SUPREME COURT OF QUEENSLAND

CITATION:	*In the will of Pamela Klazema deceased* [2019] QSC 158
PARTIES:	**COLIN LUKE KLAZEMA & LUDWIG BEREND KLAZEMA** (applicants) **v** **CHRISTOPHER KLAZEMA** (respondent)
FILE NO/S:	No 5476 of 2019
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	10 June 2019
JUDGE:	Dalton J
ORDER:	**The respondent Christopher Klazema is to have his costs of and incidental to this proceeding paid by the Estate of Pamela Klazema on an indemnity basis.**
COUNSEL:	T W Ashton for the applicants D J Morgan for the respondent Christopher Klazema
SOLICITORS:	Robbins Watson for the applicants Mullins Lawyers for the respondent Christopher Klazema J B Mould, in person, as executor

[1] An application came before me on 10 June 2019 for an order that one Myles Gerard Murphy, solicitor, be granted letters of administration in the estate of the late Pamela Klazema.

[2] Mrs Klazema died on 1 December 2018. She left a widower and two sons, Colin and Christopher. Her will had been drawn in 2005 by the aforesaid Mr Murphy. It is poorly drawn and contains unusual and complicated provisions which put Mrs Klazema's estate in the hands of a trustee on two discretionary trusts. The beneficiaries of the trusts include Mrs Klazema's widower and Colin and Christopher.

[3] The applicants were Mrs Klazema's widower and her son Colin. Christopher Klazema appeared by counsel and opposed the application; he asked that an independent solicitor

be appointed as administrator. Also appearing on the application was a solicitor, Ms Juliette Mould, who claimed to be the executor under the late Mrs Klazema's will.

[4] My decision, given ex tempore on 10 June 2019, was that the proceeding to have Mr Murphy appointed as administrator was dismissed. I declared that Ms Mould was the executor appointed by the will. I made an order that she have her costs of the proceeding out of the estate on an indemnity basis and reserved the question of whether or not the costs of the applicants and Mr Christopher Klazema ought to come out of the estate. The concern I expressed to both these parties at the hearing was that in my view the will clearly appointed Ms Mould executor and I was not convinced that it was reasonable for either of them to have contended that some other person ought to be appointed administrator in circumstances where she wished to act as executor. Both these parties were afforded the opportunity of making written submissions as to costs.

[5] Having considered those submissions, my order is that the respondent Christopher Klazema should have his costs of and incidental to this proceeding on an indemnity basis paid by the estate.

[6] My order will be silent as to any other costs, meaning that the applicants will have to bear their own costs of and incidental to the proceeding. I now give reasons explaining that decision. In summary, I do not think the conduct of the applicants in bringing this proceeding was reasonable; I do think the conduct of Mr Christopher Klazema in resisting it was reasonable.

Construction of clause 1 of the Will

[7] The first clause of the will of the deceased lady read:

> "I APPOINT MYLES GERARD MURPHY of Brisbane Solicitor to be the Executor and Trustee of this my will PROVIDED HOWEVER that if at my death the said MYLES GERARD MURPHY is not in practice on his own account I wish the senior partner of the firm of which he is a partner or the firm which carries on his practice to be the executor and trustee of this my will." (emphasis in the original)[1]

[8] The applicants relied upon an affidavit sworn by Mr Murphy (Court Document 4). This affidavit was sworn on 17 May 2019 and filed on 23 May 2019 with the application. Paragraph 11 of the affidavit says:

> "As at 1 December 2018, being the date of the deceased's death, I was not in practice on my own account and was not a partner of any firm."

[9] When regard is had to this statement and clause 1 of the will it is clear that:

(a) the will does not appoint Mr Murphy executor – he is not in practice on his own account;

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[1] Throughout this judgment quotations of material written by Mr Murphy contain his original grammar and punctuation.

(b) the will does not appoint the senior partner of the firm of which Mr Murphy is a partner as executor – Mr Murphy was not a partner of any firm;

(c) if Mr Murphy's former legal practice was being carried on at the date of death, the senior partner of that firm is appointed executor;

(d) if Mr Murphy's former legal practice was not being carried on at the date of death, the will did not appoint an executor because no firm existed which carried on the practice run by Mr Murphy.

[10] The evidence was not controversial that at the time of death Mr Murphy's former legal practice was being carried on by Ms Mould. She was the senior practitioner.[2] Thus the will appointed Ms Mould executor, and this was the basis for the declaration I made on 10 June 2019.

Basis for Applicant's Unsuccessful Contention

[11] There were two bases for the position the applicants took on this application. First, that the will, properly construed, did not appoint any executor, and secondly, that Mr Murphy was the most suitable person to administer the estate. My view is that both these contentions were so unlikely as to make an award of costs to the applicants from the estate unjustifiable. I will deal with each contention in turn.

[12] **Construction of the will.** At paragraph 12 of Court Document 4 Mr Murphy swears to a fact which is irrelevant to the construction of clause 1 of the will:

> "… there is no legal practice that continues the legal practice of Myles G Murphy Solicitors, being my sole practitioner business under which I drew the deceased's will …"

[13] The information is irrelevant because clause 1 of the will distinctly does not say that "the firm which carries on his practice" must be the firm which drew the will. That this cannot be intended by the clause is pellucidly clear. At the time the will was drawn Mr Murphy carried on practice "on his own account". All the words in clause 1 following that phrase are to deal with a circumstance where that practice has come to an end. The words "the firm of which he is a partner" contemplate a different firm from the firm which drew the will, which need not be a successor firm to the firm which drew the will. Clearly enough, "the firm which carries on his practice" need not be the successor firm to the firm which drew the will; it could equally well be the successor firm to "the firm of which he is a partner", or indeed the last firm in which he practiced prior to Mrs Klazema's death.

[14] The irrelevant information sworn to at paragraph 12 of Mr Murphy's affidavit was advanced by the applicants before me as the basis to contend that because the firm which drew the will in 2005 had no successor practice, no executor was appointed under the will. Mr Murphy swore at paragraph 8 of his affidavit (Court Document 4) that,

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[2] Between the date the will was drawn and the date of death legal practice in Queensland had changed so that rather than being the senior partner of the firm which carried on Mr Murphy's practice, Ms Mould was the senior practitioner and director of an incorporated legal practice. No party contended that this should affect the outcome of this matter.

because of the irrelevant information he believed "that there is no executor properly appointed by the will."

[15] This has not always been Mr Murphy's belief. On 8 January 2019 Mr Murphy wrote to Ms Mould saying that it had come to his attention that she was attending to the estate of the late Mrs Klazema. He says:

> "I have known this family for some time and Pam personally appointed me as her executor due to family difficulties. … Reference to the will would have disclosed this.
>
> Please note that I personally am the Executor of that estate and no work should be undertaken on the file without my approval."[3]

The remainder of the letter makes complaints about Ms Mould's dealing with other clients Mr Murphy claims as his own.[4]

[16] On 15 January 2019 Mr Murphy sent Ms Mould an authority to deliver all files and other documents which she held on behalf of the estate to him. The authority was signed by the late Mrs Klazema's widower, her son Colin, and her daughter-in-law Gail.

[17] Ms Mould says that on 28 January 2019 Mr Murphy collected documents pursuant to that authority, including the original will and death certificate, and that she instructed her book-keeper to transfer funds held in her trust account to Mr Murphy's trust account. However, it is clear that Ms Mould did not renounce her executorship, but asserted it. Two days later on 30 January 2019 Mr Murphy sent an email to Ms Mould saying:

> "I acknowledge the allegations made by yourself with regard to the executorship.
>
> Without commenting on the same (as they are part of the proceedings)[5] I would like to say
>
> I have known Pam Klazema and her family since the 1990's
>
> You will have seen from the file that she has followed me in my practices from the days before Stacks Gray and MGM Solicitors
>
> She has chosen to place her faith in me, as has her family.
>
> I am privy to a number of family issues of a sensitive nature and drafted Pams last will and testament with these in mind.
>
> The family Likewise has placed their faith in me as can be seen by their authorities which have been delivered to you.

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3 Court Document 17, Exhibit JMB-1.

4 In fact it appears there is more than one dispute. Mr Murphy says in this letter of 29 March 2019 that he has been accused of poaching Ms Mould's clients. In Ms Mould's affidavit (Court Document 17) she refers to Mr Murphy providing legal services from 15 January 2019 under a name substantially identical with, or deceptively similar to, the name of the practice he sold to her.

5 I do not know what proceedings are referred to here.

> The family wish me to start the probate process and to this end and to avoid argument I am writing to ask if you would accede (without any admission on either of our parts) to execute a relinquishment of any claim that you may have to the Role of executorship of the estate.
>
> This would ensure the estate is expedited and that any issues between you and I will not delay the process and that the family's wishes are respected.
>
> Pam's husband Is not young and there will be need to transact the estate in order to release funds to him for his daily living.
>
> If you could advise if you are prepared to sign such relinquishment I shall prepared the same and forward it to you."[6]

[18] Mr Murphy wrote to the applicants, and Christopher Klazema on 25 February 2019:

> "When I attempted to uplift the will from the Lawstore Queensland [the firm Ms Mould bought from Mr Murphy] I was advised by the Principal of the new practice that the appointment of executor read, '*Myles Murphy or if he is not in practice on his own account the senior partner of the firm which has taken over his practice*'. This means of course that at the date of your mother's death, I was not practising on my own account and Juliette Mould, being the Principal of The Law Store Queensland was officially the Executrix."[7]

[19] Thus as at 25 February 2019 Mr Murphy understood that Ms Mould was the executor appointed under the will and that he was not appointed. He knew that she asserted her right to be an executor on a construction of clause 1 of the will, which he accepted.

[20] In this letter Mr Murphy says that he had written to Ms Mould "a number of times" in an effort to have her renounce her position as executrix, but that she had not done so. He records some advice from Ms Mould that she would renounce her position as executrix on conditions which had not at that point been fulfilled. Other than the assertion in this letter, there was no evidence before me that Ms Mould had made this conditional agreement, and I am not prepared to find that any such agreement was made. No-one in the proceeding before me contended that Ms Mould had made such conditional agreement or had otherwise renounced her executorship. On 10 May 2019 Ms Mould published a notice of intention to apply for a grant of probate.[8]

[21] In response to the letter of 25 February Christopher Klazema's solicitors noted that Mr Murphy accepted that it was Ms Mould who was the executor; objected to Mr Murphy acting as an executor, and said that Mr Christopher Klazema "prefers to abide by the terms of the Will and have [Ms Mould's] firm act as executor and trustee".[9]

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6 Court Document 17, Exhibit JMB-3.
7 Letter 25 February 2019, Court Document 21, exhibit bundle p 4.
8 Court Document 4, Exhibit MGM-4.
9 Letter 4 March 2019, Court Document 21, exhibit bundle p 6.

[22] Mr Murphy replied on 12 March 2019.[10] He confirmed his views that Ms Mould was the executor but said he had not appreciated this until he had "collected a copy of the will and had the appointment wording pointed out to me". That is, he put his view as to Ms Mould being the executor on the basis of a construction of the will.

[23] In that letter Mr Murphy goes on to assert that notwithstanding the way he drew clause 1 of the will, the deceased lady intended he should be the executor if he was "capable of undertaking the task". He again asserts that "the principal of my previous firm has agreed to renounce the appointment thus leaving the office vacant". Again, I note there was no evidence of this before me. He then goes on to make remarks that he ought to be the executor because he ought to be in charge of exercising the discretion under the testamentary trusts.

[24] Mr Christopher Klazema's lawyers wrote to Mr Murphy on 14 March 2019 asserting that Ms Mould was the executor on the construction of clause 1 of the will and objecting to him acting as executor and trustee. Ms Mould wrote on 29 March 2019 disputing that Mr Murphy was the executor.[11]

[25] Mr Murphy wrote again on 26 March 2019.[12] Again, he asserted that notwithstanding the terms in which he had drafted clause 1, "In my opinion Pam was quite clear that she wished me to undertake the role for various reasons". He for the first time asserted that there was no executor relying upon what I have called the irrelevant fact, see [12] above. Upon the basis of this new interpretation of clause 1 he states that he will not be releasing documents and funds belonging to the estate to Ms Mould. He reiterates that he knew what the testator intended (although he did not document this in clause 1 of the will). He recites that the deceased lady's widower and son Colin wished him to be the executor. He stresses the cost to the estate if there is a dispute about who should be the executor. He puts this cost at between $160,000 and $200,000. He urges the widower and his two sons to agree on who ought to be the executor and says that he is happy to undertake the role. He says the following:

> "One of the responsibilities of executorship is that at times one may have to make 'tough' decisions and take responsibility for those decisions which are unpopular with all or some of the beneficiaries. One of the reasons Pam wished me to undertake the role of Executor was because she perceived my independence which shield you all as family members from that responsibility.
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> … I do believe that I have the advantage of Pam's trust and that she would have endorsed that trust if she were here today."[13]

[26] Mr Murphy was not cross-examined as to how and why his view of clause 1 changed. Both the widower and Colin Klazema swore that they were advised and believed that "due to the circumstances as existed at the date of … death, there is no validly appointed"[14] executor. They were not cross-examined as to what advice they had

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10 Court Document 21, exhibit bundle p 8.
11 Court Document 17, Exhibits 4 and 5.
12 Court Document 21, exhibit bundle p 15.
13 Court Document 21, exhibit bundle p 17.
14 Court Document 10, paragraph 16.

received and why they did not believe the earlier advices they had received to the contrary from Mr Murphy, see [18] above. These matters remained unexplained, although they called for explanation.

[27] **Suitability of Mr Murphy to administer the estate.** Mr Klatt, an experienced estate practitioner, swore an affidavit on behalf of Christopher Klazema. He points out that the executor of the will is named as trustee and also as "appointor". He notes that the trustee has complete discretion as to which of the beneficiaries receives the income and capital of the estate. Further, he comments that normally in such a case there would be an independent person as appointor to provide "a mechanism for some oversight of the trust".[15] He notes that the will trusts contain a provision which, if valid, would allow the trustee to discharge him or herself as outgoing trustee.

[28] In short, the executor of Mrs Klazema's will becomes a trustee who has unusual discretionary powers. Whether Mrs Klazema's widower and two sons receive anything under the will depends on the exercise of discretion of the trustee. It is necessary that anyone who fills this role must be impartial in exercising the discretion. In my view, even if there were no executor validly appointed by the will, Mr Murphy is unsuitable for the role of administrator and trustee and this must have been apparent to the applicants and their lawyers. I now discuss the reason for this view.

[29] Mr Baldwin, a solicitor, of Gympie, made an affidavit on behalf of Mr Christopher Klazema. He deposes to having met Christopher Klazema because he was a tradesman working at Mr Baldwin's home. He says that through December 2018 he became aware that Christopher Klazema was "increasingly stressed and concerned at his inability to obtain any information in relation to his mother's estate and to obtain a copy of her last Will".[16] By the end of January 2019 Christopher Klazema still had not obtained a copy of the will, notwithstanding that Mr Murphy had promised to provide him with one. Mr Baldwin thought this irregular, having regard to the provisions of s 33Z of the *Succession Act 1981* (Qld). He therefore contacted Mr Murphy on 31 January 2019. He said that, "After pressing Mr Murphy and referring to section 33Z of the Succession Act, he agreed that if I wrote him a letter … he would provide a copy of the Will."[17] Mr Baldwin deposes that, during this conversation, Mr Murphy asked whether Christopher was going to contest the will and then "said words to the effect of that he had drafted the Will and it was 'incontestable'." He gave Mr Baldwin to understand that the reason for this view was that Christopher Klazema was the beneficiary of a discretionary will trust and that the trustee had "a wide ranging discretion as to who received benefits under the trust".

[30] On 11 February 2019 Mr Murphy sent an email to Mr Baldwin summarising the will trusts and giving Mr Christopher Klazema a copy of the will for the first time. The summary of the trusts given is inaccurate in that it excludes Christopher from the list of beneficiaries in one of the trusts.

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[15] Court Document 14, paragraph 15.
[16] Court Document 21, paragraph 3.
[17] Court Document 21, paragraph 8(b).

[31] Because he was concerned about the inaccurate summary of the trusts, Mr Baldwin telephoned Mr Murphy on 14 February 2019, during which conversation, "Mr Murphy made a statement to the effect that 'Chris gets more than Colin and always has and that Chris was always more vociferous than Colin and Colin did not ask for things'."[18] In a later conversation between the two on 6 March 2019 Mr Murphy said of Mr Colin Klazema and his wife Gail, "I wouldn't regard them as friends of mine not in the sense of friends … they're professional friends that I've acted for them for a long time". He made other statements which are difficult to understand but seem to indicate some ongoing business connection with Mrs Gail Klazema.

[32] Mr Murphy demonstrates that he cannot be impartial as between Mrs Klazema's two sons, Colin and Christopher. He contends that the deceased lady wished him to be executor of the estate, and trustee of the discretionary trusts, "due to family difficulties".[19] What Mr Murphy means by this is not entirely clear but his letter of 26 March, paragraph [25] above, makes it clear that he feels it involves making tough decisions which will be unpopular with some of the beneficiaries. These statements take substance from the remarks Mr Murphy made to Mr Baldwin. For no apparent reason Mr Murphy initially asked whether Christopher Klazema was going to contest the will, and then gave his view that he had drafted the will to prevent Christopher Klazema being able to successfully contest the will.[20] He refused to give Mr Christopher Klazema a copy of the will for over two months, and only did so after Mr Christopher Klazema engaged solicitors to act for him. Then he gives a summary of the trusts which is inaccurate in that it excludes Mr Christopher Klazema from the list of beneficiaries of one of the trusts. Mr Murphy made statements giving his view that Christopher always "got more" than Colin and was more "vociferous" than Colin.[21] He made a comment that he was friends with Mr Colin Klazema and his wife Gail in a professional sense.[22]

[33] Furthermore, Mr Murphy saw fit to act on the instructions of Mrs Klazema's widower and her son Colin in obtaining a letter of authority to collect the will and in telling Ms Mould that the family had placed their faith in him and wished him to be the executor when calling upon her to renounce the role of executor on 30 January 2019. These statements are quite remarkable for by "the family" Mr Murphy could only have meant Mrs Klazema's widower and her son Colin. At that time he was refusing even to allow Mr Christopher Klazema a copy of the will. To ignore the interests of Mr Christopher Klazema in those circumstances, and to that extent, is a clear indication of Mr Murphy's partiality.

[34] Apart from the preference Mr Murphy has demonstrated for Mr Colin Klazema over Mr Christopher Klazema, in my opinion Mr Murphy showed an unprofessional enthusiasm to act as trustee of the will trusts. This advocating approach based on his claim to know what the deceased lady wanted made him an inappropriate candidate for administrator.

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18 Court Document 21, paragraph 13(c).
19 Letter 8 January 2019, paragraph [15] above, and email 30 January 2019, paragraph [17] above.
20 Conversation 31 January 2019.
21 Conversation 14 February 2019.
22 Conversation 6 March 2019.

[35] I will mention that submissions were made on behalf of the applicants that they ought to have their costs of this proceeding because the proceeding was necessary in order that somebody be appointed to take charge of the estate, and was beneficial in that it resulted in certainty as to who was the executor. It was submitted that this was so against six months during which no progress was made with administration of the deceased lady's estate.

[36] I reject this submission. The only lack of clarity as to who ought to have been in charge of the estate was produced by the second opinion Mr Murphy formed about what the will meant, and that opinion was in my view a most unlikely one. The reason no progress was made with the administration of the estate was that Mr Murphy on the authority of the applicants persuaded Ms Mould to give him the will and funds belonging to the estate. When he read the will and formed the view that he was not executor, he did not do what he ought to have done, namely return the documents and funds to Ms Mould, but behaved in an unprofessional way, attempting to have Ms Mould renounce executorship. In fact Ms Mould had given notice of an application for probate 13 days before the filing of this application. I have not lost sight of the fact that Mr Murphy is not an applicant, but he purported to act on the applicant's behalf for some time prior to the making of this application, and the applicants have relied upon his testimony and made this application supporting the idea that he should be administrator.

The Position of the Respondent Christopher Klazema on the Application

[37] Certainly while Mr Christopher Klazema's matters were in the hands of Mr Baldwin of Gympie, his position was that Ms Mould was the duly appointed executor and should be allowed to act as such. Once the matter was transferred to the Brisbane solicitors who represented Mr Christopher Klazema on the application before me, a different approach was taken:

> "The applicants have approached the matter on the basis that Myles Murphy is not the executor instituted under the will, and needs to be appointed pursuant to the court's discretion to appoint an administrator … apparently Ms Mould still makes herself available as the executor appointed under the will, but she is not actively put forward by Christopher Klazema. He does not object to her acting but would prefer an independent solicitor accredited as a succession or specialist."[23]

[38] At the hearing of the application counsel on behalf of Mr Christopher Klazema made the point that, due to the wide discretions available to the will trustees, it would be better if someone other than Mr Murphy were to be administrator because it was said that Mr Murphy had showed himself to be less than independent. I accept that submission as correct. It was said that due to the complexity of the will trusts an accredited specialist practitioner would be preferable as administrator. Nonetheless, in accordance with the approach foreshadowed in written submissions (above), counsel for the respondent Christopher Klazema did not actively oppose the idea that Ms Mould should be the executor. In all the circumstances, I think this approach was reasonable even though the validity of Ms Mould's appointment as executor means that it is not

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[23] Written submissions on behalf of the respondent Christopher Klazema, Court Document 20, paragraph 1.

appropriate to appoint any other administrator the estate. So that while part of the case advanced by the respondent Christopher Klazema was unsuccessful, I do not think it was so unreasonable that he should be precluded from recovering his costs against the estate.