

CITATION: *In the Estate of Peter Richard Allen*
[2025] NTSC 1

PARTIES: IN THE ESTATE OF PETER RICHARD
ALLEN

ON REFERENCE from the Registrar of
the Supreme Court of the Northern
Territory

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory
Jurisdiction

FILE NO: 2024-00457-SC

DELIVERED: 17 January 2025

JUDGMENT OF: Burns J

Administration and Probate Act 1969 (NT) s 17
Wills Act 2000 (NT) ss 3, 8, 10, 12, 16

Banks v Goodfellow (1870) LR 5 QB 549, applied.

REPRESENTATION:

Counsel:

Applicant: Z Mauger

Solicitor:

Applicant: Hunt & Hunt Lawyers

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

In the Estate of Peter Richard Allen [2025] NTSC 1
No. 2024-00457-SC

**IN THE ESTATE OF PETER
RICHARD ALLEN**

**ON REFERENCE from the
Registrar of the Supreme Court
of the Northern Territory**

CORAM: Burns J

REASONS FOR DECISION
(Delivered 17 January 2025)

Background

- [1] This is an application made under the *Wills Act 2000* (NT) (‘the Act’) to grant probate to Sharon Bury (also known as Sharon Baylis) (‘the Applicant’) in the estate of the late Peter Richard Allen (‘the Deceased’). The Applicant is the daughter of the Deceased’s de facto partner, Wendy Bury.
- [2] The Deceased died testate on 10 June 2023. He left an estate with a net value of \$402,572.12 comprised of money held in bank and superannuation accounts.
- [3] The Deceased made a will, comprised of three pages, duly executed on 4 March 2020 (‘the Will’).

- [4] The Deceased appointed the Applicant as his executor and trustee and on 14 February 2024, she made an application for probate to be granted to her.

Amendments to the Will

- [5] On 8 August 2022, the Deceased caused a hand-written amendment to be made to his copy of the Will at Clause 3(c) which altered the distribution of the proceeds of his estate ('the Codicil'), as follows:

Should the proceeds of any accounts I hold with ANZ One Path and Colonial First State be paid into my estate, I DIRECT that the combined net total of the accounts be paid as follows:

...

- (c) I GIVE the remaining two thirds of the balance held to those of my children FIONA TWOLEE also known as FIONA ALLEN, DAVID ALLEN, STEPHEN ALLEN also known as STEVE ALLEN and KATRINA ZANDER also known as KATRINA ALLEN who survive me and if more than one as tenants in common in equal shares, *but with David Allen's portion to be divided between himself and his son, JAMIE ALLEN (my grandson), as tenants in common in equal shares.*

(Emphasis added)

- [6] On 20 May 2023, the Deceased caused a further hand-written amendment to be made to Clause 5 of the Codicil which altered the distribution of the residue of his estate, as follows:

Should my de facto partner WENDY FLORENCE BURY predecease me, or not inherit from me for any other reason, I DIRECT my Trustee to divide the residue of my estate amongst those of my children FIONA ALLEN, DAVID ALLEN, STEPHEN ALLEN also known as STEVE ALLEN and KATRINA ZANDER also known as KATRINA ALLEN who survive me and if more

than one as tenants in common in equal shares, *but with David Allen's portion to be divided between himself and his son, JAMIE ALLEN (my grandson), as tenants in common in equal shares.*

(Emphasis added)

Validity of the Codicil

- [7] Section 3 of the Act defines will to include “a codicil and any other testamentary disposition”. Section 16 of the Act provides how a will may be effectively altered.

16 HOW WILLS MAY BE ALTERED

- (1) An alteration made to a will after the will is executed is not effective unless the alteration:
 - (a) is executed in a manner in which a will is required to be executed by this Act;
 - (b) is made by a minor pursuant to an order of the Court made under section 18(1) and is otherwise in accordance with section 18;
 - (c) is made for and on behalf of a person without testamentary capacity pursuant to an order of the Court made under section 19(1) and is otherwise in accordance with Division 2 of Part 3; or
 - (d) is a document that under section 10 the Court is satisfied embodies testamentary intentions of a deceased person and so constitutes an alteration to the will of the deceased person; or
 - (e) obliterates words in the will so that their effect is no longer apparent.
- (2) In altering a will, it is sufficient compliance with the requirements for execution if the signatures of the testator and of the witnesses to the alteration are made:
 - (a) in the margin or on some other part of the will beside, near or otherwise in relation to the alteration; or
 - (b) as authentication of a memorandum referring to the alteration and written on the will.

- (3) This section does not apply to an alteration to a will if the words or effect of the will are no longer apparent because of the alteration.

[8] Section 8 of the Act provides how a will should be executed.

8 HOW WILLS SHOULD BE EXECUTED

- (1) A will is not valid unless:
 - (a) it is in writing and signed by the testator or by some other person in the presence of and at the direction of the testator;
 - (b) the signature is made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time; and
 - (c) at least 2 of those witnesses attest and sign the will in the presence of the testator.
- (2) It is not necessary for the 2 witnesses referred to in subsection (1)(c) to attest and sign the will in the presence of each other.
- (3) The signature of the testator:
 - (a) must be made with the intention of executing the will; and
 - (b) is not required to be made at the foot of the will.
- (4) It is not necessary for a will to have an attestation clause.
- (5) If a testator purports to make an appointment by his or her will in the exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this section.
- (6) If:
 - (a) a power is conferred on a person to make an appointment by a will that is to be executed in some particular manner or with some particular solemnity; and
 - (b) the person exercises the power by a will that is in accordance with this section and not in that manner or with that solemnity,the exercise of the power is valid.

[9] Section 16(1)(a) of the Act cannot be relied upon for the Codicil to effectively alter the Will, because the Codicil has only been attested and signed in the presence of one witness, being the Applicant, who is also a beneficiary under the Will pursuant to Clause 3(a) of the Will.

[10] Section 16(1)(d) of the Act provides that an alteration made to a will after the will is executed may be effective if it is a document that the Court is satisfied embodies the testamentary intentions of a deceased person and so constitutes an alteration to the will of the deceased person.¹

[11] Section 10 of the Act provides:

10 WHEN COURT MAY DISPENSE WITH REQUIREMENTS FOR EXECUTION OF WILLS

- (1) In this section, *document* means a record of information and includes:
 - (a) anything on which there is writing;
 - (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them;
 - (c) anything from which sounds, images or writings can be reproduced with or without the aid of another thing or device; and
 - (d) a map, plan, drawing or photograph.
- (2) If the Court is satisfied that a deceased person intended a document or part of a document that purports to embody the testamentary intentions of the deceased person (but which is not executed in the manner required by this Act) to constitute his or her will or an alteration of his or her will or to revoke his or her will, the document or part of the document

¹ s 10.

constitutes the will of the deceased person or an alteration of the will or revokes the will, as the case requires.

- (3) In forming its view whether a deceased person intended a document or part of a document to constitute his or her will or an alteration of his or her will or to revoke his or her will, the Court may have regard (in addition to the document or a part of the document) to any evidence relating to the manner of execution or the testamentary intentions of the deceased person, including evidence (whether or not admissible before the commencement of this section) of statements made by the deceased person.
- (4) This section applies to a document whether it came into existence in or outside the Territory.

[12] By Affidavit, promised on 12 February 2024, the Applicant deposed the manner of execution of the Codicil, and statements by the Deceased in relation to his testamentary intention as embodied in the Codicil.

Referral

[13] On 18 April 2024, the Registrar referred the issue of the alteration to the Will of the Deceased to the Court pursuant to s 17(2)(c) of the *Administration and Probate Act 1969* (NT). The referral was principally with regard to the application of s 16(1)(d) of the Act (which raises the application of s 10) but also with regard to the application of s 12 of the Act.

[14] I am satisfied that all persons who may have an interest in the distribution of the Deceased's estate have been notified of these proceedings.² No persons other than the Applicant chose to participate.

2 Affidavit of the Applicant promised 26 August 2024.

[15] Submissions were received from solicitors engaged by the Applicant. It was accepted that the Codicil does not comply with s 8 of the Act, in particular because the hand-written amendments were witnessed by only one person, the Applicant.

[16] The submissions referred to s 16(1)(d) which permits a will to be altered through a document that, under s 10 of the Act, the Court is satisfied embodies the testamentary intentions of the Deceased and so constitutes an alteration to their will.

[17] The submissions referred to the affidavit of the Applicant promised 12 February 2024. In that affidavit the Applicant stated, at [11]-[15]:

At some time prior to 8 August 2022 the deceased indicated to me an intention to alter his will such that the benefit it provided for his son DAVID ALLEN be shared equally with David's son JAMIE ALLEN, the deceased's grandson.

The reason given by the deceased for the alteration of the will was that the deceased had had little to no contact from his son David for many years and in particular, in the years since the deceased was diagnosed with lung cancer in 2016. The deceased had, however, had regular contact from David's son Jamie.

On 8 August 2022 the deceased requested that I provide some wording to give effect to the intended alteration given, I believe, my previous background as a lawyer and as a trust officer with the Public Trustee. I provided some wording on a piece of paper that the deceased was satisfied with, and the deceased and I signed and dated that paper, a copy of which is annexed and marked with the letter "A".

Also on 8 August 2022 at the deceased's request I included at clause 3 (c) of the copy of the will I had received from the deceased the wording for the alteration of his will and the deceased and I signed and dated the alteration in the margin of the copy of the will, which document is referred to in this affidavit

and in the Grant of Probate and in all other affidavits filed by me in support of the grant as the codicil dated 20 May 2023.

On 20 May 2023 I suggested to the deceased that the wording for the alteration of his will should also be included at clause 5 of the copy of the will, being the clause that provides alternative instructions with regard to the residue of the estate in the event that the deceased's de facto partner did not inherit from him for any reason. I included the wording at the deceased's request and the deceased and I signed and dated the alteration in the margin of the copy of the will, which document is referred to in this affidavit and in the Grant of Probate and in all other affidavits filed by me in support of the grant as the codicil dated 20 May 2023.

[18] From the above it is noted that the Applicant was present with the

Deceased when the Deceased made the hand-written amendments and she also witnessed the Deceased's signature.

[19] The Applicant deposed to the fact that the Deceased attempted to draft a new will with the assistance of the Public Trustee in late May 2023.

At that time, the Deceased's physical condition was such that he did not like to leave the house. The Public Trustee declined to make a home visit to the Deceased and suggested that he and those assisting the Deceased could draw up a new will and have two independent persons witness it.

[20] Some three days after this advice was given, the Deceased was taken into palliative care and died eight days later on 10 June 2023. There is no suggestion that the Deceased was suffering from any mental impairment at any time prior to his death.

[21] I accept that the delay in the Deceased attempting to formalise the hand-written amendments was due to his belief that these amendments were effective to alter his will and that nothing further was required to formalise his testamentary intentions.

[22] The testamentary capacity test, as set out in *Banks v Goodfellow*,³ requires a testator:

- a) to understand the nature of the act of making a will and its effects;
- b) to be aware of the extent of the property of which they are disposing;
- c) to be able to comprehend and appreciate the claims to which they ought to give effect; and
- d) to be suffering from no insane delusions.

[23] I am satisfied that each of the above matters has been demonstrated in this case. I am further satisfied that the Codicil embodies the testamentary intentions of the Deceased.

[24] Pursuant to s 12(1) of the Act, if a beneficial disposition is given or made by will to a person who is a witness to the will, the disposition is void to the extent that it concerns the person. The term “will” is

3 (1870) LR 5 QB 549.

defined in s 3 of the Act as including a codicil or any other testamentary disposition. In the present case, the Will of the Deceased, as originally executed, provided for a disposition to the Applicant. The Applicant, however, was not a witness to that document. The Applicant witnessed the hand-written codicil but that document made no alterations to any disposition to the Applicant. The clauses of the Will altered by the codicil did not provide her with any beneficial disposition that would otherwise be void pursuant to s 12 of the Act.

[25] In any event, I am satisfied that the Deceased knew and approved of disposition to the Applicant and it was made freely and voluntarily by the Deceased.⁴

[26] I order that a grant of probate be granted to the Applicant.

⁴ s 12(2)(c) of the Act.