

SUPREME COURT OF QUEENSLAND

File No 9074 of 200

BETWEEN:

KILGARIFF

Applicant

AND:

LEDLIE & ORS

Respondent

MOYNIHAN J – REASONS FOR JUDGMENT

CITATION: *Kilgariff v Ledlie & Ors* [2003] QSC 050

PARTIES: **Kilgariff**
(Applicant)

v

Ledlie & Ors
(Second Respondent)

FILE NO/S: SC9074 of 2002

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 13 March 2003

DELIVERED AT: Brisbane

HEARING DATE: 11 October 2002

JUDGE: Moynihan J

ORDER:

- 1. I declare that upon proper construction of the will of John Reid Ledlie (deceased) of which probate was granted by the Court on 19 April 2002 upon division of the trust estate referred to in Clause 13 of the will into six equal shares and until the death of Dawn Margaret Ledlie one of each of the three one sixth shares of the trust estate referred to in Clause 14 of the will as “my wife’s income shares” must be held subject to each of the trusts respectively declared by Clauses 17 (Rosemary’s Fund), 19 (Meredith’s Fund) and 21 (Andrea’s Fund) of the will.**

2. I also order that:

- **The applicant be removed as a trustee of each of the trust estates referred to in the will as Rosemary's Fund and Meredith's Fund.**
- **The second respondent be removed as a trustee from Meredith's Fund and Andrea's Fund.**
- **The third respondent be removed as a trustee from Rosemary's Fund and Andrea's Fund.**

3. The parties' costs of and incidental of this application assessed on an indemnity basis be paid of out the deceased's trusts estate.

CATCHWORDS: SUCCESSION – WILLS, PROBATE, AND ADMINISTRATION – Construction and effect of testamentary disposition – where benefactor of disposition is unclear.

COUNSEL: KA Barlow for the Applicant

P Hackett for the Respondent

SOLICITORS: Russell and Co for the Applicant

H Drakos for the Second Respondent

- [1] The applicant is an executrix and trustee of the will of John Reid Ledlie (deceased - the testator). Probate of the will was granted on 19 July 1992. The applicant seeks a declaration that on a proper construction of the will, upon division of the trust estate referred to in clause 13 of the will into six equal shares and until the death of Dawn Margaret Ledlie (her mother the testators widow – Mrs Ledlie):-
 “The property comprising the three one sixth shares of the trust estate referred to in clause 14 of the will as “my wife’s income shares” must be held separately, and subject to a separate trust, from the property the subject of each of the trusts respectively declared by clauses 17 (“Rosemary’s Fund”), 19 (“Meredith’s Fund”) and 21 (“Andrea’s Fund”) of the Will.”
- [2] There are other claims for relief which can be dealt with once the declaration issue is determined.
- [3] The will appointed the testator’s wife (Mrs Ledlie) and their three daughters as executrices and trustees under the will. All are parties to this application. The construction advanced by the applicant is apparent from the form of the declaration sought. The respondent Rosemary Nearhos contends for construction to the effect that the will provides that an equal share of the capital of “my wife’s income fund be paid to each daughters fund and the income from it be paid to Mrs Ledlie.
- [4] I turn to the relevant provisions of the will, I have highlighted the provisions directly relevant to this issue here. Clause 5 of the will devises and bequeaths the

testators estate to the trustee's trust with provisions as to selling or converting it, which are of present concern.

[5] Clause 13 provides:

*“**I DIRECT** that my trustees shall stand possessed of the real and personal property mentioned in clause five hereof and the proceeds of sale and conversion thereof **UPON TRUST** to pay thereout my funeral and testamentary expenses and debts and all legacies bequeathed by this my will or any codicil hereto **AND** subject as aforesaid my trustees shall stand possessed of the real and personal property mentioned in clause five hereof and the proceeds of sale and conversion thereof (hereinafter with the investments for the time being representing the same called “my trust estate”) upon trust that my trustees shall divide my trust estate into six equal shares.”*

[6] Clause 14 then provides:

*“**I DIRECT** that subject as aforesaid and to the provisions of clause thirty one of this my will my trustees shall pay the income during the life of my said wife of three shares (hereinafter called “my wife’s income shares”) of such six equal shares in my trust estate to my wife **PROVIDED** that ... (\$54,000.00) **AND I FURTHER DIRECT** that subject as aforesaid my trustees shall stand possessed of one of the three income shares constituting my wife’s income shares upon the same trusts and with and subject to the same powers as are hereinafter declared of and concerning the share in my trust estate which is hereinafter referred to as Rosemary’s share and that as subject to aforesaid my trustees shall stand possessed of another one of the three shares constituting my wife’s income shares upon the same trusts and with subject to the same powers as are hereinafter declared of and concerning the share in my trust estate which is hereinafter referred to as Meredith’s share and that subject as aforesaid my trustees shall stand possessed of the last of the three shares constituting my wife’s income shares upon the same trusts and with and subject to the same powers as are hereinafter declared of and concerning the share in my trust estate which is hereinafter referred to as Andrea’s share.”*

[7] Clauses 17, 19 and 21 establish what are respectively called “Rosemary’s Fund”, “Meredith’s Fund”, and “Andrea’s Fund” in the following identical (save for the name) terms:-

*“17. **I DIRECT** that subject as aforesaid my trustees shall hold the income ... of [sic] one share of such six equal shares in my trust estate other than my wife’s income shares (such share being hereinafter called “Rosemary’s share”) **AND I DIRECT** that subject as aforesaid my trustees shall stand possessed of Rosemary’s share and of such income **UPON TRUST**:-*

(a) to set up a fund (“Rosemary’s Fund”) to consist of the income and assets hereinbefore in this present

clause which I have directed my trustees to hold upon trust to set up Rosemary's Fund and any income or property added to Rosemary's Fund from time to time ..."

The Fund income is to be applied for the benefit of Rosemary's children or remoter issue. After the expiration of the Fund uncertainty period the capital may be applied for the same purposes.

- [8] It is useful to note that Clause 25 declares that the trustees in their discretion might apply the whole or any part of the income of capital of "the share of my trust estate or Rosemary's Fund or Meredith's Fund or Andrea's Fund to which any person may be entitled ..". Clause 26 is a declaration that the trustees may apportion "property forming part of my estate or any of the said three funds to or towards the share of any person or persons therein under the trust herein before contained". Clause 33 declares that payments in the nature of income arising "from my estate or any of the three funds wholly or partly before my death" are to be treated as accruing wholly after the death and not apportioned.
- [9] The construction of the will is not without difficulty. I am however unable to construe it as providing for the creation of the fourth fund in relation to "my wife's income shares". It provides for the disposition of the capital and differentiates as to the interest of the shares.
- [10] The wife's income shares entitle Mrs Ledlie to income during her lifetime but not capital, no trust fund is created in her favour and there is nothing as to how such a fund would be dealt with on her death.
- [11] This is in contrast with the way in which the remaining three equal shares of the estate are to be dealt with. A one sixth share constitutes each of Andrea's Fund, Rosemary's Fund and Meredith's Fund and the trustees are directed to invest each fund as authorised. There are specific directions as to the disposition of the income and capital to which I have previously referred.
- [12] In my view Clause 13 having directed the estate be divided into six equal shares directs that income from each of wife's shares is to be paid to Mrs Ledlie during her lifetime, so far as capital is concerned, one of the wife's income shares is to be placed in each of the daughters' Funds constituted under the will and held on the terms of the specific fund to which it is allocated with the income paid to Mrs Ledlie. Once she dies it is available to the beneficiaries of the fund in which it was placed.
- [13] I mentioned that there are types of relief to be dealt with once the declaration issue was determined, these are as I understand it no longer controversial.
- [14] I therefore declare that upon the proper construction of the will of John Reid Ledlie (deceased) of which probate was granted by the Court on 19 April 2002 upon division of the trust estate referred to in Clause 13 of the will into six equal shares and until the death of Dawn Margaret Ledlie one of each of the three one sixth shares of the trust estate referred to in Clause 14 of the will as "my wife's income shares" must be held subject to each of the trusts respectively declared by Clauses 17 (Rosemary's Fund), 19 (Meredith's Fund) and 21 (Andrea's Fund) of the will.

[15] I also order that:

- The applicant be removed as a trustee of each of the trust estates referred to in the will as Rosemary's Fund and Meredith's Fund.
- The second respondent be removed as a trustee from Meredith's Fund and Andrea's Fund.
- The third respondent be removed as a trustee from Rosemary's Fund and Andrea's Fund.

[16] I order that the parties' costs of and incidental of this application assessed on an indemnity basis be paid of out the deceased's trusts estate.