SUPREME COURT OF QUEENSLAND

CITATION: *Nofz as executor of the estate of Henry Matthew Fitzgerald (deceased) v Kane & Ors* [2015] QSC 372

PARTIES:
YVONNE VIVENNE NOFZ AS EXECUTOR OF THE ESTATE OF HENRY MATTHEW FITZGERALD (DECEASED)
(applicant)
v
DONALD KANE & NGAIRE KANE
(first respondent)
and
TANIA MARIE RICHARDS
(second respondent)
and
AUSTRALIAN VOLUNTEER COAST GUARD ASSOC. INC QF 9 CAIRNS
(third respondent)
and
FREEMASONS QUEENSLAND BOARD OF BENEVOLENCE
(fourth respondent)
and
DISTRICT GRAND LODGE OF CARPENTARIA, HOLDEN UNDER THE UNITED GRAND LODGE OF QUEENSLAND
(fifth respondent)
and
THE CORPORATION OF THE ANGLICAN DIOCESAN SYNOD OF NORTH QUEENSLAND
(sixth respondent)
and
MERCY HEALTH AND AGED CARE INC.
(seventh respondent)
and
ROMAN CATHOLIC TRUST CORPORATION FOR THE DIOCESE OF CAIRNS
(eighth respondent)
and
SALVATION ARMY (QUEENSLAND) PROPERTY TRUST
(ninth respondent)
and
THE UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (QUEENSLAND)
(tenth respondent)
and

JESSICA HAMPSON, GENEVEVE KANE, HILTON KANE, LISA KANE, NAOMI KANE, NORMAN KANE, JUDY HARLAND, RODNEY KOCH, JENNIFER FLEUROT, JOHN ADAM LOTH, DARRYL STRONG, BERNARD MULLINS, ROBERT MILLS, BOBBY WILMOTT, FAY ALICE LOBBAN AND ROSS LOBBAN AS EXECUTORS OF THE DECEASED ESTATE OF ALMA GEM FITZGERALD, WILLIAM AND FREDA JOHNSON, HERMA LAMONT, GREGORY NEIL LYONS, KAREN GAIL PHILLIPS, RENEE BAKER, ANTHONY VILLALAB, SASHA MCDONNELL, RALPH COLES, JENNIFER MCCULLOCH, AUSTRALIAN FINANCIAL SECURITY AUTHORITY AS TRUSTEE OF THE BANKRUPT ESTATE OF KLEY MCPHERSON, ALISTAIR MCPHERSON, CAMERON MCPHERSON, VERITY GROGAN, VERILYN FITZGERALD, MORELL ANN TAYLOR, REVE DAVIDSON, HOWARD SEXTON, THE BARTLE FRERE MASONIC LODGE
(eleventh respondent)

FILE NO/S:	SC No 459 of 2015
DIVISION:	Trial
PROCEEDING:	Applicant
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX-TEMPORE ON:	30 November 2015
DELIVERED AT:	Cairns
HEARING DATE:	27 November 2015
JUDGE:	Henry J
ORDER:	**1. Pursuant to s 96 of the *Trusts Act* 1973 (Qld) I direct that the applicant would be justified in distributing the testator's estate pursuant to the last will dated 5 May 2011 ("the will") on the basis that:** **1.1 the gift in clause 4, category 5(s) of the will to *'Tammy Ritchies'* is a gift instead to *'Tania Marie Richards';*** **1.2 the gift in clause 4 (Category 2) is a gift:** **(a) of 7.375% of the residuary estate to Donald Kane; and**

(b) of 7.375% of the residuary estate to Ngaire Kane;

1.3 the gift in clause 4 (Category 7(ii)) of the will to the *Cairns Marine Radio Club Inc* be read and construed as a gift to *Australian Volunteer Coast Guard Assoc Inc Qf 9 Cairns;*

1.4 the gift in clause 4 (Category 7(ii)) of the will to *The District Board of Benevolence of the Aged Masons Widows and Orphans Fund for the District Grand Lodge of Carpentaria to be used by the organisation for the charitable purposes associated with the Freemasons Home for the Aged situated at McManus St, Cairns* be read and construed as a gift to *the Board of Benevolence and Aged Masons Widows and Orphans Fund (ABN 54 216 065 828) of 60 Wakefield Street, Sandgate, QLD 4107 for the general charitable purposes of Morinda Aged Care, McManus St, Cairns;*

1.5 the gift in clause 4 (Category 7(iii)) of the will to the *Anglican Church of Australia to be used by that religious body for charitable purposes in respect of the Diocese of Cairns*, be read and construed as a gift to *The Corporation of the Anglican Diocesan Synod of North Queensland for the general charitable purposes of the parish of Cairns;*

1.6 the gift in clause 4 (Category 7(v)) of the will to *The Salvation Army in Queensland* be read and construed as a gift to the *Salvation Army (Queensland) Property Trust*;

1.7 the gift in clause 8 of the will to *Bluecare (Blue Nursing Services) in the Cairns area* be read and construed as a gift to *The Uniting Church in Australia Property Trust (Queensland) for the general charitable purposes of Blue Care as it operates in the Cairns region.*

2. That the Applicant's and Eighth Respondent's costs of and incidental to this application be paid from the estate of the Deceased on an indemnity basis.

3. Liberty to apply on giving two business days notice in writing.

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – PETITION OR SUMMONS FOR ADVISE – GENERALLY – where the applicant executor applies under s 96 Trusts Act 1973 for the court's directions as to the bases upon which she ought distribute – whether the threshold requirement of a written statement of facts under the section has been complied with –

whether affidavit material filed and read accompanying the application adequately provide the court with the facts upon which the court can give directions

SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – PRINCIPLES OR RULES OF CONSTRUCTION – WHERE UNCERTAINTY – AS TO PERSON OR OBJECT – where the applicant applies under s 96 Trusts Act 1973 for the court's direction as to the bases upon which distribution ought be made – whether the gifts to beneficiaries inaccurately described or not in existence can be made to the beneficiaries in the application

SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – PRINCIPLES OR RULES OF CONSTRUCTION – WHERE MISTAKE OR MISDESCRIPTION – AS TO PERSON OR OBJECT – where certain beneficiaries under the will were either inaccurately described or did not exist at the time of death – whether the court should construe the gifts as intended for beneficiaries named in the application

Kordamentha Pty Ltd and Calibre Capital Ltd v LM Investment Management Ltd (in liq) and Anor; Park and Muller and Anor v Kordamentha Pty Ltd and Calibre Capital Ltd [2015] QSC 4, followed
Public Trustee of Queensland v Attorney-General for the State of Queensland (2009) QSC 353, considered
Sneath and Anor v Sneath and Ors [2014] QSC 152, cited

Property Law Act 1974 (Qld) s 45
Trusts Act 1973 (Qld) s 96
Succession Act 1981 (Qld) s 33C

COUNSEL: J Trevino for the applicant

SOLICITORS: Maurice Blackburn for the applicant
MacDonnells Law for the eighth respondent

HIS HONOUR: Henry Fitzgerald died on the 24th of February 2014, leaving an estate worth about $1.9 million. Doubts have arisen as to how parts of the estate ought be distributed.

This is principally because his last will of 5 May 2011 left some of the residue of his estate to beneficiaries that were either inaccurately described or did not exist by the time of his death. To resolve her doubts, the applicant executor and trustee of the will applies under section 96 of the *Trusts Act* 1973 (Qld) for the Court's directions as to the bases upon which she ought distribute.

Section 96(1) provides:

> *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.*

Applications under provisions like section 96(1) are sometimes made seeking guidance in respect of litigation - see, for example, *Macedonian Orthodox Community Church, St Petka Inc v Petar* (2008) 237 CLR 66. It is uncontroversial on the terms of section 96(1) that the matters now raised, which turn upon interpretation of the will, are also apt for application for directions pursuant to section 96(1).

However, there is a threshold issue as to whether the section's requirement of the application being upon a written statement of facts has been complied with. No document styled "written statement of facts" has been filed. As in *Sneath and Anor v Sneath and Ors* [2014] QSC 152, such written statement of facts as has been advanced on the application is, at best for the applicant, the statements of fact which appear in writing in the affidavits. All but two of the affidavits were filed on behalf of the applicant. Two were filed on behalf of the eighth respondent, the Roman Catholic Trust Corporation for the Diocese of Cairns. None of the content of the affidavits is inconsistent per se, although, as will be seen, there is an issue with sufficiency of detail as regards the eighth respondent.

In *Sneath* I regarded the affidavits as constituting the written statement of facts for the purposes of section 96. Martin J did not favour that reasoning in *Kordamentha Pty Ltd and Calibre Capital Ltd v LM Investment Management Ltd (in liq) and Anor; Park and Muller and Anor v Kordamentha Pty Ltd and Calibre Capital Ltd* [2015] QSC 4, where the same dilemma also arose. However, his Honour proceeded on the basis that the applicant's written outline of submissions and draft statement of claim contained the written statement of facts.

I agree with the view inherent in Martin J's reasons in *Kordamentha* that, while ordinarily a document styled "written statement of facts" should be filed by the applicant in a section 96(1) application, its absence will not be fatal if the facts upon which the Court is asked to give directions are readily apparent from the facts stated in writing in the materials accompanying the application.

In my respectful view, whether the facts as stated in writing in an affidavit or affidavits have that quality should not be resolved determinatively against an applicant merely by reason of them appearing in such documents rather than a document styled "written statement of facts". The critical consideration, which depends on the circumstances of the particular case, is whether the information which the Court is being asked to assume to be fact for the purposes of giving directions is readily apparent from the written statement or statements of fact appearing in the material filed and read in the application.

The facts upon which I am here asked to give directions are readily apparent from the affidavits. I therefore turn to the substantive consideration of the application.

In that exercise, which turns largely upon interpreting Mr Fitzgerald's will, it is permissible to have regard to Mr Fitzgerald's intention within the limits prescribed by s 33C, *Succession Act* 1981 (Qld), which provides:

> "(1) In a proceeding to interpret a will, evidence, including evidence of the testator's intention, is admissible to help in the interpretation of the language used in the will if the language makes the will or part of it –
>
> (a) meaningless; or
>
> (b) ambiguous on the face of the will; or
>
> (c) ambiguous in the light of surrounding circumstances.
>
> (2) However, evidence of the testator's intention is not admissible to establish any of the circumstances mentioned in subsection (1)(c).
>
> (3) This section does not prevent the admission of evidence that would otherwise be admissible in a proceeding to interpret a will."

In dealing, firstly, with the ambiguously or inadequately described gifts, the Court is also to be guided by the principle "falsa demonstratio non nocet, cum de corpore constat" (a false description does not vitiate when the thing is described with certainty). In Lee's Manual of

Queensland Succession Law, Sixth Edition, at 14.170, the application of the principle is explained as follows:

> "It is a major principle of the construction of wills that an inaccuracy of description, whether of property or of persons, will not be permitted to destroy the testator's intention. This is a particular example of the Court of construction's concern to correct the testator's mistakes. It must be clear, from a reading of the will as a whole, what property or person is intended before the erroneous description can be disregarded.
>
> A distinction is made between a description which is erroneous and added words which are intended to restrict the generality of the references to property or person." (citation omitted)

Clause 4 of the will gifts a 3.5 per cent share of the estate residue to various persons including 'Tammy Ritchies'. The applicant has searched for but cannot find Tammy Ritchies. She has, however, found Tania Marie Richards, who is evidently the only person with a name resembling Tammy Ritchies known to be connected with Mr Fitzgerald.

It transpires Ms Richards was Mr Fitzgerald's god-daughter. She maintained contact with Mr Fitzgerald, indeed she attended his 90th birthday party. Despite her first name being Tania she has always been known to family and friends as Tammy. Her maiden name is Woodhouse. Mr Fitzgerald may not have clearly recalled the spelling of her married name, Richards, and misspelt it Ritchies. He obviously intended by the description Tammy Ritchies to be naming his god-daughter, Tania Richards. The applicant would therefore be justified in distributing on the basis that the gift in clause 4 category 5(s) of the will to 'Tammy Ritchies' is a gift instead to 'Tania Marie Richards'.

Clause 4 category 7 of the will gifts seven per cent of the residue of the estate to various entities. The entity and use described at paragraph 2 thereof is:

> "The District Board of Benevolence of the Aged Masons, Widows and Orphans fund for the District Grand Lodge of Carpentaria to be used by that organisation for the charitable purposes associated with the Freemasons Home for the Aged situated at McManus Street, Cairns."

There is no Freemasons home for the aged. The home for the aged at McManus Street to which Mr Fitzgerald was referring was plainly the Morinda Aged Care Facility at McManus Street. It is operated by Masonic Care Queensland under the auspices of the Board of Benevolence and Aged Masons, Widows and Orphans Fund, a charity. The district grand lodge of Carpentaria – the local Freemasons branch – has unremarkably confirmed it has no interest in the gift. Mr Fitzgerald was obviously intending his gift be used for the purposes of the aged persons home at McManus Street. His understanding of its ownership and connection with Masons was generally correct, save for the incorrect inclusion of the reference to the district grand lodge.

Accordingly, the applicant would be justified in distributing on the basis the gift in clause 4 category 7(ii) of the will be read and construed as a gift to the board of Board of Benevolence and Aged Masons, Widows and Orphans fund (ABN 54216065828) of 60 Wakefield Street, Sandgate, Queensland, 4017 for the general charitable purposes of Morinda Aged Care, McManus Street, Cairns.

The entity and use described at category 7 paragraph 3 is:

> "The Anglican Church of Australia to be used by that religious body for charitable purposes in respect of the Diocese of Cairns …".

The error in that description is principally the reference to the Diocese of Cairns. The relevant Diocese is North Queensland, which embraces, inter alia, Townsville and Cairns. Cairns is a parish within that diocese. It is the area of the Cairns parish which Mr Fitzgerald obviously intended to refer to. The other error here is the description of the corporate entity. A letter from Mr Lynham, registrar of the Anglican Diocese of North Queensland confirms the correct description is that appearing in the application, which is the Corporation of the Diocesan Synod of North Queensland.

Mr Fitzgerald's intention is clearly and readily implemented if in respect of this particular gift the will's words be read and construed as a gift to the Corporation of the Anglican Diocesan Synod of North Queensland for the general charitable purposes of the Parish of Cairns.

The next misdescription arises out of the gift and use in category 7 paragraph 5, which reads:

> "The Salvation Army in Queensland to be utilised by that organisation for the charitable purposes of the Salvation Army in the Cairns area …."

The named entity is not a known entity on the Australian Charity and Not-for-profits register. The Salvation Army (Qld) Property Trust is such a registered entity, a detail which if known to Mr Fitzgerald would doubtless have been correctly reflected in his choice of words.

Thus the applicant would be justified in distributing on the basis that the gift in clause 4 category 7(v) of the will to the Salvation Army in Queensland be read and construed as a gift to the Salvation Army (Qld) Property Trust.

Note this order goes to the corporate entity only and makes no change to the charitable purpose set out in that clause of the will, there being no suggestion of a problem with the Salvation Army Property Trust honouring that description of purpose, namely its use in the Cairns area.

Clause 8 of the will gifts eight per cent of the residue of the estate to "Blue Care (Blue Nursing Services) in the Cairns area".

It transpires Blue Care is not a distinct legal entity but rather is an operational branch of the charity the Uniting Church in Australia Property Trust (Qld). It follows Mr Fitzgerald's intention can be readily implemented if the distribution is on the basis that the gift in clause 8 of the will to Blue Care (Blue Nursing Services) in the Cairns area be read and construed as a gift to the Uniting Church in Australia Property Trust (Qld) for the general charitable purposes of Blue Care as it operates in the Cairns region.

I turn next to the possible lapse of gifts to two charitable entities in the will. In respect of both of these gifts the intended beneficiary ceased to exist before death. The general rule, subject to exception, is that a testamentary gift to a charitable entity lapses if the entity ceases to exist in the testator's lifetime.

Exceptions to the rule were summarised by A Lyons J in *Public Trustee of Queensland v Attorney-General for the State of Queensland* (2009) QSC 353 in the following way at [9] to [13]:

"[9] The traditional approach of the courts is that, except in three circumstances, or possibly four, a testamentary gift to a charitable entity lapses if, either before or after the date of the will, that entity ceases to exist during the testator's lifetime.

[10] The first exception is that if upon the true interpretation of the will, the testator intended that the gift should operate as an accretion to assets of the named institution so as to become subject to whatever chargeable trusts were from time to time applicable to those trusts and, after the named institution ceased to exist, its assets remained subject to the charitable trusts which were still on foot on the testator's death, then the gift will be treated as taking effect as an accretion to any property which at his death was subject to those trusts.

[11] The second exception is if, at the testator's death, there is in existence another institution which has taken over the work previously carried on by the named institution and which can properly be regarded as the successor of the named institution, and the dominant chargeable intention of the testator was wide enough to allow the gift to take effect in favour of that successor institution, then the gift would take effect in favour of the successor institution. That is not an instance of cy-pres but merely requires an order by way of administrative scheme that the money is paid to the successor institution.

[12] The third exception is if, upon the proper construction of the will, it is found that the testator had a general charitable intention to benefit work or purposes of the kind which the named institution carried out, then the property the subject of the trust can be applied cy-pres.

[13] Recently the courts have developed a fourth exception which is a way of extending the second exception, which is if, upon the proper interpretation of the will, the gift is not made to a particular named charitable institution but is a gift to a particular charitable purpose, it may be upheld if that purpose remains capable of fulfilment. This does not require that there be a true successor institution, nor does it require a cy-pres scheme. If this exception applies, the money may be paid to a suitable person or entity to apply the funds to that purpose." (citations omitted)

Clause 7, paragraph 1, named the beneficiary and use as:

> "Cairns Marine Radio Club Inc to be used by them as they direct and I direct that the receipt by the treasurer shall be sufficient discharge to my trustee."

Cairns Marine Radio Club Inc was deregistered on 16 October 2012. Its charitable work in marine radio was concerned with maritime safety and it is obviously that charitable purpose which attracted the testamentary largesse of Mr Fitzgerald, who often put to sea in boats, particularly to fish. The not-for-profit organisation Australian Volunteer Coast Guard Association Inc QF9 Cairns maintains a daytime radio watch for the purpose of maritime safety. It used to work with Cairns Marine Radio Club and handed over its watch to Cairns Marine Radio Club for that club to fulfil that role at night. The night-time role is now fulfilled by a government entity, but the coast guard continues in its day-watch role. It also has a marine radio operator training and licensing role, which was formally fulfilled by Cairns Marine Radio Club and was taken over by the coast guard when the club ceased.

The coast guard therefore comes within the second of the exceptions mentioned above. Accordingly, the applicant would be justified in distributing on the basis the gift in clause 4, category 7(ii), of the will to the Cairns Marine Radio Club Inc shall be read and construed as a gift to Australian Volunteer Coast Guard Association Incorporated QF9 Cairns.

The beneficiary and use described at category 7, clause 4, is:

> "The Roman Catholic Trust Corporation for the Diocese of Cairns to be utilised by that religious body for the charitable purposes of the Bethlehem Home for the Aged …."

By these words, Mr Fitzgerald correctly named a corporate entity. His wife was Catholic and he doubtless was happy to favour that religion's corporate form economically. But on the information presently stated, it is not clear whether that was only incidental or was influential in a determinative sense. In respect of his actual intention, by his words Mr Fitzgerald clearly intended the gift should be used for the charitable purposes of the Bethlehem Home for the Aged. Such an aged persons home, as owned by The Roman Catholic Trust Corporation for the Diocese of Cairns, did exist at 257 Gatton Street, Westcourt, Cairns, but it was sold in 2006 to Holy Spirit Care Services. It was demolished.

The land it had been on was sold to Mercy Health and Aged Care Inc and that entity now operates a more recently constructed aged care facility on the site.

The local Catholic diocese does not operate such a facility locally. It does run an aged care in-home assistance programme locally and it will be remembered Mr Fitzgerald did favour a similar programme, Blue Care, run by the Uniting Church. However, it will also be remembered the purpose of the present gift was for an aged care facility at a specific location, not a programme.

What, if any, weight is to be given and in what way to the either incidental or influential link to the Catholic Church via his wife, to which I earlier referred? The written statements of fact do not address what, if any, link Mercy Health and Aged Care Inc has with the Roman Catholic Church. In the absence of such information, I am not prepared to form a concluded view as to Mr Fitzgerald's intention in respect of this bequest, or as to which, if any, entity might be substituted under one of the abovementioned exceptions. I will, however, give liberty to apply in case the applicant wants to pursue the point.

Finally, the applicant seeks a direction as to the construction of clause 4, category 2, which reads:

> "The beneficiaries named in this category are to share fourteen point seven five per cent (14.75%) of the residue of my estate:-
> Mr Donald Kane and Ngaire Kane (jointly, or the survivor of them)."

They each survive. Mr Kane has already been the subject of a costs order, however, and there is also a live prospect the estate may institute proceedings against him. In the circumstances, there is clear utility in the gift to him and Ms Kane being split equally and Ms Kane's distribution occurring. In that way, her interests will not be prejudiced by the issues which have arisen in relation to this matter regarding Mr Kane. Such an approach is not opposed. Moreover, it appears section 35 of the *Property Law Act* 1974 (Qld) would have the effect that the clause ought be construed as being made for these two beneficiaries as tenants in commons and not joint tenants. The applicant would therefore be justified in distributing in this context on the basis that the gift is of 7.375 per cent of the residuary estate to Donald Kane and of 7.375 per cent of the residuary estate to Ngaire Kane.

I will make orders consistent with all of the above conclusions in the form of an amended draft order.

As to costs, there is no reason to depart from the ordinary practice in estate matters. The applicant and the eighth respondent, each of whom filed material and appeared, should each have their costs paid from the estate on the indemnity basis.

I order as per the amended draft order signed by me and placed with the papers.