

SUPREME COURT OF QUEENSLAND

CITATION: *The Public Trustee of Queensland v Intellectually Handicapped Persons Association of Queensland and Ors*
[2014] QSC 178

PARTIES: **THE PUBLIC TRUSTEE OF QUEENSLAND** as Trustee
of the Trusts established by the Will of **JOHN THOMAS
PETTY (Deceased)**, dated 6 January 1987
(applicant)

v

**INTELLECTUALLY HANDICAPPED PERSONS
ASSOCIATION OF QUEENSLAND**
(first respondent)

ROSS PHILIP LANDSBERG as executor of the Will of
IVY MABEL PEARL PETTY NEE NODEN (Deceased)
(second respondent)

THE PUBLIC TRUSTEE OF QUEENSLAND as
Administrator of the Estate of **DOUGLAS JOHN PETTY
(Deceased)**
(third respondent)

MARIE LAWRIE
(fourth respondent)

FILE NO/S: SC 4153 of 2014

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 8 August 2014

DELIVERED AT: Brisbane

HEARING DATE: 17 June 2014

JUDGE: Boddice J

ORDER: **I shall hear the parties as to the form of orders, and costs.**

CATCHWORDS: SUCCESSION – MAKING OF A WILL – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSAL – ASCERTAINMENT OF TESTATOR’S INTENTION – HOME MADE WILL – where the Public Trustee of Queensland makes application for advice or directions in relation to the proper construction of a homemade Will – where in dispute is the distribution of sale proceeds of two residential properties owned by the deceased – whether an absolute gift is made of the first property – whether the gift of the first property was made on condition – whether an intestacy exists in respect of the sale proceeds of the second

property

Trusts Act 1973 (Qld), s 96

Public Trustee Act 1978 (Qld), s 134

The Congregation of the Religious Sisters of Charity of Australia and Ors v Attorney-General for the State of Queensland [2011] QSC 100, cited

COUNSEL: R T Whiteford for the applicant
 D J Topp for the first respondent
 M J Liddy for the second respondent
 No appearance for the third respondent
 J I Otto for the fourth respondent

SOLICITORS: Official Solicitor of the Public Trustee for the applicant
 Redchip Lawyers for the first respondent
 Minter Ellison for the second respondent
 No appearance for the third respondent
 The Estate Lawyers for the fourth respondent

- [1] **BODDICE J:** The Public Trustee of Queensland (“the Applicant”) makes application, pursuant to s 96 of the *Trusts Act 1973 (Qld)* and, or alternatively s 134 of the *Public Trustee Act 1978 (Qld)*, for advice or directions in relation to the proper construction of the Will of John Thomas Petty (“the Deceased”). At issue is the distribution of the sale proceeds of residential properties owned by the Deceased.
- [2] The First Respondent is the Intellectually Handicapped Persons Association of Queensland (“the Association”). The Second Respondent is the executor of the Will of the Deceased’s wife. The Third Respondent is the Public Trustee of Queensland, as administrator of the estate of the Deceased’s son. The Fourth Respondent, Marie Lawrie, is the daughter of the Deceased by his second wife, and the sole beneficiary of the intestate estate of the Deceased’s son.

Background

- [3] The Deceased died on 16 August 1987. He was survived by his wife, his son and his daughter. His son was born with Downs Syndrome and had an intellectual disability. He was in need of care throughout his life.
- [4] The Deceased’s last Will, dated 6 January 1987, was homemade. By it, the Deceased appointed three individuals as his executors and trustees. Probate for that Will was granted on 25 October 1988. Two of the three trustees appointed by the Will died in 2005. On 23 December 2008, the remaining trustee retired as trustee of trusts established by the Will. The Applicant was appointed as trustee in his place.
- [5] The First, Second and Fourth Respondents appeared and made submissions. The Third Respondent did not appear at the hearing and did not make submissions.

Will

- [6] At the time of his death, the Deceased owned houses at 28 Lara Street, Sunnybank and 30 Mains Road, Sunnybank. Clause C of the Will provided the following in relation to these properties:

“As to my house property and all improvements thereon situate at 28 Lara Street, Sunnybank, Brisbane in the said State being on land described as Lot 2 on Registered Plan No 186716 situate in the County of Stanley Parish of Yeerongpilly containing an area of 661 sq metres and being the whole of the land contained in Certificate of Title Volume 6612 Folio 25 to be the property of the Intellectually Handicapped Persons Association of Queensland with the proviso that my son Douglas John Petty shall remain a resident at 28 Lara Street during his lifetime any alteration to this proviso to be decided by his Trustees and his doctor Dr. Dr. N. Conomos or Dr. S. Theodoros presently practising Wellers Hill. Brisbane.

I direct and declare that the rental to be decided Between the Management of the Intellectually Handicapped Person’s Ass. of Queensland and the Trustees of this my Will after payment of all rates taxes and other outgoings in connection with the said property to be held Upon Trust by my Trustees in an account hereinafter called ‘The Benefit Fund’ for the use and benefit of my son Douglas John Petty of 28 Lara Street, Sunnybank Brisbane in the said State Invalid Pensioner to apply same at the absolute discretion of my Trustees as to the future health care maintenance and wellbeing of my said Son.

On the demise of my said Son Douglas John Petty the Property as Lot 2 Registered Plan No 186716 28 Lara Street Sunnybank containing an area of 661 sq Metres to be the property of the Intellectually Handicapped Persons Ass. of Queensland 354 Brunswick St Fortitude Valley or such other similar body having similar charitable purposes as may be determined by my Trustees in their absolute discretion and as may be in occupation of the said property at the time of the demise of Douglas John Petty and John Thomas Petty.

As to my current dwelling at 30 Mains Road, Sunnybank Brisbane in the said State being on land Described as Lot 1 on Registered Plan No 186716 situate in the County of Stanley Parish of Yeerongpilly an area of 736 sq Metres and being the whole of the land contained in Certificate of Title Vol. 6612 Folio 24 or such other dwelling which I may then own and reside at the time of my death I direct and declare that my said wife Ivy Pearl Mabel Petty shall have the right to occupy so long as she may live. Should my wife wish to sell the said house 30 Mains Road Sunnybank then the Intellectually Handicapped Persons Ass. of Queensland, 354 Brunswick Street Fortitude Valley shall have first option for such price as may be determined by my Trustees and I give devise bequeath and appoint upon trust to the Benefit Fund to apply same for the use and benefit

of my said son Douglas John Petty at the absolute discretion of my Trustees as to the future health care maintenance and wellbeing of my said son.”

Properties

- [7] Following the Deceased’s death, the Association cared for his son and other intellectually disabled persons in the Lara Street property. The trustees leased the property to the Association, which paid rent for its occupation. After 1997, the Association cared for the Deceased’s son at its property at Burpengary, until the son died on 17 December 2012.
- [8] After the Association ceased caring for the Deceased’s son in Lara Street, the trustees sold the property. That sale, on 18 June 1997, realised \$111,000.00, which was invested on behalf of the son. This investment is now held by the Applicant. The present amount is \$123,930.91.
- [9] The Mains Road property continued to be occupied by the Deceased’s wife after his death until she entered a nursing home in 1998 or 1999. Following that change in circumstance, the trustees sold the property. That sale, on 10 September 1999, realised \$115,000.00. The proceeds were invested on behalf of the son. This investment is now held by the Applicant. The present amount is \$160,147.67.
- [10] In January 2013, the Association resolved it would cease caring for intellectually disabled persons, and would transfer its assets to SCOPE Inc (“SCOPE”). The Association, which ceased all operations in disability care by 1 April 2013, is now insolvent. It is being pursued by the Australian Taxation Office (“ATO”) for \$97,772.89 in unpaid tax. Any monies received by it as a consequence of this application will be used to settle that debt. In accordance with its constitution, the balance of any monies remaining will be paid to a similar charitable body. The Association contends SCOPE is the appropriate entity.

Applicant’s submissions

Lara Street

- [11] The Applicant contends the proper interpretation of the Will is that Lara Street was given to the Deceased’s trustees on trust for the Deceased’s son for life with the remainder to the Association or a similar charitable body at the trustees’ discretion. Clause C, read as a whole, does not make an absolute gift of Lara Street to the Association. Any gift is subject to a proviso that the son be permitted to continue to reside there. It is on his demise that the property “is to be the property of” the Association, or a similar body, at the trustees’ discretion.
- [12] The Applicant contends this interpretation is supported by the requirement that during the son’s lifetime the Association pay a “rental”, which was to be held on

trust for the son. The requirement to pay rental, the proceeds of which were for the benefit of the son, is consistent with the son being the life tenant of the property rather than the Association being gifted the property absolutely.

- [13] Further, the Association was not automatically entitled to the property even on the death of the son. The Deceased's trustees were given an absolute discretion to give the property to the Association or another entity. Such a discretion is inconsistent with the Association having a vested interest in the remainder.
- [14] As to the disposition of the proceeds of sale, the Applicant submits on one interpretation the trustees' discretion on the death of the son was only able to be exercised in favour of another entity which had similar charitable purposes to the Association, and which was then in occupation of Lara Street. If that interpretation applies, those criteria are not met as no similar body is or can be in occupation of Lara Street as it was sold many years ago. The gift of Lara Street could no longer be applied according to the "spirit of the trust".¹
- [15] If that be accepted, the Applicant submits as the gift is charitable, and the Association was operating at the date of the Deceased's death and the death of his son, the gift's failure was due to a supervening event, not an initial event. As the Deceased's overriding intention was to benefit the care of the intellectually disabled, the gift should be applied *cy pres*, pursuant to s 105(1) the *Trusts Act 1973* (Qld).
- [16] However, the Applicant submits the proper interpretation of Clause C, in context, is that the trustees' discretion to distribute the gift to a "similar body" was not conditional on that body being in occupation of Lara Street. Any reference to occupation came after the conferral of an absolute discretion. Further, as the Deceased's Will envisaged the son may be accommodated elsewhere, the Deceased must have foreseen Lara Street could be sold before the son's death making occupation of it impossible. The Deceased's overriding intention was to benefit a charity engaged in caring for the intellectually disabled. The directions about the disposal of the property upon the son's death are properly to be read as including the disposal of any sale proceeds.

Mains Road

- [17] The Applicant submits that properly interpreted, the Deceased's Will provided for any proceeds from the sale of the Mains Road property to be held on trust for his son for life but made no provision for what was to become of that fund on the son's death. No necessary implication can be gathered from the words of the Will to allow the Court to read in words giving the fund to any person or body. There is therefore an intestacy in respect of that fund.

¹ See *The Congregation of the Religious Sisters of Charity of Australia and Ors v Attorney-General for the State of Queensland* [2011] QSC 100 at [24].

Respondents' submissions

- [18] The Association submits that upon its proper construction, the Deceased's Will left the properties at Lara Street and Mains Road for the benefit of his son and wife respectively, and thereafter for the benefit of the "Benefit Fund" established by his Will. As a matter of construction, the funds held by the Applicant should therefore be the property of the Association. Alternatively, as the testator had a special affinity with the Association, he would have intended SCOPE receive those funds after the Association has discharged its indebtedness to the ATO.
- [19] The Second Respondent makes no submissions in respect of the proceeds of Lara Street as the Deceased's wife had no interest in that property. In respect of the proceeds of the Mains Road, he submits there is a partial intestacy, for the reasons advanced by the Applicant. The different provisions for each property is consistent with the Deceased intending that the proceeds of the sale of those properties be treated differently.
- [20] The Fourth Respondent submits the proceeds from the sale of Lara Street should either be applied *cy pres*, or to the Association or such similar body as the Applicant may appoint, in his absolute discretion. The proceeds from the sale of Mains Road are properly to be distributed in accordance with an intestacy. Such an interpretation is appropriate, notwithstanding the presumption a Court will not accept a construction which leads to a partial intestacy. To adopt another interpretation would be to engage in impermissible speculation about what the testator's intention might have been had he turned his mind to the fate of the Benefit Fund upon the death of his son.

Applicable principles

- [21] In construing the Will, it is necessary to read the Will as a whole. Where possible, the Court should ascertain the scheme the testator had conceived for dealing with his estate, and construe the Will to give effect to that scheme.
- [22] The Court cannot ignore words contained within the document, but may if appropriate, read words in by necessary implication. Greater latitude is given in construing the language employed by a testator in a homemade will. In such a case, the words of the testator may be looked at less strictly than in the case of a will drawn by a skilled professional.

Interpretation

Lara Street

- [23] Reading the Deceased's Will as a whole, and allowing for the fact it was homemade, it is apparent the intention of the Deceased was to provide residences for his disabled son and his wife, with the proceeds of the sale of those properties to be dealt with differently upon their demise or cessation of any occupation of those properties during their lifetime.
- [24] Accepting that to be the scheme of the Will, and having regard to the words used in relation to Lara Street, the clause in respect of Lara Street is properly to be read as not making an absolute gift of that property outright to the Association. That clause gave the Lara Street property to the Deceased's trustees, on trust for his son for life, with the remainder to the Association or a similar charitable body in the absolute discretion of the Deceased's trustees.
- [25] The discretion given to the Deceased's trustees is properly to be understood as an absolute discretion. It is not subject to a limitation as to the nature of the similar charitable institution. It is for the Applicant, in his absolute discretion, to pay the proceeds of the investment fund relevant to Lara Street to the Association, or a body having similar charitable purposes.

Mains Road

- [26] Unlike the terms of the disposition of Lara Street, the clause in respect of Mains Road specifically envisaged the proceeds of any sale of that property would be paid into the "Benefit Fund" established pursuant to the Deceased's Will, to be held on trust for his son for life. However, the Will made no disposition of any funds remaining upon the death of his son.
- [27] The differences in approach in respect of Lara Street and Mains Road renders it impossible to gather, by "necessary implication" from the words of the Will, who or what entity was to be the beneficiary of those funds upon the death of the Deceased's son. This conclusion renders inescapable a finding the proceeds of this fund must pass by way of an intestacy.
- [28] It is the responsibility of the Applicant to distribute the funds relevant to Mains Road in accordance with the intestacy rules applicable as at the date of the Deceased's death.

Orders

- [29] The Applicant has submitted a draft order declaring that The Public Trustee may, in his absolute discretion, pay the amount held by him representing the sale proceeds of the Lara Street property to the Association or a body having similar charitable purposes, and that he distribute the amount held by him representing the sale proceeds of Mains Road on an intestacy. It is appropriate to make declarations to that effect.
- [30] I shall hear the parties as to the form of orders, and costs.