[2006] QSC 371

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

ROBIN A/J

No 9173 of 2006

DAVID ARTHUR CAMPBELL Applicant

and

ALEXANDER ANDREW CAMPBELL Respondent

BRISBANE

..DATE 09/11/2006

ORDER

CATCHWORDS: Succession Act 1981 s 6 - joint grant of probate to applicant and respondent (executors and trustees under their fathers will) - each authorized (acting alone) to prosecute estate claims which he concluded existed against the other - neither wanted an independent executor and trustee - application for removal of respondent failed because (a) his purported renunciation was not final, (b) the applicant had an equivalent conflict of interest.

HIS HONOUR: The unfortunate aspect of this proceeding is that it takes place between brothers. Their mother died on the 10th of December 2003 and their father at an advanced age on the 24th of December 2005, having suffered a debilitating stroke about the 3rd of November 2005.

The respondent had been the carer of both of them, residing with them in the main asset of their father's, which was a home unit on the Gold Coast. The Court understands that he was the full-time carer, had forsaken whatever possibilities he had of working to attend to caring for his parents.

By the father's will the parties were appointed executors and trustees:

> "or if one should predecease me, renounce or otherwise not act or continue to act then...the other."

The estate was left to the parties equally. The Will was made on the 16th of January 2004. The application before the Court which may be regarded as coming under section 6 of the Succession Act is for a grant of probate subject to the Registrar's formal requirements to the applicant and for the removal as executor and trustee of the respondent. The applicant wants to be in a position to take proceedings in the estate's interest against the respondent; he relied on Baldwin and Neale v. Greeland [2006] QCA 293.

The application for removal is based in part on a communication which the respondent sent to his own solicitors

and copied to the applicant's solicitors on the 7th of July 2006.

It says:

> "I happily Renounce my responsibility as executor and trustee of my father's estate. I have spent many years without adequate payment. As a full-time carer for my parents it has cost me everything I own. This has been for the sole benefit of my brother."

That appears never to have been signed but there is no doubt it was sent. Its effect may have been cut down by his own solicitor's communication five days later which uses the language of futurity:

> "He will renounce his responsibility..."

Mr Ulrick, for the applicant, referred to Williams, Mortimer and Sunnucks On Executors, Administrators and Probate (17 ed, 1993 at p 378) who state:

> "Renunciation must be absolute and not conditional and is a formal act in writing whereby a person having a right to probate or administration waives and abandons that right. Although renunciation takes effect from signature, it may be withdrawn at any time up to filing."

The assertion made in Court today is that any renunciation was contingent on the applicant's acknowledging certain matters. The document of 7th July 2006 concludes:

> "Acceptance of this letter as fact by my brother now legally validates all verbal and written agreements made whatsoever between my brother and myself."

The respondent's contention is that everything that has happened has been with the agreement of the applicant.

The other aspect of the application for removal of the respondent is the conflict of interest which he is asserted to have and in my opinion does have. Simplifying a more complicated picture, the principal asset of the estate is the home unit, whose value is estimated at something in excess of $400,000 by the respondent and something near to $800,000 by the applicant.

That property is the subject of a lease or tenancy for five years granted by the testator to the respondent in early December 2005. By that time the testator was in hospital or a nursing home where he went after discharge from hospital, never to return to the unit.

The rent reserved can be described as nominal but some of the expenses of holding the unit may well have been borne by the respondent. It is understandable that the applicant is unhappy about the terms of that lease or tenancy agreement.

It has been asserted by the respondent's counsel in Court today, and not entirely consistently with correspondence over the last months, that the respondent has no interest in residing in the unit for the full term, that what was done was done on the recommendation and with the assistance of personnel of Veterans Affairs, involved because the testator was entitled to a war pension.

A similar contention is made about a payment of $70,000 which the testator made to the applicant some time after he became a widower. That payment is acknowledged by the applicant but described as a gift. The applicant says he has no knowledge whether any equivalent benefit went to the respondent, who says not only that it did not but that the acknowledged payment was organised in accordance with recommendations of officials as a way to improve the testator's position vis-à-vis his assets and their impact on pension or like entitlements. The assertion is that this was not to be a gift but rather a trust arrangement.

The testator had cash resources which the respondent has contended were not intended to form part of the estate dealt with by the Will. It is my understanding that what was said to follow was that he was entitled to those moneys, whether they went to him by survivorship from joint bank accounts or otherwise. The applicant's view is that those moneys belong to the estate.

Curious things happened in relation to the money. I do not purport to have considered matters in sufficient detail to form any final view. Those things include transactions after the death and at least one cheque signed in the testator's name apparently after the death. The two brothers along with their mother had enduring power of attorney from the testator which it seems required them to act jointly.

The respondent's contention throughout has been that the applicant was informed of and agreeable to everything that was done.

In relation to the money, however, he appears to have established arrangements which leave him with an amount more or less equivalent to the applicant's $70,000. The rest of the cash has gone to his solicitor's trust account. Although it may have been obscure in whose interest it was so deposited, it has been acknowledged today that it is in the interests of the estate.

The applicant's argument against the respondent's continuing as executor, based on conflict of interest, which is, of course, a ground for removal of an executor in appropriate cases, is an argument which tells against his own continued occupancy of the role.

I expressed concern during the hearing that in a family context it was unattractive to contemplate the applicant litigating claims against the respondent at their joint expense, in the sense that the estate would be paying, whereas the respondent was funding himself.

There is an appearance of injustice in an arrangement which would see one executor excluded for conflict of interest while the other, who has been demonstrated to have a similar

conflict of interest in respect of the $70,000, remains in sole control.

The parties are united in opposing the bringing in of any independent administrator, presumably for reasons of cost. The estate's affairs do not seem to me so complex that it is necessary to bring in an outsider if the parties can reach agreement - which has proved an elusive hope to date.

I am not persuaded that the documents referring to renunciation by the respondent of his executorship were sufficiently final to preclude his having that role or receiving a grant of probate along with the applicant. I see no reason why the respondent must make his own application, as opposed to being jointly appointed in the applicant's.

Aware of the difficulties which their being joint executors might lead to, I was nevertheless attracted to that possibility. It can be accompanied by special orders which would enable either of the parties to act alone on behalf of the estate in respect of claims the estate might have against the other. Proceeding in that way offers a way out of the impasse that has been reached.

In my opinion, such orders are open under section 6(1), (3) and/or (4) of section 6 of the Succession Act.

The differences which the parties have extend to what, if any, refurbishment of the home unit may be required to prepare it

for an advantageous sale. There has been discussion of means of getting that issue resolved. The Court is grateful to the parties for reaching agreement on many elements of an appropriate order in light of intimations from the Court as to what seem to it a suitable outcome.

I will attempt to set out now what I think are the terms of the order. Paragraph 4 (except for the default provision) and following come from Mr Ulrick's handwritten draft, which I will mark Exhibit 1.

ADMITTED AND MARKED "EXHIBIT 1"

1. Subject to the formal requirements of the Registrar, a grant of probate of the Will of the estate of Geoffrey Branch Eglinton Campbell, the deceased, be issued to the parties.

2. That Alexander Andrew Campbell, acting alone, be authorised to prosecute claims of the estate of Geoffrey Branch Eglinton Campbell, deceased, against the applicant, David Arthur Campbell.

3. That David Arthur Campbell, acting alone, be authorised to prosecute claims of the estate of Geoffrey Branch Eglinton Campbell, deceased, against the respondent, Alexander Andrew Campbell.

4. That the real property be sold unencumbered with vacant possession by the 30th of March 2007 in default of which the sale of it is to be conducted in accordance with the recommendations of Lucy Cole, real estate agent of Surfers Paradise (if no other suitable person is agreed on by the parties), unless the Court gives different directions, the parties to contribute equally to the cost of any refurbishment recommended.

5. That the original Will and the original Certificate of Title be delivered to O'Keefe Mahoney Bennett (O'KMB) to enable transmission of the real property to the parties as personal representatives.

6. That transmission documents be signed and delivered by O'KMB within 14 days of delivery by O'KMB.

7. That one-half of the $94,500 held in trust be paid from Parker Simmonds trust account to the applicant's solicitors and the other half be paid to the respondent's solicitors.

8. That the accruals from the said $94,500 be held in Parker Simmonds trust account until agreement of the parties or other order.

9. That the proceeds of the Suncorp cheque account and savings account be held in O'KMB's trust account until agreement or other order.

10. That the net proceeds of the sale of the real property be divided equally between the parties at settlement.

11. That the balance of the monies held in trust in paragraphs 8 and 9 be first used to pay any outgoings on the real property.

12. That the respondent be permitted to reside in the real property until sale but do nothing to interfere with the sale.

13. No order as to costs.

14. That paragraphs 1, 2 and 3 of this order shall not come into effect until 31 March 2007.

15. That there be liberty to apply on two days' notice.

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