

In re the Estate of the late E M Groll [2009] NTSC 14

PARTIES: IN RE THE ESTATE OF THE LATE
ELISABETH MARIA GROLL

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
TERRITORY EXERCISING
TERRITORY JURISDICTION
EXERCISING PROBATE
JURISDICTION

FILE NO: No 161 of 2008 (20826176)

DELIVERED: 6 April 2009

HEARING DATES: 21 October 2008 & 25 March 2009

JUDGMENT OF: MILDREN J

CATCHWORDS:

PROBATE AND ADMINISTRATION – lost Will – practice and procedure – copy of Will in existence – presumption of revocation – whether Will lost or mislaid – rebuttal of presumption – probate granted

Statutes:

Wills Act, s 3

Citations:

Referred to:

In the Will of W J Boyd, deceased; ex parte Whelan [1959] SR (NSW) 369

McCauley v McCauley & McCauley (1910) 10 CLR 434

Sugden v Lord St Leonards (1876) 1 PD 154

Whiteley v Clune (No 2) the Estate of Brett Whiteley (unreported) NSWSC

13 May 1993 BC9301902

REPRESENTATION:

Counsel:

Applicant: M S Emmett

Solicitors:

Applicant: Cridlands MB Lawyers

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

In re the Estate of the late E M Groll [2009] NTSC 14
No. 161 of 2008 (20826176)

BETWEEN:

**IN RE THE ESTATE OF THE LATE
ELISABETH MARIA GROLL**
Applicant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 6 April 2009)

- [1] This is an application that leave be granted to the applicants to prove a copy of a Will dated 4 December 1997 and that probate of that Will be granted to the applicants, Peter Dieter Groll and Klaus Walter Groll.
- [2] After hearing submissions I dispensed with service of the application and made an order granting leave to the applicants to prove the Will as contained in the copy and I granted probate of the copy of the Will to the applicants and ordered the costs of the application be paid out of the estate. I said I would subsequently publish my reasons. I now do so.

The Facts

- [3] The deceased, who was born in Augsburg, West Germany, on 24 September 1929, died at her unit in Poinciana Street, Nightcliff, sometime between 1 and 4 August 2008. She was then aged 78 years.

- [4] On 20 December 1952 the deceased married Erwin Groll in Augsburg, Germany. There were two children of the marriage, Peter Dieter Groll who was born on 5 July 1959 and Klaus Walter Groll who was born on 29 May 1961. At sometime prior to her death, the deceased had become divorced from Erwin Groll. On 4 December 1977 the deceased executed a Will prepared by a solicitor in which she appointed the applicants her sole executors and trustees. Under the terms of the Will, the deceased gave her jewellery to her cousin Marianne Heichele and if her husband's cousin, Emilie Settele, survived her, to hold a flat at 55 Aralia Street, Nightcliff, upon trust for Emilie Settele for life and upon Emilie Settele's death the flat in Nightcliff was to fall into residue. The applicants, Peter Dieter Groll and Klaus Walter Groll, were to inherit the whole of the residual estate.
- [5] Prior to her death, the deceased advised the applicants on a number of occasions that they were named as the executors and beneficiaries of her Will, but that all her jewellery was to go to her cousin, Marianne Heichele. The last of these discussion occurred in mid-2008. The deceased also advised the applicants that her Will was located in a black briefcase at her home. The lock combination of the briefcase was told by the deceased to the applicant Klaus Walter Groll.
- [6] After the deceased's death, Klaus Walter Groll and Peter Dieter Groll opened the briefcase and found a copy of the Will. Thinking it was the original Will, they took the copy to the applicants' present solicitors in order to obtain a grant of probate. Also located with the copy of the Will

was a letter addressed to the deceased from a firm of solicitors in the following terms:

“Dear Madam

RE: YOUR WILL

I enclose (*) for safekeeping the original of your Will. A copy of your Will is also attached (*) for your records. I also attached (*) some suggestions to clients to assist you in making arrangements for the safekeeping of your Will and listing circumstances in which you should consider remaking your Will. As the matter is now completed I attach (*) a memorandum of our fees.

Yours faithfully

Morgan Buckley
signed Janet Terry”

- [7] Considerable efforts have been made to locate the original Will without success. The deceased’s home has been thoroughly searched. Enquiries have been made with Westpac Banking Corporation with whom the deceased had done all of her banking for many years. Advertisements have been placed in the local *NT News*. Searches have also been made with the deceased’s accountants and with the Registry of this Court. As well, the applicants’ solicitors have searched the index of Wills kept by each prescribed person within the meaning of s 3 of the Wills Act and found no evidence of a Will having been lodged with any of those persons. I am satisfied that the original Will has been lost.

- [8] In these circumstances there is a presumption that the deceased destroyed the Will. However, the presumption may be rebutted by proof, the onus being upon the party seeking to propound the Will, that the deceased did not destroy the Will purposely with the intention of revoking it¹. The burden of proof is upon the applicant seeking to propound the Will, but the standard of proof is only the ordinary civil standard².
- [9] The deceased left a substantial estate consisting of two units in Poinciana Street, Nightcliff; jewellery to value of \$20,000; a substantial amount of money in savings accounts and a term deposit with Westpac Banking Corporation; two motor vehicles; and other personal effects to a total value of \$883,024 with liabilities of only \$21,171.
- [10] So far as the jewellery is concerned, I am satisfied that Marianne Heichele of Germany is still alive and is aware of her entitlement to the jewellery. I am also satisfied with Emilie Settele predeceased the deceased having died at the Royal Darwin Hospital on 9 July 2007. I am also satisfied that on an intestacy the applicants would inherit the entire estate, there being no other children or other living relatives of the deceased who would have a claim on an intestacy. The application by the applicants to obtain probate of the Will is therefore to be seen in that light.

¹ See *McCauley v McCauley & McCauley* (1910) 10 CLR 434; *In the Will of W J Boyd, deceased; ex parte Whelan* [1959] SR (NSW) 369

² See *McCauley v McCauley & McCauley* (1910) 10 CLR 434 at 442; at 447-448 per O'Connor J; and the decision of Powell J *Whiteley v Clune (No 2) the Estate of Brett Whiteley* (unreported) NSWSC 13 May 1993 BC9301902 at 26

[11] According to the affidavits of both applicants, they both had a close relationship with the deceased. Peter Dieter Groll lived with the deceased and her former husband in the family home at Nightcliff until he moved to Queensland in 1983. After that he lived in Townsville for two years and then returned to live with his mother in the family home at Nightcliff. In 1989 he moved to Germany where he lived and worked until July 2000. Whilst in Germany he returned to Darwin every two years to spend holidays with his mother and the family. His mother also travelled to Germany frequently to holiday with him and other relatives. In July 2000, he decided to leave Germany and return permanently to live in Australia. At that stage, he returned to the family home and lived with the deceased for a period of time. He now resides in Karama in the Northern Territory. From the year 2000 onwards he visited or spoke to his mother on a regular basis and also did odd jobs around her home from time to time. He also dined out with his wife and mother on a regular basis and from time to time he and his wife would spend the night at the deceased's home. Shortly prior to her death, he and his wife had planned to travel to Germany with the deceased, but she passed away before those plans were able to be put into fruition.

[12] So far as Klaus Walter Groll is concerned, he currently lives at Darwin River in the Northern Territory. He has resided in Darwin all of his life and has always assisted the deceased with whatever she required. He also did small maintenance jobs around the units which she owned and visited her on a regular basis and kept in contact by telephone.

[13] Although this evidence is put before the Court by Klaus Walter Groll and by Peter Dieter Groll, the authorities make it clear that evidence from potential beneficiaries is admissible³.

[14] I think there are a number of relevant factors which need to be considered. The first is the terms of the Will itself. As Street CJ said in the case of *In the Will of W J Boyd, deceased; ex parte Whelan*⁴ the nature of the provisions of the Will itself is very material as is the nature of the custody in which the Will itself was kept⁵.

[15] It is clear from the copy of the Will that it was properly prepared by a solicitor and duly executed. The original Will was sent to the deceased and on the evidence before me she believed that the original Will was still in her briefcase. That is where she told her sons they would find it. In fact when the briefcase was opened only a copy of the Will was found, but when the sons found the Will they thought they had the original Will. The copy they found was in fact a photocopy. Having regard to the terms of the Will, it is highly unlikely that the deceased would have destroyed the Will with the intention of revoking it, because the consequence of so doing would be to eliminate the other gifts contained in the Will and leave her sons as the only beneficiaries on an intestacy. Moreover, she herself thought that the original Will was still in her briefcase and she told the applicants of the gift of her jewellery to her cousin. I therefore think that it is most unlikely that she

³ See *Sugden v Lord St Leonards* (1876) 1 PD 154

⁴ [1959] SR (NSW) 369 at 372

⁵ See *McCauley v McCauley & McCauley* (1910) 10 CLR 434 at 438

destroyed the Will with the intention of revoking it and that, on the balance of probabilities, the Will has somehow become lost. I am unable to find exactly how it has become lost. It may be that she accidentally threw out the original Will believing it to be a copy; or it may be that she gave the original Will to her husband's cousin Emilie Settele, but when Emilie Settele died the original Will was not found. In any event, I am satisfied on the balance of probabilities that the deceased did not destroy the Will animus revocandi. In those circumstances the applicants are entitled to the relief sought in the summons and to probate of the copy of the Will.

[16] I should record also that I dispensed with service of the proceedings on any other party. The only other possible parties to whom the application could have been served are either Public Trustee or Marianne Heichele. It was unlikely in the extreme that Marianne Heichele would wish to be heard as she would benefit from the application being granted. The application has been advertised and there has been no caveat lodged. There are no other interested parties. As this is a clear case, I did not think it worth the expense of taking the step of causing service to be effected upon the Public Trustee.
