

# SUPREME COURT OF QUEENSLAND

CITATION: *Re Fox* [2020] QSC 30

PARTIES: **In the will of ROBERT LAURENCE CECIL FOX, deceased**

FILE NO: BS No 489 of 2019

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 6 March 2020

DELIVERED AT: Brisbane

HEARING DATE: 7 November 2019

JUDGE: Davis J

ORDER: **Application adjourned to a date to be fixed.**

CATCHWORDS: SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – GRANTS OF PROBATE AND LETTERS OF ADMINISTRATION – ADMINISTRATION WITH WILL ANNEXED – GENERALLY – where applicant seeks a grant of Letters of Administration of the will, but says that she will administer the estate as an intestacy – where internal inconsistencies in such an approach – where highly unlikely that deceased died intestate – where it is impossible, at present, to determine the status of the deceased estate – whether it is appropriate to adjourn the application to a date to be fixed to enable the parties to consider their respective positions and seek advice

*Succession Act* 1981, ss 15, 33G, 36A, 40

COUNSEL: Joanne Fox appeared on her own behalf  
Angelina Fox appeared on her own behalf

SOLICITORS: Joanne Fox appeared on her own behalf  
Angelina Fox appeared on her own behalf

[1] This is an application by Joanne Fox (Joanne) for orders in relation to the estate of Robert Laurence Cecil Fox (Mr Fox). Joanne represented herself in the application, as did another interested party, Ms Angelina Fox (Angelina).

[2] It is necessary to record the history of the matter before recording what relief is sought by the respective parties.

## Background

- [3] Mr Fox initially had two children; Joanne and Trevor John Fox (Trevor).
- [4] He then entered into a relationship with Olga Fox (Olga) who is the biological mother of Angelina. Angelina was adopted by Mr Fox in the sense that she lived with him while he was married to Olga and he looked after her, but she was never legally adopted.
- [5] There is a will dated 20 November 2001 (the 2001 will). It seems common ground that the 2001 will is a will made by Mr Fox.
- [6] By the 2001 will, David Ross was appointed executor and trustee of Mr Fox's estate.
- [7] The 2001 will left Mr Fox's estate in this way:

### “Operative Provisions

3. I give devise and bequeath the whole of my estate to my said Trustee upon trust to sell, call-in and convert into money such parts thereof as shall not consist of money and out of the proceeds of such sale, calling-in and conversion together with any monies in hand to pay all my just debts, funeral and testamentary expenses including state and federal death duties, if any, and to divide the balance then remaining as follows:-
- 3.1 As to Thirty Per Centum (30%) to my daughter, **JOEANNE<sup>1</sup> ELIZABETH FOX**.
- 3.2 As to Thirty Per Centum (30%) to my son, **TREVOR JOHN FOX**.
- 3.3 As to Thirty Per Centum (30%) to my wife, **OLGA FOX**.
- 3.4 As to Ten Per Centum (10%) to my stepdaughter, **ANGELINA FOX**.
- 3.5 As to five hundred dollars (\$500.00) to my executor, **DAVID ROSS**.

### Alternative Provision

4. Should one of my children named in Clause 3 die before me leaving children who are alive at my death and who reach the age of Twenty-one (21) years then those children shall, upon each reaching that age, take their deceased parent's share equally.”

- [8] After the date of the 2001 will:
- (a) A child, Alexandra Jade Fox (Alexandra) was born in 2003.

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<sup>1</sup> However, she swore an affidavit as “Joanne”.

- (b) Mr Fox divorced Olga Fox. That occurred in 2013.
- (c) Mr Fox died on 12 February 2018.
- [9] After Mr Fox's death, Joanne applied for probate with Letters of Administration of the 2001 will. That application was requisitioned because Joanne was not the executor named in the will.
- [10] On 9 July 2019, the named executor renounced his office as executor.
- [11] On 2 August 2019, Joanne applied for Letters of Administration.
- [12] Questions then arose as to whether the 2001 will was Mr Fox's last will. Trevor swore an affidavit:<sup>2</sup>

“In relation to the grant of Letters of Administration sought by Joanne Elizabeth Fox in the Will and Estate of Robert Laurence Cecil Fox deceased.

1. I was shown by my father Robert Laurence Cecil Fox, a Will, whilst living with him at Jambola Court Narangba. This Will did not include Ogl<sup>3</sup> Fox or Angelina Fox, however now included my younger sister Alexandra Jade Fox, who was not born when the previous will was written. This giving Joanne,<sup>4</sup> myself and Alexandra equal share in his estate. All other particulars from the Will, which Joanne Elizabeth Fox provided to the court, remain unchanged.
2. I trust, as the administrator of the Will that Joanne will undertake the instruction of the court and as such support her application with no reason for contest.
3. In the interest of expediting the decision of the court, it is my preference to forgo any financial entitlement to the Estate of Robert Laurence Cecil Fox, so that any financial benefit of the stated entitlement be given to Alexandra Jade Fox.

I hope it is the decision of the court to assist in this resolution as some considerable time has passed since the unexpected death of my Father.”

- [13] Joanne, who represented herself before me, then filed another application. She now seeks a grant of Letters of Administration of the 2001 will, but says that she will “administer the estate as an intestacy”. The internal inconsistencies in such an approach are obvious.
- [14] In her affidavit of 12 August 2019, Joanne said this:

“9. In the interest of expediting the decision of the court as it relates to the Will of Robert Laurence Cecil Fox, I wish to forgo any financial entitlement, right or potential claim to the

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<sup>2</sup> Exhibit B to the Affidavit of Joanne Fox sworn 12 August 2019.

<sup>3</sup> No doubt a misspelt reference to Olga Fox.

<sup>4</sup> Strangely he spelt his sister's name as both “Joanne” and “Joeanne” in this document.

Estate in favour of Alexandra Jade Fox who is the youngest child of the deceased (aged 16).”

- [15] Joanne in her affidavit, said that the investigations that she has conducted suggest that the estate is likely to be a small one.
- [16] Angelina appeared before me on the application. She opposed any notion of the estate being administered in intestacy. She pointed to directions given by Bradley J to progress Joanne’s original application for probate of the 2001 will. She submits that Joanne should be directed to press that application.

### **The apparent possibilities**

#### ***If the 2001 will is valid***

- [17] The disposition to Olga was revoked upon her divorce from Mr Fox by force of s 15 of the *Succession Act* 1981. Her 30 per cent of the estate would then naturally fall to either residue or intestacy. The entirety of the estate is divided between named beneficiaries who received designated percentages. There is no residue contemplated. Olga’s 30 per cent then probably falls to intestacy.<sup>5</sup>
- [18] Both Joanne and Trevor have disclaimed the dispositions to them. A disclaimer will cause the disposition to fall to residue or intestacy, depending upon the structure of the will. Here, as I have already observed, there is no residue contemplated so if they had simply disclaimed, then their interests would fall to intestacy.
- [19] However, they have both disclaimed in terms that their interests pass to Alexandra. Probably, the position is that they have not actually disclaimed but have maintained their interests for the benefit of Alexandra so she would ultimately benefit. Even if they have disclaimed, the benefit falls to intestacy where Joanne, Trevor and Alexandra are the only ones who take.<sup>6</sup>
- [20] Angelina would not benefit as she is not “issue” of Mr Fox.
- [21] Alexandra is not named in the will but as I said she would take that part of the estate which falls to intestacy.<sup>7</sup> She may also make application for family provision as a “child” of Mr Fox whereas Angelina may not. Angelina is not a “child, stepchild or adopted child” of Mr Fox.<sup>8</sup> She was the “stepchild” while her mother’s marriage persisted but upon Olga’s divorce from Mr Fox Angelina ceased to be a “stepchild” of his.

#### ***If Mr Fox died intestate***

- [22] In those circumstances, the three children, Trevor, Joanne and Alexandra, will take pursuant to the intestacy rules.
- [23] Alexandra will benefit from the disclaimer by Trevor and Joanne of their interests.

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<sup>5</sup> *Succession Act* 1981, section 33G, Schedule 2, Part 2.

<sup>6</sup> *Succession Act* 1981, section 36A, Schedule 2, Part 2.

<sup>7</sup> Given that Joanne and Trevor do not wish to receive a benefit.

<sup>8</sup> *Succession Act* 1981, section 40.

- [24] For the reasons already explained no family provision application can be made by Angelina.

***If there is a later will than the 2001 will***

- [25] In those circumstances, the estate will, subject to any family provision application, be distributed in accordance with the new will.

**The position here**

- [26] It is impossible, at present, to determine the status of Mr Fox's estate.
- [27] It seems to me though that it is highly unlikely that Mr Fox died intestate. He left the 2001 will. Trevor does not suggest that Mr Fox revoked the 2001 will and died intestate. His evidence suggests that there is another will.

**Where to from here**

- [28] Joanne's application that the estate be administered in intestacy cannot succeed, at least until the facts in issue are finally litigated.
- [29] It is also inappropriate to order Joanne to persist with her application for letters of administration of the 2001 will. If Angelina advocates for that position, then perhaps she can apply for letters of administration of the 2001 will.
- [30] It is not my place to advise the parties, but hopefully the observations that I have made in these reasons may be of some assistance.
- [31] The appropriate order is to adjourn Joanne's application to a date to be fixed to enable the parties to consider their respective positions and seek advice.

**Orders**

- [32] It is ordered the application be adjourned to a date to be fixed.