

SUPREME COURT OF QUEENSLAND

CITATION: *In the Will and one Codicil of Terry Shepherd deceased*
[2002] QSC 098

PARTIES: **IN THE WILL AND ONE CODICIL OF TERRY
SHEPHERD DECEASED**

FILE NO/S: No S 3089 of 2002

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court Brisbane

DELIVERED ON: 16 April 2002

DELIVERED AT: Brisbane

HEARING DATE: 15 April 2002

JUDGE: Holmes J

ORDER: **That letters of administration with the will and codicil
annexed be granted, subject to any formal requirements
of the registrar, to the applicant.**

CATCHWORDS: SUCCESSION – WILLS, PROBATE AND
ADMINISTRATION – Whether applicant entitled to grant
of probate as executor according to the tenor of the will –
Grant of letters of administration

Rule 598

Re Barrow [1939] QWN 41
Re Cowin [1968] QWN 3
In the Goods of Punchard (1872) LR 2 P&D 369
In the Goods of Adamson (1875) LR 3 P&D 253
Re Thompson (1943) 44 WALR 75
In the Estate of Williams (1984) 36 SASR 423
In the Will of R Fowler (1906) 23 WN NSW 134
In the Goods of Jones (1861) 2 Sw & TR 154; 164 ER 952
In the Will of Martin (1909) 9 SR (NSW) 576
Re Broderick (1913) 32 NZLR 1193
In the Will of Porter (1914) 31 WN NSW 56
Re McMillan (1925) 3 WWR 584

COUNSEL: Mr Stephens for the applicant

SOLICITORS: Duells Lawyers for the applicant

The applications

- [1] By his written application, the applicant seeks an order for Letters of Administration with the Will and Codicil annexed. By an oral application, he seeks an alternative order: a grant of Probate of the deceased testator's Will and Codicil to him as executor according to the tenor of the will. Notice of the intention to apply for the grant of letters of administration was duly given by publication in the approved form, and a copy served on the Public Trustee, as required by r 598. No similar notice has been given in relation to any application for a grant of probate.

The will

- [2] The testator did not appoint any executor by his will, which was dated 19 June 1991. He made in it a number of bequests and devises. Of significance is the following passage of the will:

“I appoint James William Petrie, and Mrs Deborah Christie my trustees, but appoint Mr Des Beach, accountant of Oxley with full power to dispose of my country property at Coominya at the best possible price and to distribute the proceeds as directed.”

Thereafter follows a number of instructions about the distribution of the proceeds to meet debts, including certain estate debts, and funeral expenses, with 20% of the balance remaining bequeathed to two beneficiaries. It is the moneys remaining after those payments which, together with an anticipated legacy, are left on trust for the purpose of maintaining a property at the Corso, Fairfield, a life interest in which was given to the applicant. In fact, the Coominya property did not form part of the testator's estate but passed by survivorship, presumably as the result of a joint tenancy.

- [3] A second property at Juliette Street was left unconditionally to a Mr Ken Gale. As already noted, a third property at Fairfield was left to the applicant for his lifetime on a condition that he maintain it “drawing on established trust funds under the guidance of Mr Des Beach”. The property was to be sold at public auction on the death of the applicant and directions were given for distribution of the proceeds after payment of the various expenses.
- [4] The contents of that property were also bequeathed to the applicant with exceptions for certain items, the identification of which were largely left at his discretion: a Mrs Helen Hawkes was to receive any articles she chose upon “arrangement” with the applicant; a Mr Brisbane received certain equipment except for tools required by the applicant; and a Mr Paton received a ring to be selected by the applicant (a later codicil revoked this bequest); and a number of other rings were to be shared by the applicant and Mr Gale.

- [5] Mr Beach has advised by letter dated 21 December 2001 that he renounces any interest in administering the estate.

The authorities on executors “according to the tenor of the will”

- [6] In seeking a grant of probate to the applicant as executor according to the tenor of the will Mr Stephens referred to two Queensland authorities, *In Re Barrow*¹ and *Re Cowin*². The former concerned a finding that a legatee was an executor according to the tenor of the will where the entirety of the estate was left with him with a direction to pay the testator’s debts. The latter involved the drawing of a conclusion as to the testatrix’s intention from the form in which a will was expressed. She had made the following disposition: “all my real and personal estate unto and to the use of my trustees upon trust to pay funeral and testamentary expenses debts residue to my husband”. A question on the will form asked whether any person was to be appointed as executor and trustee jointly with the trustee company, and was answered in the negative. Not surprisingly, the court drew the inference that the testator’s intention was to appoint the trustee company as executors and trustees.
- [7] Mr Stephens very properly also drew my attention to a third decision, *In the Goods of Punchard*³. In that case, an individual was named as “trustee to the estate”. No specific duties were imposed upon him as trustee. The court held that the mere naming of the person as trustee was insufficient to warrant his appointment as executor according to the tenor of the will.
- [8] The applicant’s case is slightly stronger. There was intended a trust of the proceeds of the sale of the Coominya property with the applicant and Mrs Christie as trustees and what Mr Stephens described as powers of appointment (their precise characterisation does not matter for present purposes) given to the applicant in relation to certain of the personal effects of the testator. But there was no general power conferred on him to receive and pay what was due to and from the estate, the usual *indicium* of an executor’s role⁴.
- [9] In some circumstances a general appointment as trustee may lead to an inference of an intention to appoint as executor (see *Re Thompson*⁵; *In the Estate of Williams*⁶); and the absence of a direction to pay debts is not *per se* fatal (*In the will of Fowler*⁷). Generally, however, where the trusteeship is relevant only to a portion of

¹ [1939] QWN 41

² [1968] QWN 3

³ (1972) LR 2 P&D 369

⁴ See, for example, *In the Goods of Adamson* (1875) LR 3 P&D 253

⁵ (1943) 44 WALR 75

⁶ (1984) 36 SASR 432

⁷ (1906) 23 WN NSW 134

the estate and there is no direction otherwise to perform the duties of an executor, a trustee has not been found to be an executor according to the tenor: in *The Goods of Jones*⁸; *In the Will of Martin*⁹; *Re Broderick*¹⁰; *In the Will of Porter*¹¹; *Re McMillan*¹².

Conclusion

- [10] In the present case, any duties akin to those of an executor, of payment of debts and funeral expenses, were imposed on Mr Beach. The applicant was appointed merely as trustee in relation to the proceeds of the Coominya property, with certain limited powers in respect of identification of specific items of property as bequests. There is not, in my view, an intention indicated in the will that he should act as executor.
- [11] However, the applicant would appear to rank at least equally with any other legatee in priority for letters of administration. I consider therefore that he is entitled to a grant of letters of administration with the will and codicil annexed, subject to any formal requirements of the registrar, and will order accordingly.

⁸ (1861) 2 Sw & T R 154; 164 ER 952

⁹ (1909) 9 SR (NSW) 576

¹⁰ (1913) 32 NZLR 1193

¹¹ (1914) 31 WN NSW 56

¹² (1925) 3 WWR 584