

SUPREME COURT OF QUEENSLAND

CITATION: *Rathbun v Rathbun & anor* [2015] QSC 82

PARTIES: **CHRISTOPHER PAUL RATHBUN**
(Applicant)
v
JOHN PATRICK RATHBUN and **MARY SABINA GIBBENS** (also known as **MOIRA SABINA GIBBENS**)
(as executors of the Will of **JACK RATHBUN** deceased)
(Respondents)

FILE NO: SC No 5941 of 2014

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 10 April 2015

DELIVERED AT: Brisbane

HEARING DATE: 10 April 2015

JUDGE: Boddice J

ORDER:

- 1. Order (1) of the orders made in this proceeding by Justice Byrne SJA on 12 August 2014 be vacated;**
- 2. Order (4) of the orders made in this proceeding by Justice Byrne SJA on 14 August 2014 be vacated;**
- 3. The Originating Application filed on 26 June 2014 be dismissed, with no order as to costs, including reserved costs; and**
- 4. There is no order as to the costs of the Application filed 19 March 2015.**

COUNSEL: On the papers

SOLICITORS: On the papers

Background

- [1] Jack Rathbun (“Mr Rathbun”) had four adult children: Mary Sabina Gibbens (also known as Moira Sabina Gibbens), Sarah Elizabeth Domigan, John Patrick Rathbun and Christopher Paul Rathbun. Mr Rathbun died on 2 April 2010. By his Will dated 4 June 2009 (“the Will”), Mr Rathbun appointed two of his adult children, John

Rathbun and Mary Gibbens (“the Respondents”), as his executors and trustees. Probate of the Will was granted to the Respondents on 11 May 2011.

Originating Application

- [2] By Originating Application filed on 26 June 2014, Christopher Rathbun (“the Applicant”) sought orders:
1. removing the Respondents as executors, and appointing an independent solicitor in their place, to finalise the administration of the estate;
 2. in the alternative, requiring the Respondents to file an affidavit exhibiting an estate account, including all the information specified in rule 648 of the *Uniform Civil Procedure Rules 1999 (Qld)*;
 3. for damages of \$17,569.24, for legal costs the Applicant had incurred since 9 August 2013 in obtaining accounting information concerning the estate; and
 4. requiring the Respondents to pay the costs of the Originating Application in their personal capacities.
- [3] On 12 August 2014, Byrne SJA heard an urgent *ex parte* oral application made on the Applicant’s behalf. Upon the usual undertakings by the Applicant, His Honour ordered the Respondents make no distribution or disbursement from the estate until after 14 August 2014 (when the Originating Application had been listed for hearing) or until further order of the court. Costs were reserved.
- [4] On 14 August 2014, there was insufficient time for a substantive hearing of the Originating Application to proceed. Byrne SJA ordered that “upon the undertakings stated in the order of 12 August 2014 being continued, paragraph 1 of that order, requiring that the Respondents make no distribution or disbursement from the estate, is to remain in force until the conclusion of that hearing or further order of the court”. Costs were reserved.
- [5] Before any substantive hearing of the Originating Application, the parties reached a compromise. That compromise is recorded in a Deed signed by the parties and dated 12 March 2015 (“the Deed”). In accordance with the Deed, and with the consent of the Respondents, Mr Rathbun now applies to:
1. vacate the orders of Byrne SJA which prevent the Respondents making any distributions or disbursements from the estate;
 2. have the Originating Application dismissed, with no order as to costs; and
 3. have no order made as to the costs of this Application.
- That application is sought to be determined without the need for an oral hearing.

Conclusions

- [6] Having regard to the terms of the compromise reached between the parties, and taking into account that the Respondents consent to the orders sought by the Applicant, I consider it appropriate that such orders be made without there being any oral hearing.

[7] I order that:

1. Order (1) of the orders made in this proceeding by Justice Byrne SJA on 12 August 2014 be vacated;
2. Order (4) of the orders made in this proceeding by Justice Byrne SJA on 14 August 2014 be vacated;
3. The Originating Application filed on 26 June 2014 be dismissed, with no order as to costs, including reserved costs; and
4. There is no order as to the costs of the application filed 19 March 2015.

[8] I have initialled the draft order and placed it with the papers.