SUPREME COURT OF QUEENSLAND

CITATION:	*Shaw v McKean as executor of the estate of the late Ellen Mary May McKean* [2023] QSC 261
PARTIES:	**JULIA ANN SHAW** (applicant) **v** **TRUDY FLORENCE MCKEAN AS EXECUTOR OF THE ESTATE OF THE LATE ELLEN MARY MAY MCKEAN** (respondent)
FILE NO/S:	TS 322 of 2023
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Townsville Supreme Court
DELIVERED ON:	16 November 2023
DELIVERED AT:	Brisbane
HEARING DATE:	9 - 10 November 2023
JUDGE:	Muir J
ORDER:	**1. I declare that the applicant has not disclaimed her interest under the will of the deceased Ellen Mary May McKean.** **2. I direct that the originating application be otherwise adjourned to the registry for a date to be fixed.** **3. The respondent is to pay the applicant's costs of the application as it concerns the determination of the issue of disclaimer.**
CATCHWORDS:	SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – GRANTS OF PROBATE AND LETTERS OF ADMINISTRATION – whether the residual beneficiary under a will disclaimed her residual interest in the estate of her late grandmother – where separate question ordered to be determined on this issue – whether letter of 6 July 1993 operated effectively as a disclaimer. *Uniform Civil Procedure Rules 1999* (Qld), r 5 *Federal Commissioner of Taxation v Cornwall* (1946) 73 CLR 394, cited *Hammat v Chapman* (1914) 14 SR (NSW) 416, cited *In re: Paradise Motor Co Ltd* [1968] 2 All ER 625,

considered
In re: Scott (decd); Widdows v Friends of Clergy Corp [1975] 2 All ER 1033, considered
Kennon v Spry; Spry v Kennon (2008) 238 CLR 366, cited
Matthews v Matthews (1913) 17 CLR 8, cited
Micallef & Anor v Micallef & Anor; Arrowsmith v Micallef & Ors [2012] QSC 239, considered
Probert v Commissioner of State Taxation (SA) (1998) 72 SASR 48, cited
Re: Bisset (decd); Bennett v Royal Australian Institute of Architects [2016] 1 Qd R 211, cited
Tantau v MacFarlane [2010] NSWSC 224, cited

COUNSEL: W D Evans for the applicant
A L Raeburn for the respondent

SOLICITORS: Lee, Turnbull & Co Solicitors for the applicant
Elizabeth M Dray Lawyers for the respondent

The application

[1] By an originating application filed in the Townsville Supreme Court on 10 March 2023, the applicant seeks various orders in relation to the administration of the estate of her late grandmother, Ellen Mary May McKean (**deceased**) who died on 22 April 1992. Relevantly, the applicant claims she is a residuary beneficiary under the last will of the deceased dated 6 November 1981.

[2] It is uncontroversial that the applicant and her three siblings were named as residuary beneficiaries under this will; but the affidavit material filed by the respondent in response to the application asserts that the applicant disclaimed her entitlements under the will. The applicant's siblings and other residuary beneficiaries have all sworn affidavits that they have each disclaimed their interest in the residuary estate and support the respondent's position about the applicant.

[3] On 20 September 2023, orders were made that the application be listed for the determination of the issue of whether the applicant had disclaimed her interest under the will.

[4] The hearing of this issue was listed for two days before me on 9 and 10 November 2023. At the outset, I expressed my concern about a number of matters. The first being the lack of identification by way of pleadings or otherwise of the real issues in dispute between the parties on the issue of the disclaimer. I also raised the issue of the relevance and admissibility of the affidavit material filed, and also whether there were issues with the overall claim of the applicant being statute barred. The latter issue was raised because of an obvious delay of some 22 years (between 1993 and October 2016) before the applicant raised her outstanding entitlement in the estate,

and then a further seven years before she commenced the current proceeding.[1]

[5] The hearing proceeded before me with a set of agreed facts being tendered together with a number of affidavits being admitted into evidence (on both sides). The applicant was cross-examined about a myriad of matters, and both counsel filed written closing submissions on the morning of day two.

[6] Unfortunately, my concern about the lack of clarity of the issues was confirmed as it only came to light during counsel for the respondent's closing oral address that the case for the respondent was in fact that the applicant had disclaimed her interest in the estate in a letter of 6 July 1993. That letter was from the applicant's solicitors to the solicitors for the original executors (admitted into evidence without objection), and it was submitted that the resolution of the disclaimer issue was therefore a matter of construction of that letter. Prior to that, it seemed that the respondent's case was that there had been a disclaimer by conduct.

[7] It follows that this application has not been conducted in keeping with the overriding philosophy of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**), being the just and expeditious resolution of the real issues in dispute at a minimum of expense.[2] The Court or the parties were not in any way assisted by one side contending there was a disclaimer, and the other side contending there was not, without there being an identification of the material facts underpinning each of those conclusions. If this had happened at the outset, it would have saved unnecessary costs being incurred by both sides, and it would have avoided a waste of precious Court time.

The issue

[8] The sole issue for my determination is whether the applicant disclaimed her interest in the estate of the deceased on 6 July 1993.

[9] The onus rests on the respondent to prove the disclaimer.

[10] The respondent purports to overcome this burden by relying on a letter of 6 July 1993 from the solicitors for the residuary beneficiaries to the solicitors for the original executors. This letter relevantly states as follows:

> "The instructions that we have received from each of the abovenamed are that <u>they wish to relinquish and disclaim any benefit or entitlement that they may have to the residual estate of E. M. M. McKean deceased.</u>
>
> We have also been instructed to advise you that each of the abovenamed <u>wish their share or entitlement</u> in the estate to be <u>transferred to their father, Raymond Peter McKean</u>.
>
> …

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1 I subsequently requested and received submissions from counsel for the parties about this issue. Despite the respondent maintaining that the overall claim is one that is statute barred she submitted that this was not an issue she wanted resolved at this point. The applicant submitted the claim was not statute barred and also agreed, perhaps unsurprisingly, that it was not an issue she wanted determined by the court at this point.

2 *Uniform Civil Procedure Rules 1999* (Qld) r 5.

> We have also advised Kerri McKean who is a minor that she does not have the capacity at this time to direct yourselves as executors to transfer any of her entitlement to her father and that such property to which she is entitled will be required to remain held in trust until such time as she attains the capacity to advise yourselves as executors otherwise.
>
> Would you please note our interest in this matter. Would you also please advise of your requirements to transfer the entitlement of the beneficiaries, Helen, Michael and Julia to Raymond Peter McKean."
>
> [Underlining added]

[11] The determination of this issue is discussed in the context of the relevant legal principles in the analysis below; but it is necessary to set out the undisputed facts to give some context to this correspondence.

Relevant facts

[12] The deceased was survived by her only son, Peter (who was married to the respondent), and her four grandchildren who are Peter and the respondent's children.[3]

[13] By her last will, the deceased left bequests of $5,000 to her brother and $40,000 to Peter, although the bequest of $40,000 was to be offset against a debt of $39,657 owed by Peter to the estate. The rest and the residue of the estate was to be distributed to the deceased's surviving grandchildren (who include the applicant) as follows:

(a) $20,000 when each attained the age of 25 years; and

(b) the balance in equal shares when each attained the age of 30 years.

[14] At the date of death, the assets of the deceased included a property at Proserpine and one at Dingo Beach.

[15] On 6 August 1992, probate of the will was granted to two solicitors, Graham Roberts and David Glasgow, who were the original executors of the will.

[16] By 8 April 1993, all of the residuary beneficiaries including the applicant were aware of their gifts under the will – having received correspondence from the original executors around this time.

[17] On 6 July 1993 the letter set out in paragraph 10 above was sent.

[18] Between 7 July 1993 and September 1993, the original executors and their solicitors engaged in correspondence with a view to addressing the transfer of the deceased's estate to Peter. In September 1993 counsel was engaged by these solicitors to provide an opinion in relation to the "passing" of any interest the residuary beneficiaries may have had in the deceased's estate, to Peter.

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3 The applicant was born in 1973, and her siblings were born in 1970, 1971 and 1976. The youngest was therefore a minor at the time of her grandmother's death.

[19] In March 1994, at the direction of the residuary beneficiaries, the original executors purchased another block of land in Proserpine.

[20] On 20 April 1995, the residuary beneficiaries executed a deed which, amongst other things, appointed their parents as executors in place of the original executors. It is uncontroversial that from this time, Peter treated the assets of the deceased (including the settlement proceeds from the sale of all three properties) as his own and applied them to his benefit. Peter died on 14 November 2020.

Analysis

[21] The starting point is that the law presumes a donee's assent to a gift unless the gift is disclaimed.[4] The presumption of assent has been described as a strong one.[5]

[22] As Applegarth J observed in *Micallef & Anor v Micallef & Anor; Arrowsmith v Micallef & Ors* [2012] QSC 239, a disclaimer is a refusal to accept that an interest has been bequeathed to the disclaiming party.[6] It is as if that interest had never been acquired by the disclaiming party.[7]

[23] The operation of a disclaimer was usefully described by Danckwerts LJ in *In re: Paradise Motor Co Ltd* [1968] 2 All ER 625 as follows:[8]

> "A disclaimer operates by way of avoidance, and not by way of disposition."[9]

[24] The effect was also usefully described by *In re: Scott (decd); Widdows v Friends of Clergy Corp* [1975] 2 All ER 1033 as follows:[10]

> "The effect of a disclaimer is not to throw the property on to the scrap heap, but to refuse to accept it in the first place, leaving the ownership with the people or the interest, or the estate, or whatever, from which it was derived in the first place."[11]

[25] It is well established that a residuary beneficiary may assign his or her interest in an unadministered estate, and that the right to due administration that a residuary beneficiary holds is an equitable chose in action. An effective disclaimer would therefore extinguish the equitable chose in action at least while the estate remains unadministered.[12]

[26] A disclaimer may be made by any means effective for the purposes; that is by deed or other writing, such as a letter; by word of mouth or by conduct. As stated earlier, the respondent's case does not rely on conduct, rather it is confined to the letter of 6 July 1993.

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4 See *Federal Commissioner of Taxation v Cornwall* (1946) 73 CLR 394 per Latham CJ at 401.
5 See *Matthews v Matthews* (1913) 17 CLR 8 at 44.
6 *Micallef & Anor v Micallef & Anor; Arrowsmith v Micallef & Ors* [2012] QSC 239 at [21].
7 See *Probert v Commissioner of State Taxation (SA)* (1998) 72 SASR 48.
8 *In re: Paradise Motor Co Ltd* [1968] 2 All ER 625 at 632; cited by Applegarth J in Micallef at [21].
9 *In re: Paradise Motor Co Ltd* [1968] 2 All ER 625 at 632.
10 *In re: Scott (decd); Widdows v Friends of Clergy Corp* [1975] 2 All ER 1033 at 1045.
11 Ibid.
12 See *Kennon v Spry; Spry v Kennon* (2008) 238 CLR 366 at 393-394 at 75.

[27] A disclaimer must be made with knowledge of the interest and with intention to disclaim it.[13] In the present case, it is accepted that the applicant knew of her entitlement as a residuary beneficiary under the will by 8 April 1993, but her case is that she never in fact disclaimed that gift.

[28] What is obvious from an ordinary and natural reading of the 6 July 1993 letter when read as a whole and in context, is that the applicant (and indeed the other residuary beneficiaries – namely, her siblings) were not wishing to completely relinquish their share in the estate of the deceased. On the contrary, the letter is to be construed to mean that they wished their respective interests in the estate to be transferred to their father. The expression "wish" in this context ought to be regarded as merely precatory.[14]

[29] It follows that the letter of 6 July 1993 is not correctly characterised as a disclaimer.

[30] In reaching this conclusion, I do not purport to make any other findings about whether or not there was compliance with the requirements to assign or transfer an equitable chose in action and the effectiveness of such an assignment.[15]

[31] Regardless of this finding, I am otherwise not satisfied that all three requirements necessary for a disclaimer of a gift to be effective have been established by the respondent in this case. Those requirements are as follows:[16]

(a) first, the disclaimer must be timely in that it must occur before any act constituting assent to the gift;

(b) secondly, the disclaimer must be peremptory, in that it must constitute an absolute rejection of the gift; and

(c) thirdly, the disclaimer must be communicated to the donor or the donor's agent.

[32] It is the second of these requirements that is the real issue before me.

[33] The following principles are instructive to this issue:[17]

(a) first, a disclaimer must constitute an absolute rejection of the gift. It must evince a final and non-negotiable refusal to accept the property which the donor proffers;

(b) secondly, it must not purport to do anything other than disclaim. It must not purport to dispose of the property in some other way, such as by release; and

(c) thirdly, it is a necessary incident of an effective disclaimer that being peremptory it cannot be retracted.

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13 See discussion by Professor Crago in *Principles of Disclaimer of Gifts* (1999) 28 WALR 65 at pages 78 to 82.

14 *Hammat v Chapman* (1914) 14 SR (NSW) 416 at 418.

15 See the discussion in *Micallef* at [23]-[29].

16 *Re: Bisset (decd)* [2016] 1 Qd R 211 at [34].

17 *Tantau v MacFarlane* [2010] NSWSC 224 at [104]-[121] per Ward J with reference to Professor Crago in *Principles of Disclaimer of Gifts* (1999) 28 WALR 65.

[34] In my view, the respondent's case of a disclaimer based on the construction of the 6 July 1993 letter has not been made out for the following four reasons:

(a) first, on any ordinary or natural reading of the letter, it is not an unequivocal and peremptory rejection of the gift under the will. At its highest, it is a statement of intention to transfer each of the residuary beneficiaries' interests in the estate to their father at some point in the future, subject to further requirements being met. Such a construction is supported by the use of the words, "they wish to" and the fact that the executors are asked to advise their requirements to transfer the entitlements. The obvious inference is that the transfer will occur at some later time once those requirements are satisfied;

(b) secondly, the letter is also equivocal because it refers to both a disclaimer and a transfer. Those two dealings are inconsistent with one another because the former involves an extinguishment of rights, while the latter requires rights to have vested so that they can be transferred. It is therefore not an absolute rejection of the gift;

(c) thirdly, even accepting that the intention of the beneficiaries at the time was to disclaim their entitlements and provide those instructions to their solicitors, there is no evidence that any documents were executed at that meeting, or that their instructions were carried into some type of solemn irrevocable act; and

(d) fourthly, a "mere intention" is not enough. There must be evidence of both an unequivocal act (or conduct) and the clear communication of the disclaimer to the donor. No subsequent conduct is relied upon by the respondent, and I am not satisfied that the letter itself constitutes an unequivocal act and a clear communication of that unequivocal act to the executors.

[35] My finding that there was no unequivocal disclaimer on 6 July 1993 is consistent with the following six matters which emerged from the evidence tendered by the respondent:

(a) first, the original executors wrote to the beneficiaries' solicitors in response to the 6 July 1993 letter with a question about whether the beneficiaries were able to disclaim;

(b) secondly, the solicitors for the beneficiaries wrote to one of the residuary beneficiaries (Helen) in August 1993, informing her about the issues raised by the original executors and recommending that they obtain a barrister's opinion. Of course, if there had been a disclaimer, that opinion would have been unnecessary;

(c) thirdly, a barrister's opinion was obtained which recommended that an application be made to the Court to determine the construction of the will;

(d) fourthly, on 8 August 1994, Helen wrote to the solicitors for the beneficiaries, outlining that the residuary beneficiaries wanted to hand over the estate to their father or, at the very least, appoint "our own trustee." Again, if there had been a disclaimer, it would have been unnecessary for her to have given these instructions and impossible for her to effect any handover of her interest;

(e) fifthly, the residuary beneficiaries purportedly gave a direction to the original executors in 1994 to purchase a property. If there had been a valid disclaimer, it follows that they had no standing to give such instructions; and

(f) sixthly, the asserted disclaimer is inconsistent with the deed of retirement of trustees entered into in 1995. That document does not mention any disclaimer and purports to record the residuary beneficiaries directing the original executors to retire in place of their parents. Again, that document would have been completely unnecessary if the disclaimer had been effective in 1993.

[36] It follows that the respondent has failed to satisfy the onus on the issue of disclaimer.

Orders and declarations

[37] I therefore declare that the applicant has not disclaimed her interest under the will of the deceased, Ellen Mary May McKean. As requested by the parties at the conclusion of the hearing, I direct that the originating application be otherwise adjourned to the registry for a date to be fixed.

[38] My preliminary view is that costs should follow the event and that therefore the appropriate order as to costs is that the respondent is to pay the applicant's costs of the application as it concerns the determination of the issue of disclaimer.[18] But I will allow the parties until 4.00pm on Thursday 23 November 2023 to email written submissions of no longer than two pages on this issue or to provide a consent order as to costs to my Associate. Otherwise, the costs order I have foreshadowed will be made.

[18] On delivery of judgment argument was had, and this was the costs order ultimately made.