

# SUPREME COURT OF QUEENSLAND

CITATION: *The Public Trustee of Queensland v The Public Trustee of Queensland & Ors* [2014] QSC 47

PARTIES: **THE PUBLIC TRUSTEE OF QUEENSLAND AS A CORPORATION SOLE**  
(applicant)  
v  
**THE PUBLIC TRUSTEE OF QUEENSLAND AS MANAGER OF THE ESTATE OF MERIN NIELSEN PURSUANT TO PART 7 PUBLIC TRUSTEE ACT 1978**  
(first respondent)  
**ALBERT HOLT, YVONNE WILSON, YVONNE HOLMES AND GORDON HOLT**  
(second respondents)  
**SUBUD-BRISBANE INC (ORGANISATION REGISTRATION NO.144089350)**  
(third respondent)

FILE NO/S: SC No 1173 of 2014

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 21 March 2014

DELIVERED AT: Brisbane

HEARING DATE: 19 March 2014

JUDGE: Chief Justice

ORDER: 

- 1. Pursuant to s 29(1)(b)(iii) *Public Trustee Act 1978* that, subject to the formal requirements of the Registrar, an order to administer the estate of Francis Ward, deceased, according to his will dated 5 August 2007 be granted to the Public Trustee of Queensland.**
- 2. Pursuant to s 6 *Succession Act 1981* and s 134 *Public Trustee Act 1978* that the Public Trustee notwithstanding the terms of the said will, in the events which have occurred, should distribute the estate of Francis Ward, deceased, as on intestacy to the second respondents.**
- 3. That the applicant's costs of and incidental to this application be paid out of the estate of Francis Ward, deceased, on the indemnity basis.**

CATCHWORDS: CRIMINAL LAW – GENERAL MATTERS – OTHER GENERAL MATTERS – DISABILITIES AND DISQUALIFICATIONS OF CONVICTED PERSONS – DISQUALIFICATION FROM CIVIL BENEFITS ACCRUING AS A RESULT OF CRIME – the first respondent was convicted of having assisted the testator to commit suicide and sentenced to three years imprisonment with parole fixed after six months – the first respondent was the sole executor and beneficiary under the testator’s will – whether the first respondent is disqualified from acting as executor under the testator’s will by virtue of his assistance in the testator’s suicide – whether the first respondent has forfeited his right to any benefit under the testator’s will by virtue of his assistance in the testator’s suicide

SUCCESSION – FORFEITURE WHERE TESTATOR OR INTESTATE KILLED UNLAWFULLY – GENERALLY – the first respondent was convicted of having assisted the testator to commit suicide and sentenced to three years imprisonment with parole fixed after six months – the first respondent was the sole executor and beneficiary under the testator’s will – whether assisting in a testator’s suicide results in the application of the forfeiture rule

SUCCESSION – FORFEITURE WHERE TESTATOR OR INTESTATE KILLED UNLAWFULLY – FORFEITURE MODIFICATION ORDERS AND MITIGATION OF RULE – the first respondent was convicted of having assisted the testator to commit suicide and sentenced to three years imprisonment with parole fixed after six months – the first respondent was the sole executor and beneficiary under the testator’s will – whether assisting in a testator’s suicide results in the application of the forfeiture rule – whether judicial discretion exists in the applicability of the forfeiture rule in Queensland either generally or for assisted suicide

*Dunbar v Plant* [1998] Ch 412, applied

*Director of Public Prosecutions v Rolfe* (2008) 191 A Crim R 213; [2008] VSC 528, cited

*In the Estate of the Late Fiona Ellen Fitter & The Forfeiture Act 1995; Public Trustee of New South Wales v Fitter & Ors* [2005] NSWSC 1188, cited

*Nay v Iskov* [2012] NSWSC 598, cited

*R v Justins* [2011] NSWSC 568, cited

*R v Hood* 130 A Crim R 473; [2002] VSC 123, cited

*R v Maxwell* [2003] VSC 278, cited

*State of Queensland v Byers* [\[2006\] QSC 334](#), cited

*Troja v Troja* (1994) 33 NSWLR 269, applied

COUNSEL: R T Whiteford for the applicant  
J C O’Neill for the first respondent  
No appearance for the second respondents and third

respondent

**SOLICITORS:** Official Solicitor to the Public Trustee for the applicant  
 Mitchells Solicitors for the first respondent  
 No appearance for the second respondents and third  
 respondent

- [1] **CHIEF JUSTICE:** Francis Ward died on 20 June 2009 as the result of a drug overdose. His estate is valued at approximately \$140,000. By a “home made” will of 5 August 2007, he revoked a prior will (of 25 November 1999), appointed Mr Merin Nielsen as his executor, and left his estate to Mr Nielsen.
- [2] On 16 February 2012 Mr Nielsen was convicted by a jury of having assisted Mr Ward to commit suicide. That is an offence under s 311(c) of the *Criminal Code*. Dalton J sentenced him to three years imprisonment, with release on parole fixed after six months. There is no reason to doubt the validity of the 2007 will.
- [3] The Public Trustee contends that Mr Nielsen is not “capable” of acting as executor under that will, with the consequence that the Public Trustee is entitled to an order to administer the estate (s 29(1)(b)(iii) *Public Trustee Act* 1978). That is because Mr Nielsen’s “right” to act as executor arose from his crime, in assisting Mr Ward to commit suicide. Further, it was submitted, that crime means that Mr Nielsen has forfeited the benefit he would otherwise take under the will, so that the estate should be administered as on an intestacy. That would mean that the estate would be shared by Mr Ward’s surviving siblings, Albert Holt and Yvonne Wilson, and Yvonne Holmes and Gordon Holt, the children of his brother David Holt who predeceased him.
- [4] Mr Nielsen had travelled to Mexico at the request of Mr Ward, where he purchased the drug Pentobarbital. Mr Nielsen provided the drug to Mr Ward forthwith upon his arrival back in Australia, and it was the ingestion of that drug which led to the death.
- [5] Mr Whiteford appeared for the Public Trustee.
- [6] Because Mr Nielsen is a prisoner (notwithstanding his currently being on parole) the Public Trustee manages his estate under Part 7 of the *Public Trustee Act*. As part of that, the Public Trustee has properly authorised the engagement of solicitors and counsel to represent Mr Nielsen in relation to this application. Mr O’Neill of counsel appeared for Mr Nielsen.
- [7] In *Troja v Troja* (1994) 33 NSWLR 269, the New South Wales Court of Appeal (by majority) affirmed that a person responsible for the death of another cannot be allowed to benefit from that other person’s estate. The beneficiary in that case had been convicted of manslaughter on the basis of diminished responsibility. Meagher JA said the rule rested in “an abhorrence of the notion that one may profit from killing another”, and described the rule as “absolute and inflexible”. He rejected a contention that the court had a discretion whether to apply the forfeiture rule or not. See p 299.
- [8] Douglas J of this court referred to *Troja* with approval in *State of Queensland v Byers* [2006] QSC 334 at para 26.

- [9] In *Dunbar v Plant* [1998] Ch 412, the English Court of Appeal held that the common law forfeiture rule was not confined to cases of murder and manslaughter, and extended to assisting suicide, and that the ethical question of degrees of culpability was beside the point: provided the death was the result of the crime, then the rule applied. In short, this is one of those few remaining clear-cut situations about which citizens can be absolutely certain.
- [10] That condition, causation, is satisfied where Mr Nielsen was convicted of assisting Mr Ward to commit suicide, and all parties readily accepted the factual accuracy of her Honour's sentencing remarks. In that matrix, I am satisfied on the (presently relevant) civil standard of proof that Mr Nielsen assisted Mr Ward to commit suicide. I note that, the "presence of acts or threats of violence" is not a prerequisite to the application of the forfeiture rule. It is also irrelevant that the person assisting the suicide did not intend, or lacked the motive, to benefit from the deceased's estate (see *Dunbar v Plant* at p425).
- [11] There is apparently no reported Australian case of assisted suicide where the forfeiture rule has been applied. Mr O'Neill submitted that in other Australian jurisdictions the definition of "unlawful killing" has been expanded in forfeiture legislation to include assisting a suicide. It follows, on Mr O'Neill's submission, that as Queensland has not enacted such legislation, any expansion of the forfeiture rule to assisted suicide cannot be sustained.
- [12] While the New South Wales legislation, the *Forfeiture Act 1995* (NSW), does expressly cover forfeiture in cases of assisted suicide, one should not draw from that any implicit acknowledgement that the common law principle does not extend to assisted suicide. I consider it clearly does. The New South Wales forfeiture legislation may simply have been intended to reflect the common law in its application to forfeiture resulting from assisted suicide.
- [13] The whole purpose of the forfeiture legislation in New South Wales and the Australian Capital Territory was to ameliorate what was perceived to be harshness in the otherwise necessary rigid application of the forfeiture rule (see *In the Estate of the Late Fiona Ellen Fitter & The Forfeiture Act 1995; Public Trustee of New South Wales v Fitter & Ors* [2005] NSWSC 1188 at para 42 and *Nay v Iskov* [2012] NSWSC 598 at para 10).
- [14] Since I am to apply the common law without any statutory veneer, the result is I believe clear, where the crime of Mr Nielsen has resulted in the death of Mr Ward, in the sense that it materially contributed to it, and that is that his interest is forfeited.
- [15] Mr O'Neill relied on the following circumstances favouring the exercise of a discretion not to apply the rule in this case:
- (a) The deceased had a long-standing fear of being disabled to the point where he could not function independently.
  - (b) He had resolved, some years before his death, to take his own life should his perception of his situation reach that point.

- (c) To that end he had consulted with a society that provided advice on such matters.
- (d) He independently sought the assistance of his friend Mr Nielsen once he had made the decision to terminate his own life.
- (e) At the time the decision was made the evidence of a neighbour was that he was unable to even take out his own rubbish. The medical evidence from the autopsy disclosed a number of life threatening medical conditions. The death certificate lists in fact four causes of death, of which Pentobarbital toxicity is only one.
- (f) The Crown case was that Mr Nielsen visited the deceased after his return from Mexico where he had gone at the request and expense of the deceased. It is likely that the Pentobarbital was handed over at that time.
- (g) At some stage during the afternoon the deceased took the substance. He was found dead in the early evening. There was no suggestion from the Crown that Mr Nielsen was present when the substance was ingested, or that he did any act directly causal of the deceased taking the Pentobarbital. In other words it was an independent decision freely entered into by the deceased.
- (h) Although the deceased was elderly there was no evidence that he was otherwise than in full control of his mental faculties.
- (i) The decision to take the tablets and the fact of taking them was entirely independent of Mr Nielsen.
- (j) It was open to the deceased to have exercised his decision to take his own life by a range of alternative means. It is a reasonable inference that he believed Pentobarbital was quick, effective and painless.
- (k) Insofar as Mr Nielsen 'aided' the deceased such assistance was remote from the act itself.
- (l) Given the remoteness that decision to take his own life was the deceased's alone. Acting out that decision was in effect a novus actus interveniens.
- (m) The deceased was aware that Mr Nielsen would benefit from his Will as the sole beneficiary. He made the decision that he did therefore, in the expectation that Mr Nielsen would benefit from his estate when the deceased killed himself."

- [16] I do not consider however that the discretion for which Mr O'Neill contends exists. As I have said the rule is inflexible and absolute; absent statutory change. The discretion in *Dunbar v Plant* [1998] Ch 412 applied solely because of the *Forfeiture Act* 1982 (UK). Once one identifies the causal relationship between the crime and the death, and that is established essentially by the conviction, then any entitlement under the deceased estate is, without more, forfeited.
- [17] There have been some few similar cases of assisted suicide. Dalton J referred to most of them in her sentencing remarks. These cases include *R v Maxwell* [2003] VSC 278; *R v Hood* [2002] VSC 123 and *Director of Public Prosecutions v Rolfe* [2008] VSC 528. One does not know whether the forfeiture rule was applied, or simply ignored, in those cases despite, for the reasons I have expressed, having arguable applicability under the common law. It may have been that the relevant statutory trustee body or beneficiaries under those wills decided not to agitate the point in the circumstances of those cases, where what were described as loving and compassionate killings had occurred. For the reasons expressed by the Dalton J, this assisted suicide bore a different complexion.
- [18] The decision referred to by the sentencing Judge as the most comparable to Mr Nielsen's conviction was that of *R v Justins* [2011] NSWSC 568. In that case the deceased's de facto partner was originally convicted of manslaughter. This was overturned on appeal, following which Justins' plea of assisted suicide was accepted. A settlement regarding the distribution of the will was reached between Justins and the deceased's daughters at the time Justins was convicted of manslaughter. Again, it is unknown whether the forfeiture rule had any relevance to the settlement terms despite its indisputable application to cases of manslaughter.
- [19] In this State, the law is clear. A person who assists the suicide of someone else cannot act as that person's executor, or take an interest in his or her estate. The court has no discretion to modify the application of that rule. Saying nothing as to the facts of this case, I observe that it is irrelevant that the offender may have been motivated to ease suffering or to have acted at the request of the deceased.
- [20] If there is to be any change in that arena, it is a matter of high public policy appropriate for consideration by the legislature, not determination by the courts. I should say that I am not to be taken to be inviting any such legislative consideration.
- [21] I will therefore make the following orders:
1. pursuant to s 29(1)(b)(iii) *Public Trustee Act* 1978 that, subject to the formal requirements of the Registrar, an order to administer the estate of Francis Ward, deceased, according to his will dated 5 August 2007 be granted to the Public Trustee of Queensland;
  2. pursuant to s 6 *Succession Act* 1981 and s 134 *Public Trustee Act* 1978 that the Public Trustee notwithstanding the terms of the said will, in the events which have occurred, should distribute the estate of Francis Ward, deceased, as on intestacy to the second respondents;
  3. that the applicant's costs of and incidental to this application be paid out of the estate of Francis Ward, deceased, on the indemnity basis.