

SUPREME COURT OF QUEENSLAND

CITATION: *Re: Humpheys* [2002] QSC 090

PARTIES: **NOEL PATRICK HUMPHREYS**
(applicant)
v
RUTH MERLE HUMPHREYS as executrix of the Will of
FRANCIS THOMAS HUMPHREYS deceased
(respondent)

FILE NO: 1921 of 2002

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 10 April 2002

DELIVERED AT: Brisbane

HEARING DATE: 25 March 2002

JUDGE: Ambrose J

ORDER: **I order therefore that –**

- 1. Each of the applicant and the respondent be empowered jointly and secondly to transfer to the respondent a life interest in the property referred to in cl 3(e) of the will situated at 160 Oxlade Drive, New Farm, described as Lot 12 on RP 8785 and Lot 1 on RP 45693.**
- 2. That upon the registration of the respondent as the proprietor of a life estate in fee simple in the said property, the applicant and respondent, as trustees under the will, hold the remainder of that estate in fee simple upon the trusts specified in cl 3(e),(ii), (aa) and (bb) of the will.**
- 3. That the applicant as executor and trustee of the will of FRANCIS THOMAS HUMPHREYS deceased with or without the consent of the respondent have power to sell the remainder of the estate in fee simple in the said property referred to in cl 3(e) of the will to Joseph Alexander Mackay and Catherine Cynthia Heather Mackay being the parties to a contract a copy of which is Exhibit E to the affidavit of Noel Patrick Humphreys filed herein on 28 February 2002 for the sum of \$770,000 subject to the prior production to this court of a valuation by an approved valuer being a member of the Australian Institute of Valuers selected by at least one of the trustees of the will demonstrating that**

\$770,000 is not less than the value of that property at the time of sale.

4. I order that the costs of the applicant and of the respondent of and incidental to this application be assessed upon an indemnity basis and that those costs be a first charge upon the proceeds of any sale of the remainder of the estate in fee simple referred to in paragraph 2 of this order.

5. Each of the applicant and the respondent have liberty to apply for further orders or directions upon four (4) days notice in writing given to the other.

CATCHWORDS: TRUSTS AND TRUSTEES – APPLICATIONS TO COURT – where trust created under will – where respondent trustee-executrix given personal license to reside in house – where applicant-executor given interest in eventual sale of the property under the will – where applicant seeks variation of trusts created under the will for the sale of the property and the creation of a life interest for the respondent – whether Court should vary the trusts – whether Court has power to vary the trusts

TRUSTS AND TRUSTEES – APPOINTMENT OF TRUSTEES

WILLS, PROBATE AND LETTERS OF ADMINISTRATION – ACCELERATION

Trusts Act 1973 (Qld), s 6(1)(d), s 32, s 94, s 95(1)(b), s 98(1)

COUNSEL: A Heyworth-Smith for the applicant
D J Morgan for the respondent

SOLICITORS: Lawson Jones for the applicant
de Groot & Co for the respondent

- [1] **AMBROSE J:** This is an application pursuant to s 6(1)(d) of the *Trusts Act 1973* by one of two executors and beneficiaries under the will of Francis Thomas Humphreys (deceased) (“the testator”) who died on 28 October 1990 for orders relating to the sale of realty which the applicant and the respondent hold in trust for persons given interests in that property and/or the proceeds of its eventual sale under the terms of the will.
- [2] The applicant executor-trustee seeks to sell the property and the respondent executrix-trustee objects to any such sale.
- [3] The applicant is the only son of the testator by his first marriage and five specific legatees under cl 3(a) of the will are all children of the applicant – ie grandchildren of the testator by his first marriage. The respondent is the widow of the testator by his second marriage.
- [4] Clauses 3(b), (c) and (d) of the will all give specific legacies to either the respondent or the applicant.

- [5] This application is brought by the applicant to avoid among other things, problems of and likely delays in the administration of the estate perceived to arise from the terms of cl 3(e) of the will which reads as follows-

“(e) As to my real property and improvements thereon situate 160 Oxlade Drive New Farm aforesaid (or any other real property and improvements thereon owned and occupied by me at my death in lieu thereof) together with the furniture furnishings and household items the whole forming my home for my son NOEL PATRICK HUMPHREYS [ie the applicant] to stand possessed of same UPON TRUST (hereinafter referred to as my “sub-trustee”) -

(i) TO PERMIT the said RUTH MERLE HUMPREYS [ie the respondent] to have the right of personal residence therein during her lifetime or until she notifies my sub-trustee in writing that she no longer wishes to exercise her right of personal residence whichever event occurs first free of rent for her use and benefit absolutely BUT subject to her paying all rates fire insurance premiums land tax repairs and similar outgoings payable from time to time in respect thereto so that these payments will be kept up-to-date and my home maintained in good order and condition and

(ii) ON the cessation of the right of personal residence immediately above given to the said RUTH MERLE HUMPHREYS or on my death should she predecease me I DIRECT that the said property or any other real property and improvements thereon owned and occupied by me at my death in lieu thereof together with the furniture furnishings and household items contained therein be sold by my Trustees AND I DIRECT my Trustees to pay the proceeds therefrom as follows:-

(aa) AS TO the sum of Five thousand dollars (\$5,000) each for my grandchildren [ie. those specified in cl 3(a)]... who have attained or shall attain twenty-five years of age each sum for their separate and individual use and benefit absolutely and

(bb) TO PAY transfer and set over the balance thereof to my said son NOEL PATRICK HUMPHREYS [the applicant] for his sole use and benefit absolutely and

I FURTHER DIRECT that my said son NOEL PATRICK HUMPHREYS be given the option to

purchase the said property or any other real property and improvements thereon owned and occupied by me at my death in lieu thereof together with the furniture furnishings and household items contained therein at such value as shall be determined as a fair and reasonable market value at the time of my death by a member of the Australian Institute of Valuers and as selected by my Trustee upon such terms and conditions as my Trustees shall in their absolute discretion think fit and

- (f) AS TO the balance of my residuary estate for RUTH MERLE HUMPHREYS [ie. the respondent] for her sole use and benefit absolutely and
- (g) IN THE EVENT of the said RUTH MERLE HUMPRHEYS predeceasing me or failing to survive me then the balance of my estate to my Trustees upon trust TO PAY transfer and set over the balance of my residuary estate to my said son NOEL PATRICK HUMPHREYS for his sole use and benefit absolutely.”

- [6] All children of the applicant (and grandchildren of the deceased) are *sui juris*, four of them having attained an age greater than 25 years, the youngest having attained the age of 22 years.
- [7] A trustee company appointed as one of the executors of the will has renounced.
- [8] No grant of representation is needed or has been sought.
- [9] The respondent was born on 15 September 1922. She is therefore about 79½ years of age at the present time.
- [10] Since the death of the testator about 11½ years ago, the respondent has continued to live in the former matrimonial home pursuant to what was described upon the application as the “personal licence” given to her under cl 3(e)(i) of the will.
- [11] At the present time the respondent receives a “social security blind aged pension”. Her eyesight was significantly affected as the result of a stroke she suffered six years ago which affected both her eyesight and her hand co-ordination. Although her health is poor and she must rely upon a carer to assist her with household chores and a gardener to look after the garden and her son to prepare her meals for her, she says she is currently able to walk to the local shops and her general practitioner and five of her medical specialists who treat her for various health ailments are within convenient distance of where she resides.
- [12] The applicant desires in effect to have trusts resulting from dispositions of the will varied, if that is possible, to achieve a speedy conclusion to the winding up of the testator’s estate and to permit an acceleration of the enjoyment of beneficial interests by beneficiaries under the will which is presently postponed to the event of the respondent’s death or her surrender of her personal license to occupy the former matrimonial home.

- [13] He seeks in essence to have orders made effecting a conversion the personal licence of the respondent to occupy the house property at New Farm to a life interest in fee simple with the remainder vesting in the applicant and respondent subject to all the trusts in favour of the specific legatees referred to in cl 3(e)(ii)(aa) and (bb).
- [14] The applicant and the respondent have in effect received an offer for the purchase of the realty at New Farm for the sum of \$770,000, the purchasers agreeing to accept the burden of the personal licence given to the respondent under cl 3(e)(i) of the will.
- [15] Having regard to perceived difficulties that may arise in enforcing her rights under such a licence against any proposed purchasers or their successors in title of the real estate from the applicant and the respondent, the applicant seeks an order having the effect of substituting an interest for life for the respondent in the property in lieu of her current personal licence to occupy it on the terms specified in the will for her life or her relinquishment of that licence prior to her death.
- [16] The applicant is presently 57 years of age.
- [17] Apart from the use and/or disposition of the realty (or the proceeds of its sale) between the applicant and the respondent the estate of the deceased has otherwise been administered.
- [18] The order which the applicant seeks in my view, would clearly place the respondent as beneficiary under the will with a life interest in the residential property in a much more secure and advantageous position than that which she presently occupies as the holder of only a personal licence. With advancing age it may well be the case that the respondent will need to receive care and accommodation in a nursing home for elderly and infirm people or at least in some sort of residential facility designed to give them the care that their advanced age and failing health requires which may not be available in the home she currently occupies. Should she cease to reside in the house which is part of the estate, her personal licence would at least arguably terminate. On the other hand if she had a life interest in the property she could dispose of that interest or at least lease the property for the balance of her life to some person in New Farm at a rental which might help defray the cost of any institutionalised care that she might need.
- [19] When this matter was raised with counsel for the respondent, he seemed unable to suggest any detriment to which the respondent would be subjected if she received a life interest instead of a personal licence for life or until she left the property. Indeed it was not contested that in fact should the order the applicant seeks be made the respondent would be more secure and in a stronger financial position than she is now.
- [20] The respondent and the testator had lived in the former matrimonial home for about 5½ years prior to his death in October 1990 and she has continued to live in that house since that time for a period of about 11½ years. Having regard to the period of time that she has lived in that house and to her age, it is understandable why she would not at this time wish to change her place of residence. On the other hand in my view, the order sought by the applicant would not involve her changing her place of residence unless she decided that that was the best thing for her to do having regard to her age and state of health. If she did so decide then if she had a

life estate in the property of course, it would be of value to her because it would permit her to give a lease of the property until the date of her death.

- [21] It is far from clear to me that the legal consequence of the order sought by the applicant has been clearly understood by the respondent. If it has been clearly explained to her, one can only attribute her resistance to the application to a lack of understanding of the full implications of the order sought or perhaps to some antipathy that has developed between the respondent as his step-mother and the applicant (and his issue as descendants of the testator's former marriage).
- [22] Subject to the adequacy of the price which the prospective purchaser of the residential property at New Farm is willing to pay for the remainder of that property subject to the life interest of the applicant – which would be of more interest to the applicant and his children than it would be to the respondent, I should think the only matter to be determined is whether I am given power to make such an order under the *Trusts Act* which in effect would vary the trusts resulting from the dispositions of the will with a view only to improving the position of the respondent as far as her future security in her old age is concerned and to leading to a much earlier winding up of the estate than might otherwise be the case.
- [23] I will turn then to those sections of the *Trusts Act* upon which the applicant relies.
- [24] Under s 6(1)(d) of the *Trusts Act* 1973 it is provided *inter alia* –

“6 Exercise of powers

- (1) Subject to section 31(3), the powers by this Act conferred on a trustee may be exercised by, and the powers by this Act capable of being conferred by the court on a trustee may be conferred upon and, where conferred, may be exercised by, the following persons —
- (a) ...
- (b) ...
- (c) in respect of any land or other trust property not hereinbefore provided for—by the trustee (if any) of that land or other trust property;
- (d) in any case, or where the persons by whom, or at whose direction, the powers conferred by this section are exercisable do not agree — by such person or persons and in such manner as the court may order or direct on application thereto of any person who has, directly or indirectly, an interest, whether vested or contingent, in that property.”

- [25] Under s 32 of the Act of course, a trustee may sell a trust property or any part of it. In any event the applicant and the respondent in this case are expressly given power of sale of the house property presently occupied by the respondent.
- [26] Under s 94 of the *Trusts Act*, where the court is of the opinion that any sale or other disposition or other transaction is expedient in the administration of any property vested in a trustee, or would be in the best interests of the persons, or the majority of such persons beneficially interested under the trust, but it is inexpedient to effect the

disposition or transaction without the assistance of the court, the court may by order confer upon the trustee the necessary power to do so subject to such provisions and conditions as the court may think fit.

[27] Under s 95(1)(b) of the Act it is provided that where real property is held on trusts the court may approve

- (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event ...
any arrangement (by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.”

[28] Under s 98(1) and s 6(1)(d) of the Act the applicant in this case may seek an order concerning the trust property which he and the respondent together hold because he is a person beneficially interested in the trust property as well of course, as being a duly appointed trustee under the will who does not agree with his co-trustee.

[29] In my view, the order which the applicant seeks would be for the benefit of all beneficiaries of the trust property (and/or its proceeds of sale) which the applicant and the respondent together hold as trustees under the will, and in particular would be for the benefit of the respondent.

[30] The order sought would also be expedient in the management or administration of the real property vested in the applicant and respondent. If made it would almost certainly result in a speedy termination of the administration of the estate, which has to date has extended over a period of 11½ years and which might in the absence of the order sought extend for an unpredictable time perhaps even exceeding a further 11 years.

[31] It is not really contended that the court does not have jurisdiction to make the order sought; it is rather contended that the order should not be made because the respondent is content with the way the testator's estate's assets have been administered over the last 11½ years and there is no good reason advanced to justify making any order which might hasten the termination of administration of the estate.

[32] In my view, the applicant has made out a proper case for the relief which he seeks.

[33] I order therefore that –

1. Each of the applicant and the respondent be empowered jointly and secondly to transfer to the respondent a life interest in the property referred to in cl 3(e) of the will situated at 160 Oxlade Drive, New Farm, described as Lot 12 on RP 8785 and Lot 1 on RP 45693.

2. That upon the registration of the respondent as the proprietor of a life estate in fee simple in the said property, the applicant and respondent, as trustees under the will, hold the remainder of that estate in fee simple upon the trusts specified in cl 3(e),(ii), (aa) and (bb) of the will.
3. That the applicant as executor and trustee of the will of FRANCIS THOMAS HUMPHREYS deceased with or without the consent of the respondent have power to sell the remainder of the estate in fee simple in the said property referred to in cl 3(e) of the will to Joseph Alexander Mackay and Catherine Cynthia Heather Mackay being the parties to a contract a copy of which is Exhibit E to the affidavit of Noel Patrick Humphreys filed herein on 28 February 2002 for the sum of \$770,000 subject to the prior production to this court of a valuation by an approved valuer being a member of the Australian Institute of Valuers selected by at least one of the trustees of the will demonstrating that \$770,000 is not less than the value of that property at the time of sale.
4. I order that the costs of the applicant and of the respondent of and incidental to this application be assessed upon an indemnity basis and that those costs be a first charge upon the proceeds of any sale of the remainder of the estate in fee simple referred to in paragraph 2 of this order.
5. Each of the applicant and the respondent have liberty to apply for further orders or directions upon four (4) days notice in writing given to the other.