

SUPREME COURT OF QUEENSLAND

CITATION: *Yu v Yu & Ors* [2015] QSC 373

PARTIES: **JASON YU** as executor of the Will of **KARTER YU**
(applicant)
v
KINSON YU
(first respondent)
STEFFEN AUFSATZ
(second respondent)
DOMINIC CLARKE
(third respondent)

FILE NO: SC No 11939 of 2015

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED EX TEMPORE ON: 8 December 2015

DELIVERED AT: Brisbane

HEARING DATE: 8 December 2015

JUDGE: Ann Lyons J

ORDER: **THE COURT DECLARES THAT:**

- 1. Upon the proper construction of the Will of Karter Yu deceased dated 31 August 2011:**
 - (a) the funds received by the Estate from the deceased's Westpac Choice account number [xxx] and UBank Savings Account number [xxxx] form part of the "cash" referred to in paragraph 3 of the Will;**
 - (b) the monies received by the Estate from the Australian Taxation Office (in respect of the deceased's employment entitlements) except for \$634.45, BT Financial Group (in respect of the deceased's superannuation policy) and PSSap (in respect of the deceased's superannuation and life insurance policies) form part of the residue under paragraph 8 of the Will; and**
 - (c) the deceased's personal effects and household chattels within the meaning of s 34A of the *Succession Act 1981* (Qld) form part of the residue under paragraph 8 of the Will.**
- 2. The applicant is at liberty to distribute all entitlements**

under paragraph 3 of the Will to Jason Yu, Kinson Yu, Steffen Aufsatz, and Dominic Clarke.

THE COURT ALSO ORDERS THAT:

- 3. The applicant's costs of the application be paid out of the estate of Karter Yu deceased on the indemnity basis.**

CATCHWORDS: SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – PRINCIPLES OR RULES OF CONSTRUCTION – WORDS TO HAVE ORDINARY AND GRAMMATICAL MEANING – where a deceased's estate comprised funds in bank accounts, personal effects, unpaid employee entitlements, superannuation and proceeds from a life insurance policy – where the deceased left an informal Will on his computer bequeathing, *inter alia*, his “cash” to be apportioned between five different parties and leaving the remainder to be handled by his executor at his discretion – whether the superannuation, life insurance proceeds and/or employee entitlements were intended to constitute “cash” pursuant to the deceased's Will

SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – PARTICULAR TESTAMENTARY DISPOSITIONS – DESCRIPTION OF SUBJECT MATTER – PARTICULAR WORDS AND PHRASES – MONEY – where a deceased's estate comprised funds in bank accounts, personal effects, unpaid employee entitlements, superannuation and proceeds from a life insurance policy – where the deceased left an informal Will on his computer bequeathing, *inter alia*, his “cash” to be apportioned between five different parties and leaving the remainder to be handled by his executor at his discretion – whether the superannuation, life insurance proceeds and/or employee entitlements were intended to constitute “cash” pursuant to the deceased's Will

Trusts Act 1973 (Qld), s 96

Succession Act 1981 (Qld), s 6

Kruize & Anor v Cheung & Ors [\[2008\] QSC 156](#), considered
Public Trustee of Queensland v Stibbe & Anor [\[2012\] QSC 357](#), considered

Re Ledger [1983] 1 Qd R 176, considered

Re Lilly's Will Trusts [1948] 2 All ER 906, considered

Re Plant [1974] Qd R 203, considered

Re Thomson & Anor [\[2010\] QSC 167](#), considered

COUNSEL: H Henley (*sol*) for the applicant
No appearance for the respondents

SOLICITORS: Bennett & Philp for the applicant
No appearance for the respondents

This application

- [1] Karter Yu died on 2 September 2011 in the Australian Capital Territory, leaving property in Queensland. Probate of the “Electronic copy of the Will” of the deceased, which was made on the “Notes” Application on his iPhone, was granted to his brother, Jason Yu as executor, by this Court on 15 November 2013.
- [2] Pursuant to an application filed on the 24th of November 2015, the executor now seeks direction from the Court as to how various funds of the estate received from banks, superannuation and life insurance policies and employee entitlements should be administered upon the proper construction of the Will.
- [3] The largest component of his estate is an amount of almost \$260,000 paid as a death benefit pursuant to a life insurance policy under his Public Sector Superannuation Plan. The issue to be determined in this application is whether that amount comes within the description of “cash” as described by the deceased in his Will.

The assets

- [4] At the time of his death, the deceased’s assets comprised funds in bank accounts, personal effects, unpaid employee entitlements, as well as amounts in a superannuation fund and a life insurance policy as follows;

| | |
|---|---------------|
| Westpac Choice bank account | \$ 3,600.00 |
| UBank Savings bank account | \$ 58,077.41 |
| BT Financial Group, under a superannuation policy | \$ 23,761.70 |
| PSSap, under a superannuation and life insurance policy | \$ 274,366.71 |
| ATO, in respect of employment entitlements | \$ 8,853.05 |

- [5] The amounts held in his bank accounts total almost \$62,000 and the BT Superannuation policy is over \$23,000. The Public Sector Superannuation Accumulation Plan (PSSap) amount totals \$274,366.71 and is comprised of both an amount for superannuation together with the death benefit paid under a life insurance policy under that Plan. That life insurance component is an amount of \$259,031. There is also an amount from the Australian Tax Office, where he was employed, in relation to his employment entitlements. Of that amount the sum of \$634 comprises wages that were paid after his death. The rest of that amount is the cashed-up component of his long service leave and holiday leave, and other entitlements in relation to his employment at the Australian Tax Office.

The Will

- [6] In his Will the deceased made specific gifts of his video games, his Xbox, his television and his PlayStation to named persons. He also specifically made a bequest of his townhouse to his parents, and he then gave instructions as to his cremation.
- [7] That Will relevantly states:

“I grant my executor all power required to deal with my affairs in the event of my death. This include all powers to sell any part of my estate not mentioned below at his discretion and be given the proceeds after any associated fees that requires paying off.”

[8] Specifically, the Will stated:

“After all debt has been paid off including hotel bills, credit card bills etc. as well as expenditure required to execute my will from my savings account at both Westpac and Ubank, as well to cover my share of rent at 22/121 Thynne street Bruce ACT until the conclusion of the lease in late December, I would like *the remainder of my cash* equally apportioned between five parties: Jason Yu, Kinson Yu, Steffen Aufsatz and Dominic Clarke.”

[9] The Will stated that should any of them decline, their share was to be divided equally amongst the remaining. At paragraph 8, the Will stated:

Anything else I own that has not been named is to be handled by my executor at his discretion. And any proceeds will go to him as stated above.

What constitutes ‘cash’?

[10] This application seeks directions about the proper construction of the Will and in particular what is to be considered as ‘Cash’ as described.

[11] I am satisfied that all of the beneficiaries in relation to this Will have been advised of this application.

[12] I have received material from one of those beneficiaries, namely, Dominic Clarke, who has forwarded an affidavit signed on the 7th of December 2015. That is exhibit 1 in these proceedings.

[13] In his affidavit, Mr Clarke states that he believes that due to the nature of his employment, the deceased had a strong understanding of the superannuation system and would have been aware that superannuation is considered a cash benefit. He states that as a fellow employee of the Australian Tax Office, he understood specific terminology and language, and that the deceased would have chosen his words carefully in accordance with his understanding of the superannuation system. He states that he believes the deceased chose to use the language “cash” because he would have considered his superannuation and life insurance as cash benefits or assets.

[14] Mr Clarke argues that the deceased chose this wording deliberately in order to clearly separate all cash assets from physical assets, as he goes into specific detail about his house, television, games and DVDs in subsequent paragraphs. Mr Clarke argues that this level of specificity suggests that he did not consider anything else he owned that has not been named to be significant cash assets. He, therefore, considers that all of the funds in the Public Sector Superannuation Scheme, as well as the BT benefit and the Australian Tax Office benefits, should all be considered cash and shared equally between the four parties named in the Will.

- [15] There is no doubt that the applicant requires direction from the Court. The real issue is whether the amounts that I have just indicated, namely, the superannuation and the Australian Tax employment benefits, as well as the life insurance policy, which is by far the most substantial component of his estate, should be considered cash.
- [16] It is clear that this application for directions is brought pursuant to s 96 of the *Trusts Act* 1973 (Qld) and s 6 of the *Succession Act* 1981 (Qld). The relevant principles were set out in the decision of *Re Thomson & Anor*.¹ There, Atkinson J considered the task of the Court in construing the terms of a Will. In particular, her Honour stated²
- “The task of a court of construction is to discover the testator’s intention by examination of the words used in the will. Judicial construction involves having ‘regard to any rules of construction which have been established by the courts, and subject to that, [such courts]... are bound to construe the will as trained legal minds would do.’
- The general principle of construction of a will is the ‘usual meaning rule’ which is that the court interprets the words of the will, in the context in which they appear, according to their usual meaning.” (footnotes omitted)
- [17] That decision has subsequently been affirmed in a number of other decisions including *Kruize & Anor v Cheung & Ors*,³ where Cullinane J held at [31] that:
- “In all cases it is the meaning of the term as used in the particular Will taken with the context that appears and such surrounding circumstances as can be taken into consideration which will determine the meaning.”
- [18] The meaning of the term “cash” has been discussed in a number of decisions. In *Public Trustee of Queensland v Stibbe & Anor*,⁴ I previously considered the meaning of the word “cash”. In that decision, the question was whether funds held by The Public Trustee as administrator on behalf of the deceased pursuant to an appointment during her lifetime, and held in their accounts, could be considered as cash that the deceased had in her bank accounts at the time of her death.
- [19] I held that the moneys in cash and term investment accounts held by The Public Trustee did not fall within the ambit of the gift in the Will, because although the funds might be considered to be cash, they were not held in the deceased’s own bank account. I considered that the unit investments did not fall within the ambit of the gift because they were redeemable, and whilst could be considered as money, the reference by the deceased to “cash in my bank account” was not synonymous with a unit held in an investment fund, and, furthermore, they were not held by a bank.
- [20] In an older decision of the Queensland Supreme Court of *Re Plant*⁵ the deceased had left to his wife by his Will “one-half of all cash held to my credit in any Bank Account in my name subject to the payment by her” of certain amounts. At the time of the death,

¹ [2010] QSC 167.

² at [10]-[11];

³ [2008] QSC 156.

⁴ [2012] QSC 357.

⁵ [1974] Qd R 203.

the deceased had two bank accounts and two deposit accounts with the Toowoomba Permanent Benefit Building and Investment Society. It is clear that the bank accounts held just over \$2,929, and the Toowoomba Permanent Building Society account held over \$58,000. The wife sought a declaration from the Court that the money held in the Building Society account fell within the meaning of “any bank account” in the Will. The Court held that they did not.

- [21] Similarly, in the decision of *Re Ledger*⁶ there was a codicil to the deceased’s Will, which stated:

“I leave any investments and cash to my husband and on my death, to be divided equally between my two sons.”

- [22] At the time of her death, the deceased owned cash in the Commercial Bank of Australia, an amount to her credit with the Metropolitan Permanent Building Society, debentures with a face value of \$4,000 at General Credits Ltd, and two life insurance policies payable on the death of her husband. In that case, the Court held that the Building Society moneys fell within the definition of “cash”, because although they actually represent shares in the Society, McPherson J had no doubt that, like everyone else, the deceased thought of it as cash. The contentious issue before the Court in that case was whether the two surrender values of the life insurance policies fell within the description of “cash” or “investments”. McPherson J held that they did not fall within the meaning of “cash”. McPherson J, at 177, held:

“I do not think that, on any view, they can be regarded as “cash” at the date of death of the testatrix. It is by no means clear from the material that the policies have been surrendered, but, if they have been, they were certainly not surrendered at her death even if they may then have had a surrender value.”

- [23] In that decision, there was reference to the decision of *Re Lilly’s Will Trusts*,⁷ in which Harman J held that the policy moneys payable on the death of the testator under two life insurance policies did not fall within the expressions in the Will of “investments” and “securities for money”. In doing so, the judge rejected the submission that “anything was an investment which was a mode of laying out money with a view to obtaining a return, and that a man who put out his money to buy himself a policy to return a sum, whether at 65 or at his death, was investing money, and that the proceeds would properly be called an investment.”

- [24] As I have indicated, the issue here is whether the amounts indicated constitute cash. Having considered the Will and the amounts which have been received by the estate since the death of the deceased, I do not consider that the amount of insurance payout, which comprises some \$259,000, could be considered as cash. The deceased had been employed in the public sector for a very short period of time. It would seem it was a period of under two years. He was a young man and I am told that he was in his twenties. In my view, it is most likely that he was not aware that, on his death, there *could* be an amount in the order of \$259,000 paid to his estate as a death benefit.

⁶ [1983] 1 Qd R 176.

⁷ [1948] 2 All ER 906.

- [25] It is clear that that was a significant amount of money and, in all respects, I consider it was not known to him that such a benefit could be paid to him, otherwise he would have made a specific reference to it in his Will. I am satisfied that not only could it not be held to be cash on an objective basis, I am also satisfied that it is most likely that he was not aware that this money would be paid.
- [26] I am satisfied, therefore, that it was not something that is specifically bequeathed to the four persons mentioned in his Will but, rather, it was something that he did not turn his mind to and it should be caught by the catch-all section of his Will where he leaves anything that he did not specifically make provision for to the executor.
- [27] I consider that the deceased intended the word “cash” to comprise the money from his Westpac and UBank bank accounts and that anything else was to fall within the ambit of “Anything else I own that has not been named”.
- [28] It is clear that the word “cash” is used in close proximity to the specific bank accounts that I have referred to. It is also clear that the BT Public Sector superannuation moneys and employment benefits were not cash at the time that he wrote the Will and that the amounts were not ever held in any bank account of the deceased.
- [29] I am satisfied, however, that the small amount of \$634, which was an amount paid from his employer as wages after his death, and which, in the mind of the deceased, would have been owing to him and paid after his death would be amounts which would have ended up in his bank account. So I consider that the amount of \$634 should be added to the amounts which could be considered to be cash. Otherwise, I am not satisfied that the superannuation, life insurance or the cashed up employment benefits for holidays and leave will be considered to be “cash”.
- [30] I am, therefore, satisfied that it is appropriate for the directions to be made that the BT Benefit, the PSSAP benefit and the employment entitlements, other than the \$634, fall into the residue of the estate to be distributed in accordance with clause 8 of the Will.
- [31] So there will be orders that on the proper construction of the Will, Karter Yu, deceased, dated 31 August 2011, the funds received from the estate from the deceased’s Westpac Choice Account and UBank account form part of the cash. Refer to paragraph 3. The moneys received from the Australian Tax Office, except for the sum of \$634.45, the BT Financial Group and PSSAP form part of the residue and that the deceased’s personal effects and household effects form part of the residue. It is clear that the personal effects and household chattels, that he has not mentioned, will form part of the residue. There is also an order that the applicant can distribute all entitlements under paragraph 3 of the Will to the four named persons. I am also satisfied that the costs of the application be paid out of the estate on the indemnity basis. There is an order in those terms.