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Date: 31 July, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

No 5438 of 2003

SYBIL MARY BRAYBROOK and WARREN RUTLEDGE CHESTERS (as Executors of the Estate of Brook David Gareh (deceased)) — Applicants

BRISBANE

..DATE 24/07/2003

ORDER

[2003] QSC 229

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HIS HONOUR: This is an application by the executors of the estate of Brook David Gareh, deceased, for direction under section 96 of the Trusts Act 1973. The directions are sought upon a statement of fact prepared by the executors. The executors are a solicitor who was in fact a solicitor acting for the deceased prior to his death and a sister of the deceased.

The sister is one of the residual beneficiaries and is also the principal beneficiary in the sense that she and her husband receive the largest share of the estate. She is also a residuary beneficiary.

The will provides for six specific bequests to nieces and nephews of the deceased, each in the sum of $150,000 to be paid from an identified source of funds which, in the circumstances, existing at the date of death consist of a bank account held in Hong Kong.

The will further provides that all debts, funeral and testamentary expenses, including the cost of administration of the estate, are to be paid from the same fund. It specifically directs that if there are insufficient assets in this part of the estate to make the specified distributions of $150,000, then each of the specific requests should be reduced equally to enable the expenses to be paid.

Before his death the testator entered into a series of transactions with his sister, the executor, and her husband

for the development of land at the Gold Coast. Land was vested in the deceased, the executor and her husband jointly. Money was paid from the Hong Kong bank account into a company formed specifically for the purpose of developing the land and a building was built on the land. The shares in the company were devised to the sister executor and her husband.

The issues on which the trustees seek to have directions given are the amount which the executors ought to recover from the sister and her husband in respect of their liabilities to the company; whether such funds, when recovered, fall into residue or may be paid into the Hong Kong account; whether the executors have any interest in the land which was placed in joint names; whether the bequests of $150,000 are vested or contingent; whether since there are insufficient funds in the account to pay all of the legacies and the expenses there has been ademption of those bequests; and whether the legacies will be subject to defeasance should an individual beneficiary die childless before the nominated age at which the legacies are to take. The application has been sent to the adult beneficiaries and to the parents of those nephews and nieces who remain infants, although strictly it has not been served in accordance with the rules. There has been no appearance on behalf of any other party.

I am concerned in this situation to proceed on the application in the absence of a contradictor. The questions appear reasonably clear and the submissions helpfully prepared on behalf of the executors are very useful. However, I know only

the facts which the executors have put before me and have no capacity to investigate other facts, and nor do I have the capacity to raise matters of fact which would possibly give rise to further questions of law.

It is not appropriate that the Court should do any of these things. The problem, as I see it, is that there are infant beneficiaries. Their rights have not been spelled out. In particular, it has not been explained that the directions which the trustees propose will produce the result that the legacies to the infants will be substantially less than they would have been had the transactions entered into by the testator before his death with his sister not occurred, or than they would be if the money, if any payable by the sister and her husband to the estate were to be payable into the Hong Kong bank account rather than into residue and thereby to go back to the sister at least in part.

In other words, it is a situation where one of the two executors who seeks these directions stands to benefit in a significant way by the directions which are given. The directions seem, as far as I can see, to be appropriate but I am not comfortable with making the in the absence of consideration of the interests of the infants by a person who has no other interest to take into account.

It may be that the executors take the view (as Mr Conrick has submitted is the position) that there is no arguable proposition which can be advanced to the contrary of the

directions that are sought. If that is so, one wonders why the application has been made. There is no need to get directions in relation to matters which are unarguable. The fact that directions are sought suggests that there is some degree of uncertainty on the part of the executors such that they wish to avail themselves of the protection of the Court.

To gain that, it seems to me that the Court needs to have the interests of the infants fully investigated. That would require an analysis of the net effect on the infants' interests of the orders being proposed by the executors and a consideration of whether there are any other relevant facts and what the appropriate law is to decide whether the orders are indeed appropriate.

At the present time I am not prepared to make the orders sought by the executors. I am willing to adjourn the application to a date to be fixed to enable the executors to consider their position. Precisely what mechanism should be adopted to deal with the interests of the infants is a matter for them to consider. It may be possible to appoint a guardian of the property of the infants or at least so much of their property as derives from the will pursuant to the Guardianship Act; it may be possible to appoint the Public Trustee; or it may be possible, and indeed more economical, to appoint an experienced solicitor to act in their interests and to investigate the facts and the relevant law - not only the facts as put forward by the executors, but any other facts which may be relevant. In the circumstances, the correct

course is, in my view, to adjourn the application to a date to be fixed. Costs should be reserved.
