

SUPREME COURT OF QUEENSLAND

CITATION: *Rodgers deceased, Re* [2001] QSC 282

PARTIES: **In the will of FLORENCE STUART RODGERS deceased
CHERYL ANN RIETHMULLER and GARY
RIETHMULLER
(applicants)
v
JANICE MARGARET BALLARD
(first respondent)
and
TODD ANTHONY BALLARD
(second respondent)
and
JASON ANDREW BALLARD
(third respondent)**

FILE NO: 5424 of 2001

DIVISION: Trial Division

DELIVERED ON: 6 August 2001

DELIVERED AT: Brisbane

HEARING DATE: 16 July 2001

JUDGE: Mullins J

ORDER: **1. It is declared that on the true construction of the last will of Florence Stuart Rodgers deceased ("deceased") dated 13 March 1996 the gift "To Todd Anthony Ballard any money that is in Commonwealth bank" is a gift of the money remaining in the Commonwealth Bank to the credit of the deceased after payment of funeral, testamentary and administration expenses to the extent which they exceed the amount of her residuary estate and after payment of the pecuniary legacies given under the said will of the deceased.
2. It is ordered that the applicants' costs of the application be paid from the estate of the deceased on an indemnity basis.**

CATCHWORDS: SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – Construction and effect of testamentary dispositions – nature of gift – whether intended as a specific bequest or residuary disposition – whether there

was a contrary intention for payment of debts for purpose of s 59(3) *Succession Act* 1981 – whether there was a contrary intention for payment of pecuniary legacies for purpose of s 60 *Succession Act* 1981.

Succession Act 1981, s 55, s 59, s 60

Doe v Hiscocks (1839) 5 M&W 363; 151 ER 154

Frangescos v Shaw [1977] 1 NSWLR 660

Re Shaw deceased [1955] St R Qd 284

COUNSEL: LA Stephens for the applicants
The first respondent in person
The second respondent in person
The third respondent in person
SOLICITORS: SW Ungerer for the applicants

- [1] **MULLINS J:** On 18 June 2001 Cheryl Ann Riethmuller and Gary Riethmuller ("the applicants") applied for probate of the will of the late Mrs Florence Stuart Rodgers who died on 30 April 2001. On the same date the applicants applied for a number of orders in relation to the proving and/or construction of Mrs Rodgers' will which is dated 13 March 1996.
- [2] The applicant Mrs Riethmuller is a niece of Mrs Rodgers. Mrs Rodgers was survived by her only daughter Janice Margaret Ballard ("the first respondent"). The first respondent has two sons Todd Anthony Ballard ("the second respondent") and Jason Andrew Ballard ("the third respondent"). The respondents appeared at the hearing of the application, but did not oppose the orders sought by the applicants.
- [3] The application was argued before me by Mr Stephens of Counsel on the basis that I had to consider the granting of probate in addition to the construction of the will. I reserved my decision. When looking at the file in connection with considering my decision, it became apparent that probate of Mrs Rodgers' will was granted by the registrar on 19 June 2001. The probate was granted to the applicants as executors. That part of the will in respect of which Mrs Rodgers disposed of her estate which is the subject of the granted probate was:

"I Give Devise and Bequeath

To my beloved grandsons my home situated at 50 City View Rd
Camp Hill Brisbane 4152 and all contents

if any car at time of death to Todd Anthony Ballard

To Jason Andrew Ballard the sum of Twenty Thousand dollars

To Janice Margaret Ballard the sum of eight hundred dollars

To Todd Anthony Ballard any money that is in Commonwealth bank.

To Cheryl Ann Riethmuller the sum of \$500"

- [4] I will therefore proceed with the issue of construction which has arisen in relation to the gift in the will of "any money that is in Commonwealth bank".
- [5] The will was made using a will form that was completed in the handwriting of Mrs Rodgers.
- [6] As at the date of Mrs Rodgers' death, her assets comprised the house at which she resided at 50 City View Road, Camp Hill which with contents the applicants estimate was valued at between \$200,000 and \$220,000, a motor vehicle which the applicants estimate was worth \$13,000 and Commonwealth Bank accounts and deposits as follows:

Account Type	Balance	Interest Accrued	Total
Ezy Action	79.07	Nil	79.07
Term Deposit	40,000.00	1,058.13	41,058.13
Passbook Savings	2,704.73	1.41	2,706.14
Pensioner Security Savings	6,041.41	35.10	6,076.51
Total			\$49,918.44

- [7] Subsequent to the date of death, apart from interest accruing on the above accounts, the estate received a final pension payment of \$407.84 on 4 May 2001. The applicants have also paid the funeral account of \$2,873.10 from the pensioner security account. Mrs Rodgers had no liabilities at the date of her death. It is estimated that the administration expenses will be in the order of \$8,000.
- [8] The payment of debts and the payment of pecuniary legacies under a will are regulated by ss 59 and 60 of the *Succession Act* 1981 which provide:

"Payment of debts in the case of solvent estates

59.(1) Where the estate of a deceased person is solvent the estate shall, subject to this Act, be applicable towards the discharge of the debts payable thereout in the following order, namely-

class 1-property specifically appropriated devised or bequeathed (either by a specific or general description) for the payment of debts; and property charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts;

class 2-property comprising the residuary estate of the deceased including property in respect of which any residuary disposition operates as the execution of a general power of appointment;

class 3-property specifically devised or bequeathed including property specifically appointed under a general power of appointment and any legacy charged on property so devised bequeathed or appointed;

class 4-*donationes mortis causa*.

(2) Property within each class as aforesaid shall be applied in the

discharge of the debts and, where applicable, the payment of pecuniary legacies rateably according to value; and where a

legacy is charged on a specific property the legacy and the property shall be applied rateably.

(3) The order in which the estate is applicable towards the discharge of debts and the incidence of rateability as between different properties within each class may be varied by a contrary or other intention signified by the will, but a contrary or other intention is not signified by a general direction, charge or trust for the payment of debts or of all the debts of the testator out of the testator's estate or out of the testator's residuary estate or by a gift of any such estate after or subject to the payment of debts.

Payment of pecuniary legacies

60. Subject to a contrary or other intention signified by the will-

- (a) pecuniary legacies shall be paid out of the property comprised in class 2 referred to in section 59 after the discharge of the debts or such part thereof as are payable out of that property; and
- (b) to the extent to which the property comprised in class 2 referred to in section 59 is insufficient the pecuniary legacies shall abate proportionately."

- [9] The applicants believe that the intention of Mrs Rodgers was that the gift of the bank account be in the nature of a residuary gift, rather than a specific bequest. They therefore seek a construction of the gift in the will of the money in the Commonwealth Bank that it is in the nature of a residuary disposition and directions as to how the legacies should be paid.
- [10] The home and contents and the car are specific gifts and are class 3 property. Subject to any contrary intention in the will, the pecuniary legacies must be paid out of the property comprised in class 2. The definition of "residuary estate" in s 55 of the *Succession Act* 1981 applies to property that is not effectively disposed of by the will and property not specifically devised or bequeathed, but included in a residuary disposition.
- [11] If the gift of the bank account were not in the nature of a residuary gift, but considered to be a specific bequest of any money of Mrs Rodgers that was in the Commonwealth Bank, the only residuary estate for the payment of the legacies would be the pension payment of \$407.84. That sum of \$407.84 must first be used by the applicants for payment of the debts of the estate. In the absence of any contrary or other intention signified by the will, the lack of a residuary gift would have the result of the pecuniary legacies left under the will to the applicant Mrs Riethmuller and the first and third respondents abating in their entirety. That follows as there would not be sufficient residuary estate to meet the payment of these legacies, after payment of the funeral and other administration expenses. It would also mean that, subject to any contrary intention in the will, the balance of the funeral and other administration expenses not met out of the sum of \$407.84 would be paid rateably out of each of the respective gifts of the home and contents, car and money in the Commonwealth Bank. It is this result of non-payment of the pecuniary legacies and the rateable diminution of the other assets in order to meet the debts of the estate that the applicants are seeking to avoid.

- [12] It is obvious that this problem has arisen because Mrs Rodgers undertook the drafting of her own will without the benefit of professional advice. In construing the will to ascertain the intention of Mrs Rodgers, it is relevant to take into account that she had drafted her own will. It is also relevant to consider the nature of the assets comprising Mrs Rodgers' estate and that the pecuniary legacies in her will were intended to benefit the first and third respondents and the applicant Mrs Riethmuller: *Doe v Hiscocks* (1839) 5 M&W 363, 367-368; 151 ER 154, 156; *Re Shaw deceased* [1955] St R Qd 284, 289.
- [13] The applicants rely on the decision in *Franguescos v Shaw* [1977] 1 NSWLR 660. There was no residuary clause in the deceased's will. Clause 3(c) of that will provided for the payment of "the balance of all moneys including cash, money in Bank accounts or on fixed deposits held by me at my death" as to three-quarters to the deceased's daughter and as to one-quarter to the deceased's son. The deceased's widow submitted that either the use of the word "balance" in cl 3(c) of will indicated that the deceased had established his own order of application of assets for the payment of debts mentioned in cl 3(a) and the legacy mentioned in cl 3(b) or the assets referred to in cl 3(c) of the will were not specifically disposed of by the will but included in a residuary gift. Waddell J reached the conclusion that the deceased did provide for his own order of application of assets and that on the true construction of the will the debts and expenses mentioned in cl 3(a) and the legacy mentioned in cl 3(b) should be paid out of the assets the subject of cl 3(c). He also made an alternative finding that cl 3(c) should be regarded as a general gift of all moneys held by the deceased at his death and should not be understood as disposing specifically of the types of assets mentioned in the clause, so that cl 3(c) should be regarded as effecting a residuary gift of the assets within the meaning of the relevant statutory order of assets for the payment of debts.
- [14] Because the description "any money that is in Commonwealth bank" in Mrs Rodgers' will identifies the money by reference to her investment or holding of accounts with the Commonwealth Bank, it is difficult not to conclude that it is property specifically bequeathed to the second respondent and therefore class 3 property. Unlike the relevant clause in *Franguescos v Shaw* the gift of the money in the Commonwealth Bank by Mrs Rodgers is confined to her money held with one bank.
- [15] The question then arises whether Mrs Rodgers has exhibited an intention in her will for the pecuniary legacies to be paid from the money held in the Commonwealth Bank, before the gift to the second respondent takes effect. The language used by Mrs Rodgers is "any money" and not "all my money" or "my money". Having regard to the effort that Mrs Rodgers made in detailing the pecuniary legacies, her relationship with each of the pecuniary legatees, her failure to expressly specify what part of her estate was residue, the composition of her assets and the other gifts under the will, I consider that her intention by using the expression "any money" was equivalent to saying "any money left in the Commonwealth Bank after paying my debts and legacies". I therefore find that there is a contrary intention in the will for the purpose of s 59 of the *Succession Act* 1981 that, to the extent which the funeral, testamentary and administration expenses exceed the amount of Mrs Rodgers' residuary estate, the funeral, testamentary and administration expenses be paid from Mrs Rodgers' money in the Commonwealth Bank and that there is a contrary intention in the will for the purpose of s 60 of the *Succession Act* 1981

which was that the pecuniary legacies be paid from Mrs Rodgers' money in the Commonwealth Bank.

[16] I therefore order as follows:

1. It is declared that on the true construction of the last will of Florence Stuart Rodgers deceased ("deceased") dated 13 March 1996 the gift "To Todd Anthony Ballard any money that is in Commonwealth bank" is a gift of the money remaining in the Commonwealth Bank to the credit of the deceased after payment of funeral, testamentary and administration expenses to the extent which they exceed the amount of her residuary estate and after payment of the pecuniary legacies given under the said will of the deceased.
2. It is ordered that the applicants' costs of the application be paid from the estate of the deceased on an indemnity basis.