

SUPREME COURT OF QUEENSLAND

CITATION: *Glasscock v The Trust Company (Australia) Pty Ltd* [2012] QSC 15

PARTIES: **ROLAND CHRISTOPHER GLASSOCK & JULIAN JAMES GLASSOCK** (as personal representatives of the Estate of James Thomas Creed Glasscock Deceased)
(Applicants)

v

THE TRUST COMPANY (AUSTRALIA) PTY LTD (FORMERLY TRUSTEE COMPANY LIMITED)
ACN 000 000 993 (as personal representative of the Estate of James Thomas Creed Glasscock Deceased)
(Respondent)

FILE NO/S: BS 701 of 2012

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 13 February, 2012

DELIVERED AT: Brisbane

HEARING DATE: 2 February, 2012

JUDGE: Boddice J

ORDER:

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – PETITION OR SUMMONS FOR ADVICE – PROCEEDINGS BETWEEN TRUSTEES AND BENEFICIARIES OR THIRD PARTIES – where the applicants are executors and trustees and residuary beneficiaries seeking directions from the Court under s 96 Trusts Act 1973 – whether the applicants ought to commence proceedings to set aside an inter vivos transfer of property by the deceased to another beneficiary.

EQUITY – TRUSTS AND TRUSTEES – PROCEEDINGS BETWEEN TRUSTEES AND BENEFICIARIES OR THIRD PARTIES – where the applicants, as residuary beneficiaries, seek to set aside an inter vivos transfer of property by the deceased to another beneficiary – whether the applicants should commence proceedings – whether the costs

of the proceedings should be borne by the estate.

SUCCESSION – EXECUTORS AND ADMINISTRATORS
– PROCEEDINGS BY EXECUTORS OR
ADMINISTRATORS – whether the costs of the applicants’
proceedings should be borne by the estate.

PROCEDURE – COSTS – whether the costs of the
applicants’ proceedings should be borne by the estate.

Trusts Act 1973 (Qld) s 96

Evans v Evans [1986] 1 WLR 101, considered.

Fitzgerald v Smith [1889] 15 VLR 467, considered.

Gray v Guardian Trust Australia Ltd [2003] NSWSC 704,
considered.

Loughnan v McConnel [2006] QSC 359, applied.

*Macedonian Orthodox Community Church St Petka Inc v
Petar* (2008) 237 CLR 66, considered.

*Application of Macedonian Orthodox Community Church St
Petka Inc (No 3)* [2006] NSWSC 1247, considered.

Re Atkinson (Deceased) [1971] VR 612, applied.

Salmi & Anor v Sinivuori & Anor [2008] QSC 321,
considered.

Watson v Yore [2004] QSC 339, applied.

COUNSEL:

MK Stunden for the applicant

GR Dickson for the respondent

CA Brewer for the beneficiary Janice Athalie Glasscock

SOLICITORS:

Piper Alderman for the applicants

The Trust Company (Legal Services) P/L for the respondent

Mehera Saunders for the beneficiary

- [1] This is an application, pursuant to s 96 of the *Trusts Act 1973 (Qld)*, by two of three executors and trustees of the estate of James Glasscock (deceased) for directions that the applicants, acting alone, “can and ought to start proceedings” to set aside an *inter vivos* transfer of property owned by the deceased to the deceased and his wife, as joint tenants, on 29 March 2011. The applicants also seek directions as to the

appointment of solicitors to act for them, and the payment of those solicitors' costs out of the estate.

- [2] The deceased died on 16 October 2011, aged 76 years. The applicants are two of his four adult children. The applicants were appointed with the respondent, a professional trustee company, as executors and trustees of their father's estate by his last Will and Testament dated 28 June 2006 ("the Will").
- [3] The respondent does not oppose the making of the orders sought by the applicants. The orders are opposed by the deceased's wife.

Background

- [4] The deceased, a qualified surveyor and senior lecturer, was born on 29 October 1934. His first marriage, which resulted in the birth of all four of his children, ended in divorce in 1983. The deceased married his second wife ("Janice") on 7 September 1991.¹ Janice had two children from a previous marriage.
- [5] After his divorce, and before marrying Janice, the deceased purchased, in his own name, a property at Burgum Road, Maleny ("the Maleny property"). That property consisted of three acres of vacant land. After his marriage to Janice, and his retirement in about the mid 1990s, the deceased paid for a house to be built on the Maleny property.² The deceased and Janice then relocated from Brisbane to live on the Maleny property, which remained in the deceased's name.

¹ Affidavit of Janice Athalie Glasscock filed 2 February 2012, para 2.

² Affidavit of Janice Athalie Glasscock filed 2 February 2012, para 10.

- [6] The deceased suffered a stroke in 2002. This left him with some physical disabilities. In June 2003, the deceased executed an Enduring Power of Attorney in which he appointed Janice his attorney for financial and personal/health matters. The applicants were nominated as reserve attorneys.
- [7] On 28 June 2006, the deceased executed a Will and Enduring Power of Attorney prepared by the respondent. Janice was appointed attorney for personal/health matters, with the applicants as reserve attorneys. The respondent was appointed attorney for the deceased's financial matters, with Janice being first reserve and one of the applicants, Chris, second reserve.
- [8] On 30 March 2010, the deceased executed a further enduring power of attorney, witnessed by a solicitor, Tove Easton. In it, he appointed Janice his sole attorney for financial and personal/health matters. On 24 March 2011, the deceased signed an undated transfer of the Maleny property from himself to Janice and himself as joint tenants by way of gift. The deceased's signature was again witnessed by the solicitor, Tove Easton. Neither the applicants nor the respondent were informed of the transfer. It only came to their knowledge after the death of the deceased.

The Will

- [9] Relevantly, the Will provided:

"I GIVE my Trustee the whole of my estate UPON TRUST as follows:

- a) TO PAY my just debts, funeral and testamentary expenses and all death and other duties so that no beneficiary shall be required to refund any of such duties or expenses and
- b) TO PAY any goods and services tax ("GST") imposed on any supply made by my Trustee in the administration of my estate in accordance with this my Will pursuant to the

provisions of A New Tax System (Goods and Services Tax) Act 1999 and

- c) TO DISTRIBUTE my personal chattels in accordance with my wishes either expressed in a memorandum relating to the distribution thereof signed by me and found with my possessions at my death or made known to my wife JANICE ATHALIE GLASSCOCK during my lifetime of which my Trustee may otherwise have evidence satisfactory to it and I DIRECT that any such chattels not so distributed for my wife or should she predecease me for my children in equal shares and
- d) AS TO any motor vehicle I shall own at the date of my death for my wife JANICE ATHALIE GLASSCOCK and
- e) AS TO my real property situated at 23 Burgum Road, Maleny, Queensland or any substitute property that I shall own at the date of my death and occupied as my principal place of residence (“the property”) for my Trustees TO HOLD upon trust:-
- i) to allow my wife JANICE ATHALIE GLASSCOCK to reside therein free from rent, rates, taxes, and insurance as well as maintenance, repair and improvement costs during her lifetime upon the condition that she pay all utilities and household expenses and keep the Trustee informed of the state of repair of the property;
 - ii) this right of residence shall terminate upon the first to occur of the following events :-
 - A) the death of my wife JANICE ATHALIE GLASSCOCK;
 - B) upon my wife JANICE ATHALIE GLASSCOCK remarrying or entering into a defacto or other connubial relationship determined at the sole discretion of my Trustee;
 - C) my wife JANICE ATHALIE GLASSCOCK failing to comply with the obligations imposed on her by Sub-Clause 4(e)(i) of this my Will and continuing in such failure for a period of three (3) months after request in writing by my Trustee that she comply with any such outstanding obligation;
 - D) my wife JANICE ATHALIE GLASSCOCK giving my Trustee notice in writing that she no longer wishes to exercise this right;
 - E) my wife JANICE ATHALIE GLASSCOCK failing for a continuous period of six (6) months to permanently occupy the residence as her principal place of residence except by arrangement with

my Trustee or except in case of long-term hospitalisation in circumstances which lead my Trustee to believe that my wife shall be able to return to the residence as her permanent home in future AND I DECLARE that the opinion of my Trustee as to whether the right of residence has been terminated hereunder including its opinion as to all relevant questions of fact shall be final and binding on all beneficiaries of this my Will as shall be the decision of my Trustee as to whether to enter into any arrangement with my wife and if so upon what terms and conditions PROVIDED THAT it is my wish that in exercising any such discretion my Trustee shall first consult with my wife and give due weight to her wishes;

- iii) I EMPOWER my Trustee at the request in writing of my wife JANICE ATHALIE GLASSCOCK (or of my Trustee's own volition if my wife is unable to make such request):
- A) to sell the Property or any other residence purchased in substitution and to hold the net proceeds of sale thereof upon the trusts of my residuary estate;
 - B) to purchase or erect in the name of my Trustee out of my residuary estate a substitute residence for the use occupation and enjoyment of my wife;
 - C) I DIRECT that any cash balance arising from such sale and purchase shall form part of the residue of my estate;
 - D) I DECLARE that for the purpose of this clause the words "substitute residence" shall, without limiting the generality of the meaning of those words, include a free standing residence, a strata title unit, a company title unit, a unit in a retirement village, accommodation in a nursing home or a leasehold property;
 - E) I ACKNOWLEDGE that the purchase of certain interests in real estate for retirement living purposes does result in no capital growth in respect of that asset and can result in a diminution of the value of the asset acquired;
 - F) IN the exercise of the powers to purchase lease or otherwise acquire a residence for my wife as contained in this clause my Trustee may make such acquisition (in the

absolute discretion of my Trustee) notwithstanding that it may result in a loss to the trust or be the acquisition of a depreciating asset;

- G) I ACKNOWLEDGE that the rules of certain retirement villages do not permit the purchase of a residence by Trustees and in this event and wheresoever my Trustee is precluded from purchasing such a unit in its own name for the benefit my wife I EMPOWER my Trustee to advance capital moneys from my residuary estate to my wife upon such terms and conditions and security as my Trustee shall deem necessary to enable her to purchase or lease such residence;
- iv) upon the termination of this right of residence I DIRECT my Trustee to sell the residence on such terms as my Trustee considers expedient as though it was the absolute owner (but with power to postpone such sale for so long as it sees fit) and all of the net proceeds is to fall into and form part of the rest and residue of my estate.
- f) AS TO the rest and residue to hold upon Trust (“the fund”) and TO INVEST the same as is allowed by this my Will or by Law with a bias towards income during the lifetime of my wife JANICE ATHALIE GLASSCOCK and to apply the net annual income arising as follows:
- i) To meet all costs relating to the property referred to in clause 4(e) of this my Will that my wife is not responsible for;
- ii) To pay as soon as practicable after the date of my death a sum equal to 3.5 times the maximum annual Australian Government Centrelink single person pension as varied by CPI or any other reason from time to time to my wife JANICE ATHALIE GLASSCOCK by way of fortnightly instalments;
- iii) AS TO the remaining income TO PAY to any one or more of:
- A) My children ROLAND CHRISTOPHER GLASSOCK, JULIAN JAMES GLASSOCK, NICHOLAS CHARLES GLASSOCK and RICHARD ROBERT GLASSOCK and
- B) My natural grandchildren
in the shares and amounts and at such times as my Trustee in its absolute discretion thinks fit without any obligation to make payments to all of the persons within the classes listed in (A) to (B) inclusive of this paragraph nor to ensure equality among those to whom payments are made and

- iv) UPON the death of my wife JANICE ATHALIE GLASSCOCK TO DIVIDE the balance of the fund into four parts and:
- A) AS TO one part for my son ROLAND CHRISTOPHER GLASSOCK PROVIDED THAT should he not survive me for a period of thirty days and take a vested interest leaving a natural child or children then such child or children upon attaining the age of twenty five years shall take and if more than one equally between them as tenants-in-common the share which his her or their father would have taken had such father so survived me and
- B) AS TO one pan for my son RICHARD ROBERT GLASSOCK PROVIDED THAT should he not survive me for a period of thirty days and take a vested interest leaving a natural child or children then such child or children upon attaining the age of twenty five years shall take and if more than one equally between them as tenants-in-common the share which his her or their father would have taken had such father so survived me and
- D) AS TO one part for my son JULIAN JAMES GLASSOCK PROVIDED THAT should he not survive me for a period of thirty days and take a vested interest leaving a natural child or children then such child or children upon attaining the age of twenty five years shall take and if more than one equally between them as tenants-in-common the share which his her or their father would have taken had such father so survived me and
- E) AS TO the remaining one part for my Trustee to hold upon Trust (“the NCG Fund”) and TO INVEST the same as is allowed by this my Will or by Law with a bias towards income during the lifetime of my son NICHOLAS CHARLES GLASSOCK and at the absolute discretion of my Trustee to apply the net annual income arising to or for the benefit of my son NICHOLAS CHARLES GLASSOCK and his maintenance, education, advancement and benefit (including medical expenses) and if at any time the income is insufficient in the opinion of my Trustee then the capital can applied to the

extent that the income is not sufficient and UPON the death of my son NICHOLAS CHARLES GLASSOCK TO PAY the balance of the NCG Fund to my sons ROLAND CHRISTOPHER GLASSOCK, JULIAN JAMES GLASSOCK and RICHARD ROBERT GLASSOCK in equal shares PROVIDED THAT if any of my sons do not survive me for a period of thirty days and take a vested interest leaving a natural child or children then such child or children upon attaining the age of twenty five years shall take and if more than one equally between them as tenants-in-common the share which his her or their father would have taken had such father so survived me and”

- [10] The estate assets comprise moneys and shares, together with limited furniture and effects. The most recent statement of assets and liabilities as at the date of death estimates the value of the estate at \$1,106,816.71 less liabilities of \$6,935.³

The application

- [11] The primary order sought pursuant to s 96 of the *Trusts Act* 1973 (Qld) is for directions that:

“... the Applicants, acting alone, can and ought to start proceedings against Janice Athalie Glasscock to establish the interest claimed under caveat number 714171676 lodged on 21 November 2011 over property more particularly described as Lot 2, Registered Plan 211373, County of March, Parish of Maleny.”

(“the proceedings”)

- [12] The application relates to the transfer of the Maleny property. It is valued at approximately \$830,000. The applicants contend there is available evidence that this transfer was tainted by a lack of mental capacity on the part of the deceased and/or unconscionability and undue influence on the part of Janice.

[13] Section 96 of the *Trusts Act* provides:

“96 Right of trustee to apply to court for directions

- (1) Any trustee may apply upon a written statement of facts to the court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.
- (2) Every application made under this section shall be served upon, and the hearing thereof may be attended by, all persons interested in the application or such of them as the court thinks expedient.”

[14] Where an executor or trustee is in doubt as to the course of action to be adopted, the executor or trustee is entitled to seek the opinion of the Court as to what it should do.⁴ In determining such an application, it is not the function of the Court to investigate the evidence and make a finding whether or not the trustees will be successful in the litigation.⁵ The Court has merely to determine whether or not the proceedings should be taken.⁶ However, the matter should be sufficiently investigated to determine whether or not the proceedings would be fruitless.⁷

[15] The sole purpose in giving advice is to determine what should be done in the best interests of the trust estate.⁸ The Court’s ambit includes obtaining advice about whether it is proper for the trustee to incur the cost and expense of prosecuting or defending litigation. The function of the power is not merely to afford personal protection to the trustees. It is also to protect the interests of the trust.⁹

³ Statement of Assets and Liabilities as at date of death (16 October, 2011).

⁴ *Re Atkinson (Deceased)* [1971] VR 612 at 615.

⁵ *Salmi & Anor v Sinivuori & Anor* [2008] QSC 321 at [16].

⁶ *Fitzgerald v Smith* (1889) 15 VLR 467.

⁷ *Re Atkinson (Deceased)* at 615; adopted by Atkinson J in *Loughnan v McConnel* [2006] QSC 359 at [7].

⁸ *Macedonian Orthodox Community Church St Petka Inc v Petar* (2008) 237 CLR 66 at [104]-[107].

⁹ *Macedonian Orthodox Community Church St Petka Inc v Petar* (2008) 237 CLR 66 at [71]-[72].

[16] In *Watson v Yore*,¹⁰ Holmes J (as her Honour then was) held, in dealing with an application for directions under s 96 of the *Trusts Act*:

“Essentially, what must be determined on this application is whether retention of funds to enable an action against the first respondent is in the interests of the beneficiaries of the estate as a whole. There are a number of competing considerations: the prospects of success, the potential for substantial depletion of the estate in costs should the action be unsuccessful, the proportions of what might be gained if it were to succeed, and, peculiar to this case, the fact that there is at present no cause of action ...”

[17] If the Court does advise that the trustees ought to defend or commence proceedings on behalf of the estate, the Court has a discretion as to whether the costs of those proceedings ought to be borne out of the estate.¹¹ In *Application of Macedonian Orthodox Community Church St Petka Inc (No 3)*,¹² Palmer J observed:

“I think that the development of the law in this area has now reached the point where I may state the following proposition. Where a trustee seeks an order that it is justified in defending a claim against the trust estate by recourse to the trust assets for the costs of the litigation, the question will be whether it is more practical, and fairer, to leave the competing claimants to the beneficial interest in the trust estate to fight the litigation out amongst themselves, at their own risk as to costs and leaving the trustee as a necessary but inactive party in the proceedings, or whether it is more practical, and fairer, that the trustee be the active litigant with recourse to the trust fund for the costs of the litigation. What is ‘practical and fair’ will depend on the particular circumstances of each case and will include:

- whether the beneficiaries of the trust estate have a substantial financial interest in defending the claim;
- what are the financial means of the beneficiaries to fund the defence;
- the merits and strengths of the claim against the trust estate;
- the extent to which recourse to the trust estate for defence costs would deprive the successful claimant of the fruits of the litigation;
- if the trust is a charitable trust rather than a private trust, what, if any, are the considerations of public interest.”

¹⁰ [2004] QSC 339 at [15].

¹¹ *Salmi & Anor v Sinivuori & Anor* [2008] QSC 321 at [19].

¹² [2006] NSWSC 1247 at [62].

Submissions

- [18] The applicants contend the transfer of the Maleny property by the deceased to himself and Janice as joint tenants is inconsistent with the express terms of the deceased's Will. The Will, whilst providing Janice with a right of residency in the Maleny property, expressly provided for a termination of that right in specified circumstances, including remarriage or entry into a defacto relationship. Ultimately, the Maleny property (or its value) was to go to the residuary beneficiaries, the deceased's sons.
- [19] The applicants further contend that the transfer occurred in circumstances where the deceased's legal capacity was in issue. The deceased began to exhibit signs of dementia in August 2008, and was diagnosed with dementia in 2009.¹³ The applicants contend the condition worsened, affecting the deceased's memory and ability to comprehend concepts, and that, by March 2011, the deceased had significant impairment.
- [20] The applicants also rely on the solicitor's file in relation to the preparation of the transfer in question. They contend that file contains material consistent with Janice having provided instructions to the solicitor, with an indication there was urgency in the lodgement of the transfer. That file also does not indicate any advice being given to the deceased about obtaining independent legal advice.
- [21] The applicants contend other evidence supports the conclusion of undue influence and/or unconscionability. They also rely on the fact that the transfer involved the

¹³ Affidavit of Janice Athalie Glasscock filed 2 February 2012, para 6.

gift of real property to the deceased's designated attorney, and assert a statutory presumption of undue influence in these circumstances.

[22] Finally, the applicants submit that if the Court advises in favour of the commencement of proceedings by the applicants, the costs of those proceedings are properly to be paid out of the estate, pursuant to a trustee's right of indemnity.

[23] Janice submits the Court, in its discretion, ought not to make the orders sought by the applicants. She contends the transfer occurred in circumstances of a breakdown in the relationship between the deceased and his children.¹⁴ She also contends evidence of the solicitor, Ms Easton, and of the deceased's general practitioner, Dr Luland, does not support any lack of legal capacity or the existence of undue influence or unconscionability.

[24] Janice further contends the proposed proceedings may ultimately be fruitless, because if the transfer is set aside, she has good grounds for a successful family provision application, which may result in the Maleny property being transferred to her in any event. Janice submits she also has grounds to claim a constructive trust in respect of the Maleny property.

[25] If the court does advise in favour of commencement of the proceedings, Janice submits the costs of the proceedings should be borne by the applicants, not the estate, as the proceedings benefit the applicants as residuary beneficiaries. To do otherwise would cause a depletion of the estate, to the direct detriment of Janice as the recipient of the income of the estate.

¹⁴ Affidavit of Janice Athalie Glasscock filed 2 February 2012, para 7.

Discussion

- [26] The issue for determination is whether, on the material placed before the Court, it is in the best interests of the estate as a whole that the proceedings be taken. In giving that advice, it is not the role of the Court to determine whether the proposed proceedings will or will not be successful, although the Court does have a role in determining whether or not the proceedings would be fruitless. In this respect, it is relevant to consider not only the applicant's affidavit material, but also the material relied upon by Janice.
- [27] In accordance with the usual practice,¹⁵ Janice was served with material and made submissions. However, her counsel was not present when the applicants' counsel outlined the merits of the proposed proceedings. Having regard to the usual procedure, I will not canvass those merits in this judgment.
- [28] Having considered all of the material, I am satisfied that an order should be made advising that the applicants can and ought to commence the proceedings. The transfer occurred in circumstances where the deceased had suffered from dementia for some years, and involved a substantial asset of the estate which the deceased, by his Will, left on trust for the ultimate benefit of the residuary beneficiaries. There is no suggestion the deceased ever requested the making of a codicil to that Will.
- [29] Having regard to those circumstances and the other matters contained in the material before the Court, I am satisfied it is in the best interests of the estate as a whole that the transfer of the Maleny property be the subject of the foreshadowed proceedings. If the proceedings succeed, the residuary beneficiaries will not benefit

to the exclusion of Janice. Janice will retain residency of the Maleny property pursuant to the terms of the Will.

[30] Whilst it may be that Janice could, if the transfer was to be set aside, bring proceedings herself, that factor does not render the proceedings fruitless. The proceedings would have resulted in the return of a substantial asset of the estate. Further, Janice's proceedings may not result in the outcome contended for by her.

[31] The next question to be considered is whether the costs of the proceedings ought to be borne by the estate. A determination of this issue is important as it removes the risk that the Court may later exercise its discretion to refuse recovery of costs out of the estate.¹⁶ The determination of that issue is not, however, a predetermination as to costs as between the applicants and Janice in the proceedings.

[32] The orders sought seek to protect the applicants' right of indemnity as trustees out of the trust assets in respect of the costs, charges and expenses incurred in litigating the proceedings. The determination of costs is ultimately a matter of discretion, depending upon the circumstances of the case. One of those circumstances is that the respondent, a professional trustee company, does not seek to join with the applicants in commencing the proceedings. Instead, the respondent does not oppose an order that the applicants, "acting alone", commence the proceedings.

[33] That is significant, particularly when considering whether the costs of the proceedings brought by the applicants, two of four residuary beneficiaries of the estate, should be borne by the estate. If the proceedings are ultimately successful, it

¹⁵ For a general discussion see *Salmi & Anor v Sinivuori & Anor* [2008] QSC 321 at [14]-[16].

¹⁶ *Gray v Guardian Trust Australia Ltd* [2003] NSWSC 704 at [9].

will result in a substantial asset being brought back into the estate, to the ultimate benefit of the applicants and their siblings. Those other siblings support the applicants' proposed litigation.

[34] It is also relevant to consider the effect any order authorising the payment of the costs out of the estate would have on the assets of the estate, and upon the beneficiaries of the estate. Janice is the recipient of a designated amount of the estate's income. The material would suggest the assets of the estate are such that Janice is likely to receive all of the income generated by the estate from those assets. A depletion in the assets of the estate would impact on the income that may be earned by the estate, directly affecting Janice, who is otherwise not a person of substantial means. A depletion of the assets of the estate would also ultimately impact on the applicants as residuary beneficiaries of those estate assets.

[35] A further relevant factor to consider is the cost consequences in the event the proceedings are either successful or unsuccessful. If the costs of the proceedings are borne out of the estate, a lack of success on the applicants' part in the proceedings is likely to result in a substantial depletion of the estate's assets. In such a scenario, the estate would not only bear the costs of the applicants, but also, as a consequence of that outcome, in all probability Janice's costs. This would result in a substantial detriment to Janice as the recipient of the income of the estate. If the proceedings are successful, the estate would be likely to benefit from a costs order in the applicants' favour (on the principle costs follow the event).

[36] If the Court were to order that the costs not be met out of the estate, the applicants would have to bear those costs, and the risk of adverse costs orders.

[37] Having considered the affidavit material, the circumstances of this case and the competing considerations, I am satisfied, in the exercise of my discretion, that it is not appropriate for an order to be made that the proceedings be funded by the estate. The applicants are adults and sui juris. They stand to benefit substantially from the successful pursuit of these proceedings. It is fairer to leave the applicants, as residuary beneficiaries of the Maleny property, to fight out that litigation at their own risks as to costs. In this respect, the observations of Nourse LJ in *Evans v Evans*¹⁷ are apposite:

“In my view, in a case where the beneficiaries are all adult and sui juris and can make up their own minds as to whether the claim should be resisted or not, there must be countervailing considerations of some weight before it is right for the action to be pursued or defended at the cost of the estate.”

[38] I shall hear the parties as to the form of orders, and costs.

¹⁷ [1986] 1 WLR 101 at 107.