

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : DE BRUIN -v- DE BRUIN [2004] WASC 20

CORAM : LE MIERE J

HEARD : 6 FEBRUARY 2004

DELIVERED : 20 FEBRUARY 2004

FILE NO/S : PRO 3109 of 2003

BETWEEN : KEVIN HENK MARIA DE BRUIN
Plaintiff

AND

PAUL WILLIAM FERDINAND DE BRUIN
Defendant

Catchwords:

Probate - Application under s 64 *Administration Act 1903* (WA) to remove caveat - Circumstances in which a caveat may be removed - Undue influence - Whether sufficient grounds exist to support plea of undue influence - Fraud - Whether sufficient grounds exist to support plea of fraud

Legislation:

Administration Act 1903, s 63(1), s 64(1), s 64(3)

Result:

Caveat removed

Category: B

Representation:

Counsel:

Plaintiff : Mr J C Curthoys
Defendant : In person

Solicitors:

Plaintiff : Sceales & Co
Defendant : In person

Case(s) referred to in judgment(s):

Hayden v Bond [2003] WASC 96

In the Will of Young (1968) 70 SR (NSW) 386

West Australian Trustees Ltd v Poland, unreported; SCt of WA;
Library No 7000; 6 January 1988

Case(s) also cited:

Pearse v Michael [2002] WASC 135

1 **LE MIERE J:** These proceedings were commenced by a chamber summons dated 14 November 2003 whereby the plaintiff, the executor of the deceased, Petrus Willem De Bruin, seeks the removal of a caveat lodged by the defendant, Paul William Ferdinand De Bruin, against an application for probate of the Will of the deceased.

2 The deceased, who I will also refer to as Petrus, died on 24 May 2003, leaving a widow, Henriette Paula Johanna De Bruin (Henriette), and three adult children, Peter Charles Maria De Bruin (Peter), Paul William Ferdinand De Bruin (Paul or the defendant) and the plaintiff, Kevin Henk Maria De Bruin (Kevin or the plaintiff).

3 The Will of which probate is sought was made by Petrus on 27 February 2002. By his Will, Petrus appointed the plaintiff executor and trustee of his estate. Petrus bequeathed \$500,000 to the plaintiff, \$50,000 to the defendant and \$50,000 to Mary Schotman. There is a further bequest to Mevrouw Betty Rottger-Koedijk that fails to state the amount of the bequest. Petrus bequeathed the remainder of his estate to the St Vincent De Paul organisation to use for "the benefit of those less fortunate" than himself.

4 On 5 June 2003 Peter and Paul lodged a caveat demanding that nothing be done without notice to them. On 21 August 2003 the plaintiff caused a motion to be filed that probate of the Will of Petrus be granted to him. On 24 September Peter and Paul withdrew their caveat of 5 June. On 30 September Paul lodged a further caveat dated 10 September 2003. On 30 September Henriette filed a caveat dated 15 September. On 21 October Henriette withdrew her caveat filed on 30 September 2003.

5 On 14 November 2003 the plaintiff filed the chamber summons seeking an order that the caveat lodged by the defendant on 10 September 2003 be removed. The chamber summons came on for hearing before Anderson J on 21 November 2003. His Honour adjourned the application for 14 days and ordered that the defendant be at liberty to file and serve a further affidavit in support of the caveat within 7 days. The application came on for further hearing before Scott J on 5 December 2003. His Honour adjourned the application for a special appointment on the question of whether there was undue influence on the testator in relation to the making of the Will for which probate was sought.

6 The application came on for hearing before me on 6 February 2004. The plaintiff was represented by Mr Curthoys. The defendant appeared in person. The plaintiff read and relied upon the affidavits of the plaintiff

sworn 13 November and 19 November 2003. The plaintiff submitted that the caveat and the material before the Court did not disclose any basis that justifies the Court in concluding that there are any circumstances that warrant investigation or which throw doubt on the Will being taken at face value and submitted that the caveat should be removed.

7 The defendant read and relied upon affidavits sworn by the defendant 21 and 28 November 2003, two affidavits each sworn 5 December 2003 and a further affidavit sworn 6 February 2004.

8 At the outset of his submissions the defendant stated that the caveat should not be removed because false information was given to Petrus. The allegedly false information and its significance is as follows.

9 Petrus's instructions for his last Will are dated and signed 19 February 2002. They include the following instruction:

"\$50,000 to Paul to make at last some belated start to his life. With his inheritance of the Cobb Street property through his mother he can keep his head above water."

10 The defendant said that when Petrus made his Will he thought that Henriette had made a Will under which she left the Cobb Street property to the defendant. The defendant said that Petrus was wrong in that belief and that the belief was based on false information given to him by Kevin.

11 In the course of the hearing the defendant applied for leave to cross-examine the plaintiff. After initially opposing the application, the plaintiff withdrew his opposition to cross-examination. The plaintiff was then cross-examined by the defendant.

The Legal Framework

12 The caveat sought to be removed was lodged pursuant to *Administration Act 1903*, s 63(1). That subsection provides that any person may lodge with the Principal Registrar a caveat against any application for probate or administration, or for the sealing of any probate or letters of administration under the *Administration Act*, at any time previous to such probate or administration being granted or sealed.

13 A caveat may be removed pursuant to s 64(1). That subsection provides that in every case in which a caveat is lodged the Court may remove the caveat. Subsection 64(3) provides that the application for removal may be heard and order made upon affidavit or oral evidence, or as the Court may direct.

Circumstances in Which a Caveat May be Removed

14 The onus is on the defendant to show that the caveat application is not vexatious: *In the Will of Young* (1968) 70 SR (NSW) 386 at 388 per Walsh JA, cited with approval in *West Australian Trustees Ltd v Poland*, unreported; SCt of WA; Library No 7000; 6 January 1988, per Kennedy J at 9, and in *Hayden v Bond* [2003] WASC 96 per Barker J at [16].

15 A caveator must provide some material to show that his opposition to the Will is based upon doubt genuinely entertained by him as to the validity of the Will and that there are circumstances which the Court might regard as warranting some investigation: see *In the Will of Young* at 392, *West Australian Trustees Ltd v Poland*, *Hayden v Bond*.

Undue Influence

16 The defendant initially challenged the validity of the Will on the ground of undue influence or at least was understood by Scott J to challenge the Will on that ground. The plea of undue influence will only be sufficient to justify the retention of the caveat if there are reasonable grounds to support it, that is, there is some material which the Court regards as warranting investigation.

17 The burden of proving undue influence rests upon the person asserting it, in this case the defendant. The burden cannot be discharged by showing that the person allegedly exercising undue influence had power enabling him to overbear the Will of the testator. It has to be shown that he exercised that power and the execution of the Will was obtained thereby. A review of the evidence and submissions by the defendant provides, in my opinion, no support for the claim of undue influence.

Fraud

18 A Will may be set aside if it is established that its execution was procured by fraud. This may be on the basis that fraudulent misrepresentations were made to the testator as to certain facts upon which he determined the disposition of his assets. The fraud must be material in the sense that it had operation on the mind of the testator with respect to the making of his Will: see Hockley, MacMillan & Curthoys "Wills, Probate and Administration Service Western Australia" at [24, 025.15].

19 There is evidence that the plaintiff knew that Henriette had not left the Cobb Street property to Paul in her Will. In the course of his cross-examination the plaintiff said:

"... [Henriette] hadn't made a Will leaving the property to Paul. That was her intention, but it wasn't set up that way by my other brother Peter. As far as I am aware, Mum's Will still stands where Paul doesn't get Cobb Street. He only gets an option to purchase it."

20 And later the plaintiff said he knew the statement that Cobb Street was left to Paul to be false because he had a copy of the Will at home.

21 However, there is no evidence that the plaintiff told, or otherwise represented to Petrus, that Henriette had left the Cobb Street property to Paul in her Will. In his cross-examination, the plaintiff at first appeared to say that he could not recall whether he had passed on to Petrus the information that Henriette had left the Cobb Street property to Paul in her Will. However, later in his cross-examination, in answer to a question by me, the plaintiff said that he had not passed on to Petrus the information that Henriette had made a Will leaving the Cobb Street property to Paul. I am satisfied that the plaintiff's apparent equivocation in his initial answers was a result of the manner in which the questions were asked.

22 Having reviewed the evidence I am satisfied that there is no evidence that the execution of the Will of Petrus of 27 February 2002 was procured by fraud.

Conclusion

23 There is no basis upon which the caveat may be maintained. It must be regarded as vexatious for the purpose of this application.

24 I order that the caveat of the defendant dated 10 September 2003 and filed 30 September 2003 be removed.