

The Estate of John Andrew McMillan [2014] NTSC 51

PARTIES: THE ESTATE of JOHN ANDREW
MCMILLAN

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING TERRITORY
JURISDICTION

FILE NO: 21447429

DELIVERED: 12 November 2014

HEARING DATES: 6 November 2014

JUDGMENT OF: HILEY J

CATCHWORDS:

SUCCESSION – Wills, probate and administration – Statutory requirements for will – Where witnesses have signed two days after will signed by Testator – Where witnesses are also beneficiaries – *Wills Act 2000* (NT) ss 8, 10 & 12

Wills Act 2000 (NT) ss 8, 10 & 12

REPRESENTATION:

Applicants: Self-represented

Judgment category classification: C

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Estate of John Andrew McMillan [2014] NTSC 51
No. 21447429

PARTIES: THE ESTATE of JOHN ANDREW
MCMILLAN

CORAM: HILEY J

REASONS FOR JUDGMENT

(Delivered 12 November 2014)

Introduction

- [1] By Application filed on the 10th October 2014 (“the application”) Murray McLaughlin and Denise Officer (the **applicants**) applied for the grant of probate of the will of the late John Andrew McMillan deceased (the **testator**).
- [2] The matter was referred to the Court by the Registrar pursuant to s 17(2)(c) of the *Administration and Probate Act 1979* (NT) because the Registrar was doubtful whether probate should be granted.
- [3] Following the hearing of the application on 6 November 2014 I made an order authorising the Registrar to issue probate of the will to the executors Murray McLaughlin and Denise Officer. These are my reasons.

- [4] The testator was born 29 December 1957 and died on 28 January 2012.
- [5] On 9 July 2011 the testator signed a document entitled “Andrew McMillan’s Will 9 July 2011” (the **Will**). Beneath his signature and name, but on the next (second) page of the document, appear the words “in the presence of:” followed by the signatures of each of the applicants. However, adjacent to each signature is the date 11 July 2011.
- [6] In the Will the testator appointed three executors, the two applicants and Chips Mackinolty. Mr Mackinolty renounced probate of the Will on 7 January 2014. On 10 October 2014 the applicants filed the necessary oaths of office, affidavits of publication and search and affidavits concerning the value of the estate and other matters.
- [7] At the hearing, I noted two possible problems with the Will: firstly that the applicants had not signed it at the same time as the testator; secondly that each applicant was also named as a beneficiary under the Will, in relation to specific items that were of little monetary value. I was informed at the hearing that those items were in fact distributed to the respective beneficiaries prior to the testator’s death.
- [8] Both applicants appeared and spoke at the hearing. Ms Officer stated, and I accept, that the Will was prepared by Mr Mackinolty, and that she, Mr Mackinolty and Mr McLaughlin were all present and saw the testator sign the Will on 9 July 2011. She also said that someone then

realised that the witnesses had to sign the document as well, as a result of which the second page was drawn up and presented to the applicants to sign, which they did on 11 July 2011. Mr McLaughlin could not positively remember having witnessed the testator's signature on 9 July, but saw no reason to disagree with Ms Officer's recollections about that.

Consideration

- [9] The relevant parts of s 8(1) of the *Wills Act 2000* (NT) (“the *Wills Act*”) provide that a will is not valid unless it is in writing and signed by the testator, the testator's signature is made in the presence of two or more witnesses present at the same time, and at least two of those witnesses attest and sign the will in the presence of the testator.
- [10] It is not necessary for the two witnesses to attest and sign the will in the presence of each other. Nor is it necessary for the testator's signature to be made at the foot of the will, or for the will to have an attestation clause. However the signature of the testator must be made with the intention of executing the will.¹
- [11] I consider that the requirements of s 8 of the *Wills Act* have been satisfied. The only real question is whether the applicants attested and signed the Will in the presence of the testator. Although Ms Officer

¹ *Wills Act 2000* (NT) s 8(2) – (4).

did not say that the testator was present when the applicants executed the second page, I think it likely that he was.

[12] Even if this requirement of s 8(1) was not complied with, I am satisfied that the testator intended the document to constitute his will.²

Accordingly I would declare the Will to be a valid will.

[13] My concern arising from the fact that the witnesses were also named as beneficiaries in the Will is addressed by reference to s 12 of the *Wills Act*. The effect of a potential beneficiary witnessing a will is not to invalidate the will. Rather, the disposition to that beneficiary is void unless certain other conditions apply. One of those conditions is if the Court is satisfied that the testator knew and approved of the disposition, and that the disposition was given or made freely and voluntarily by the testator. I have no difficulty reaching this state of satisfaction. The testator was very specific in relation to particular items going to particular people. Accordingly I would declare if necessary that the dispositions in favour of each of the applicants would not be void. However I do not consider such declaration appropriate as those items, and a number of other items which were to be given to others, had already been distributed prior to death, and so would not have formed part of the testator's estate.

Conclusions

² *Wills Act* s 10(2).

[14] I conclude and declare that the Will is a valid will.

[15] Accordingly, I made an order pursuant to s 17 of the *Administration and Probate Act 1979* (NT) authorising the Registrar to issue probate of the will of the late John Andrew McMillan deceased, dated 9 July 2011, to the appointed executors Murray McLaughlin and Denise Officer.