Colleen herself in the later months of her intention to exclude Ric and rather on the contrary that there were affirmative

actions. Ric established that his wife initialled the Will in October 2014. It was this Third Will (that had Colleen's signature) which proved the intention of those documents to replace the dispositive page of the Oklahoma Will. It was also held that the piece of paper with the question and answer was not effective as a codicil to revive the revoked Oklahoma Will.

The Judge concluded that there was no coercion or lack of volition established.

Some lessons from the case

The lessons from this that you should take away are:

- Give clear instructions to your solicitors.
- Ensure that your emotional state does not cloud the waters when dealing with your succession plans.
- Know the importance of executing your last will and testament correctly.
- Understand the importance in creating a fresh will each time you wish to change a significant part (such as the disposition of your estate), so as not to create confusion about what remains valid and who benefits.

Another important lesson, however, is that there is no guarantee the estate will bear the costs of the litigation. The Judge held that each of the parties are to cover their own costs of the litigation.

In this case, the estate is worth approximately \$2.1 million (not including future royalties or valuables). Often, the successful party have their costs paid by the other non-successful party, unless it is proven that the testator (Colleen) was the cause of the litigation

or where circumstances led reasonably to an investigation. In this case, neither of the exceptions were made out. Due to the conduct of both parties leading up to and during the trial, each side were ordered to pay their own costs. This departure from the previous expectation that cost of estate matters are paid out of the estate, is critical to take into consideration if estate litigation is on the horizon.

If this article brings up questions or you find yourself in a similar scenario, feel free to contact us for further advice.



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