# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Gunn v Stenders* [2017] QSC 179 |
| PARTIES: | **TANIA GUNN** as administrator and trustee of the estate of Karlis Herbert Stenders also known as Karlis Herberts Stenders deceased<br>(applicant)<br>v<br>**PAULIS STENDERS** as beneficiary of the estate of Karlis Herbert Stenders also known as Karlis Herberts Stenders deceased<br>(respondent) |
| FILE NO: | BS4990 of 2017 |
| DIVISION: | Trial Division |
| PROCEEDING: | Originating application |
| DELIVERED ON: | 30 August 2017 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 28 June 2017 |
| JUDGE: | Mullins J |
| ORDERS: | **1. It is declared that the gift of the residuary estate in clause 4(b) of the last will of Karlis Herbert Stenders deceased dated 24 October 1990 is construed as a gift to Denisa Stenders and Paulis Stenders as tenants in common in equal shares, and not as joint tenants.**<br>**2. It is directed that the applicant is justified in treating the distribution of $49,500 made to the respondent of the proceeds of sale of Lot 81 on RP29509 County of Stanley, Parish of Oxley as a final distribution to him as a beneficiary of the estate of Karlis Herbert Stenders deceased.**<br>**3. It is directed that the applicant is justified in treating the land at 34 Tavistock Street, Oxley (Lot 2 on RP29515 County of Stanley, Parish of Oxley) as having been vested in equity in Denisa Stenders as a beneficiary of the estate of Karlis Herbert Stenders at the latest on 28 June 2002.** |
| CATCHWORDS: | SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – ASCERTAINMENT OF TESTATOR'S INTENTION – GENERALLY – where the will of the deceased provided expressly for the residuary estate to be held by the trustee for the deceased's wife and son as joint tenants |

– where the son was a minor at the date of the deceased's death – where the trustee was directed under the will to hold the son's interest on trust until he attained the age of 25 years – where there was an express power of advancement under the will in respect of any entitlement of an infant beneficiary – whether the direction to hold the son's interest in the estate on trust until he attained the age of 25 years and the power of advancement indicated the testator's intention that the gift not be held as joint tenants – whether the gift of the residuary estate should be construed as a gift to be held as joint tenants or as tenants in common

SUCCESSION – ADMINISATION OF ESTATE – DISTRIBUTION – GENERALLY – where the administrator of her deceased stepfather's estate seeks directions regarding the proceeds of sale of real property that was owned by the deceased – where the real property comprised two adjoining lots on the one title – where the wife of the deceased was the original executor under the deceased's will and the residuary estate was given to the wife and the son of the marriage – where the title of both lots was transferred into the wife's name as the personal representative of the deceased – where on one lot the wife constructed a house using moneys she borrowed and repaid from her own funds that was her principal place of residence until her death – where the other lot was sold and the proceeds distributed by the wife to the son – whether that distribution was a complete distribution of the son's entitlement under the deceased's will – where after the wife's death, the administrator sold the property which had been her principal place of residence – whether the proceeds of sale belong to the wife's estate or to the deceased's estate

*Trusts Act* 1973 (Qld), s 96

*Corin v Patton* (1990) 169 CLR 540; [1990] HCA 12, cited
*Re Leaver* [1997] 1 Qd R 55; [1996] QSC 28, considered
*L'Estrange v L'Estrange* [1902] 1 IR 467, considered
*Re Rose deceased* [1962] QWN 4, followed

COUNSEL: S K McLeod for the applicant
No appearance for the respondent

SOLICITORS: McLaughlin & Associates Lawyers Pty Ltd for the applicant

[1] Ms Gunn, as administrator *de bonis non* and trustee of the estate of the late Karlis Stenders (the deceased), who died in May 1995, applies for directions pursuant to s 96 of the *Trusts Act* 1973 (Qld) regarding the proceeds of sale of real property that was owned by the deceased when he died, but was registered in the name of Mrs Denisa Stenders as personal representative of the deceased's estate, when she died in March 2014, without completing

the administration of the deceased's estate. The application also raises a question of construction of the deceased's will.

[2] Ms Gunn is the daughter of Mrs Stenders who was the original executor of the estate of the deceased who was her late husband. Mrs Stenders died intestate and Ms Gunn is also the administrator of her mother's estate.

**Relevant facts**

[3] The deceased and Mrs Stenders were married in the 1970s and had one child together who is the respondent. He was 14 years old in the year the deceased died. Mrs Stenders had three children from a previous marriage namely, Ms Gunn, Ms Katrina Wogandt (Katrina) and Mrs Leena Wogandt (Leena). The deceased and Mrs Stenders separated in 1988, but never divorced.

[4] Mrs Stenders as the named executor was granted probate of the deceased's last will dated 24 October 1990. Under clause 4 of the will, all the deceased's property was given to Mrs Stenders as trustee to pay the deceased's debts, funeral and testamentary expenses and all duties on his estate and, pursuant to paragraph (b):

> "TO pay and transfer over the balance THEN remaining to my Wife DENISA STENDERS and my said Son PAULIS STENDERS as joint tenants and I DIRECT that my Trustees shall hold the interest in my Estate belonging to my Son PAULIS STENDERS IN TRUST until he shall attain the age of TWENTY FIVE YEARS"

Clause 5 of the will then provided:

> "I DECLARE that in and about the administration of my Estate and the execution of the Trusts of this my Will my Trustees shall have the following powers which shall be exercisable by them from time to time in their discretion that is to say the powers of sale postponement of sale retention of hazardous or wasting property raising money on mortgage or otherwise leasing letting licensing or otherwise turning to account any of the trust property carrying on business and withdrawing or increasing capital employed therein procuring or granting extensions of time compromising or settling claims expending moneys in repairs painting furnishing decoration alterations or additions providing for the maintenance education and advancement of any infant expectantly or presumptively entitled hereunder out of capital or income employing servants and agents investing moneys in any trustee investment or on fixed deposit in any public Bank or any public Company (but not Mining Company) in Australia (with liberty from time to time to change any such investment for any other or others of the kinds prescribed) conclusively determining the apportionment of blended funds and of doing all acts matter and things incidental to any of the aforesaid powers or necessary or convenient for the due execution of the trusts hereof".

[5] The deceased owned the real property at 36 Tavistock Street, Oxley which remained his residence until his death in 1995, although immediately before his death he was in hospital

for palliative care. The house located at that address had not been in good repair prior to the deceased's illness, was vandalised while the deceased was in hospital, and was uninhabitable. The title comprised two lots, Lot 2 on RP 29515 (having an area of 364m²) and Lot 81 on RP 29509 (having an area of 445m$^2$). The Valuer-General's valuation of Lots 2 and 81 as at 30 June 1995 was done as a single holding with a value of $75,000.

[6] Apart from the deceased's real property, his estate comprised his personal effects, a small amount of money, and a Datsun 180B motor vehicle which Ms Gunn describes as "an extremely modest car". Mrs Stenders paid for the deceased's funeral account and his debts either from the deceased's bank account or her own moneys.

[7] According to Mrs Stenders' brother, Mr Raduz Rudinkin, she told him she was happy to take the smaller of the two lots (which was Lot 2) and would keep Lot 81 for the respondent.

[8] In 1996 Mrs Stenders caused separate titles to be issued for each of the two lots, after organising for water and power to be connected to both lots. Mrs Stenders proceeded with the removal of the vandalised house, borrowed $70,000 to build a new house, and proceeded to construct the new house on Lot 2 which was then referred to as 34 Tavistock Street. The mortgage for the loan was secured over both lots, but Mrs Stenders repaid the loan from her own funds. Ms Gunn deposes to Mrs Stenders telling her that she had received an amount of money for the house which she used towards the removal of the slab and trees around both lots. Ms Gunn believes that the moneys from the removed house were fully used in clearing and other matters associated with the property, as Mrs Stenders told her she had no money left from the removal of the house to put towards the construction of the new house. Ms Gunn and her then husband operated a residential construction company and they undertook the construction of Mrs Stenders' house on Lot 2, contributing about $30,000 worth of labour and materials above what Mrs Stenders had available to spend on the construction from her loan.

[9] Leena purchased Lot 81 which had remained vacant land from her mother in May 2002. Mrs Stenders had the mortgage released over Lot 81 (36 Tavistock Street). Mrs Stenders was advised by her brother who was then working as a real estate salesperson that the "realistic" value of Lot 81 was $50,000. Before Leena signed the contract to purchase Lot 81 for $50,000, Mrs Stenders told her she had to get the respondent's approval to buy the land "as the land was his". Leena telephoned the respondent and he agreed to her offered price of $50,000. Ms Gunn recalls Mrs Stenders around this time telling her that the moneys paid by Leena for Lot 81 would be provided to Paul as this was his half-share of the deceased's estate. A total amount of $49,652.56 was transferred into Mrs Stenders' bank account as the proceeds of sale. Mrs Stenders' bank statements show that there was a withdrawal of $2,500 on 17 May 2002 and a withdrawal of $47,000 on 28 June 2002. According to Ms Gunn and Leena, Mrs Stenders was concerned about whether she should pay the sale proceeds to the respondent, because the deceased had not wanted the respondent to receive his entitlement under the will until he had turned 25 years old. By the time Lot 81 was sold, the respondent was 21 years old. From what Mrs Stenders told Ms Gunn and what Katrina reported to Ms Gunn about her conversation with the respondent, the respondent received the proceeds from the sale of the land from Mrs Stenders. The inference that Ms Gunn has drawn from the documents she has managed to obtain is that the respondent, in effect, received a total payment of $49,500 from the

estate of the deceased. For the purposes of this application, the difference between the total amount received by Mrs Stenders of $49,652.56 and the distribution of $49,500 is immaterial.

[10] Ms Gunn has obtained a retrospective valuation of Lot 2 as at 3 May 2002 from registered valuer Mr Geoff Duffield that valued the vacant land at $45,000. The QVAS valuations for Lot 2 and Lot 81 respectively with effect on 30 June 2002 were $42,000 and $46,000. Separate rate notices for Lot 2 and Lot 81 respectively did not issue until late 2002.

[11] Mrs Stenders remained living in the house at 34 Tavistock Street until her death. The beneficiaries on her intestacy are her four children.

[12] Leena sold Lot 81 in April 2014 and at Ms Gunn's request moved into the house on Lot 2 at 34 Tavistock Street to safeguard the property from squatters or vandals until it was sold. Leena then paid the utilities and rates on Lot 2 until she moved out on 25 July 2016.

[13] In administering the estate of Mrs Stenders, Ms Gunn discovered that the title of 34 Tavistock Street (Lot 2) was registered in the name of Mrs Stenders as personal representative of the estate of the deceased. Ms Gunn as the administrator of the deceased's estate sold the property at 34 Tavistock Street for $480,000 and the sale settled in August 2016.

[14] Mrs Stenders had paid from her own funds the rates for both Lots 2 and 81 from about July 1995 until March 2002 and from that date Mrs Stenders paid the rates on 34 Tavistock Street until her death.

[15] Although the titles to Lots 2 and 81 showed Mrs Stenders as personal representative of the deceased's estate until each lot was respectively transferred, the rate notices received by Mrs Stenders showed only her name without any reference to her being the personal representative of the deceased's estate. Ms Gunn inferred from her conversations with her mother that her mother believed the home at 34 Tavistock Street was hers on the basis that the land was her entitlement under the deceased's will and she then built the home as a result of borrowing for herself from the bank. After Mrs Stenders was diagnosed with terminal cancer, she discussed with Mr Rudinkin that she wanted to divide her assets equally among her children and told Mr Rudinkin that her estate comprised her house (which Mr Rudinkin knew was 34 Tavistock Street), any cash and other valuables and her superannuation fund. Mr Rudinkin believed that, if Mrs Stenders had understood the ramifications of not having registered Lot 2 in her name, she would have asked him to remedy that prior to her death.

[16] The respondent engaged solicitors to act on his behalf in connection with his mother's estate. Ms Gunn's solicitors sent a request on 2 August 2016 to the respondent's solicitors that he provide a sworn statement as to the terms of the agreement with his mother at the time he was paid the sum of $50,000. The request was made again by Ms Gunn's solicitors on 29 November 2016 in terms of an inquiry as to what amounts were distributed to the respondent in the administration of the deceased's estate. The respondent has not answered Ms Gunn's request for information about payments to him from the deceased's estate. The respondent's solicitors informed Ms Gunn's solicitors

that they were authorised to accept service of the originating application, the statement of facts and the affidavits of Ms Gunn, Mr Rudinkin and Leena filed in this proceeding. Ultimately those solicitors advised Ms Gunn's solicitors they did not have instructions to attend court on the hearing of the application. The respondent did not appear when called at the hearing and therefore has not challenged the facts deposed to in the supporting affidavits relied on by Ms Gunn or set out in the statement of facts.

[17] Katrina was also served with the application and supporting affidavits, but had indicated in writing to Ms Gunn's solicitors that she did not require to be heard on the hearing of the application and did not have any objection to the orders sought by Ms Gunn.

**Questions to be answered**

[18] It is submitted the directions Ms Gunn seeks will be determined by the answers to the following questions:

(a) Was the gift under the deceased's will as joint tenants at the date of death or tenants in common?

(b) If the gift was as joint tenants was the joint tenancy subsequently severed?

(c) If the gift was subsequently severed, was the distribution to the respondent a complete distribution of his entitlements under the will, or a partial distribution, and if it were only a partial distribution, how much of the estate should be distributed to the respondent and how much should be distributed to the estate of Mrs Stenders?

**Construction of the gift under clause 4(b) of the deceased's will**

[19] In reliance on the advice obtained from counsel, Ms Gunn contends that the gift pursuant to clause 4(b) of the will should be construed as a gift of the residuary estate to Mrs Stenders to hold on trust for herself and the respondent as tenants in common, as the direction that Mrs Stenders hold the respondent's interest until he attain the age of 25 years and the power of advancement were inconsistent with leaving the residuary estate to Mrs Stenders and the respondent as joint tenants, despite the express designation in the will of the gift to the named beneficiaries as "joint tenants".

[20] The respondent was a minor when the deceased died. A joint tenancy requires unity of title, unity of time, unity of possession and unity of interest: *Corin v Patton* (1990) 169 CLR 540, 548, 572. The direction under the will to Mrs Stenders as trustee to hold the interest of the respondent separately from her interest points to there not being complete unity in the ownership of the real property that passed under the will to Mrs Stenders and the respondent.

[21] Another indication against the holding of the real property under a joint tenancy is the existence in clause 5 of the will of the power of advancement of capital or income. In *L'Estrange v L'Estrange* [1902] 1 IR 467 the residuary bequest had been left on trust for

specified children of the testator, but there was an express power given to the trustees to advance such sums of money as they thought fit for the education and advancement in life of the testator's daughters and the named son (who comprised the specified residuary beneficiaries). Without the reference to the power of advancement, the clause would have been construed as making the children joint tenants, but it was held at 469 by Lord Ashbourne that by the testator including a power of advancement, his intention must have been for the legatees to take as tenants in common, and by FitzGibbon LJ that the discretionary power of advancement was incompatible with a joint tenancy "because the exercise of such a power implies the reduction of several parts of the property into possession". Holmes LJ expressed the principle at 470 in these terms:

> "It is now well settled that where a devise or bequest is made to children, followed by a power of advancement, such a power is inconsistent with a joint tenancy in the children, and upon this principle we hold that they took as tenants in common."

[22] In *Re Rose deceased* [1962] QWN 4 the testator had given the whole of his property to his daughter, granddaughter and two granddaughters "in equal shares as joint tenant". Gibbs J observed that:

> "It has long been settled that words indicating an intention to divide the property are inconsistent with the idea of a joint tenancy and that a gift to several persons equally creates a tenancy in common unless the context of the will shows that a joint tenancy is intended (see Jarman on Wills, 8th ed., pp. 1793-4). The use of the words 'in equal shares' in the present will indicates an intention to create a tenancy in common, but the question is whether the additional words 'as joint tenants' sufficiently reveal a contrary intention."

In that case the gift was construed as a gift to the three beneficiaries as tenants in common.

[23] Where there is a doubt about whether a gift takes effect as a joint tenancy or tenancy in common under a will, the approach to the construction of the will is to apply the principle that "under a will the Court will in case of doubt generally find against a joint tenancy and in favour of a tenancy in common because of the inconvenience and possible unfairness that attends a joint tenancy, particularly during the minority of any beneficiary": *Re Leaver* [1997] 1 Qd R 55, 57 applying *Rose* at 9.

[24] The terms in which the residue was given under the opening words of clause 4(b) meant that the residue vested in interest in both Mrs Stenders and the respondent on the deceased's death. Perhaps the construction of clause 4(b) is not as straightforward as in those cases where the gift under a will to named persons as joint tenants is specified in equal shares and is therefore construed as a gift to the named persons as tenants in common, but the indications in the other provisions of clauses 4(b) and 5 that are inconsistent with the gift of the residue to Mrs Stenders and the respondent as joint tenants invoke the principle that a doubt about a joint tenancy should be resolved in favour of a tenancy in common. The intention of the deceased that the respondent's use or possession of his share of the deceased's estate be postponed until he attained the age of 25 years (subject to the power of advancement) was only achievable by construing the gift of the residue to the beneficiaries as tenants in common.

[25] The gift of the residuary estate in clause 4(b) of the deceased's will should be construed as a gift to Mrs Stenders and the respondent as tenants in common in equal shares, and not as joint tenants. It is therefore not necessary to consider the question of severance.

**Has the respondent received his entitlement under the deceased's will?**

[26] At some time before the sale of Lot 81 in 2002 Mrs Stenders had determined that she would divide up the deceased's major asset of the real property by her taking Lot 2 and treating the respondent's entitlement as Lot 81. Apart from the real property, I infer from the description of the deceased's motor vehicle, the money in his bank account and his personal effects, that after the payment of the funeral account, there was little, if any, realisable funds left in the deceased's estate. It was inconsistent with Mrs Stenders' role as executor to use Lot 81 as security for the loan that Mrs Stenders obtained to build the house for her purposes on Lot 2. Even though at all material times the title to Lot 2 remained in Mrs Stenders' name as personal representative of the deceased's estate, the evidence supports the conclusion that her intention was to distribute Lot 2 to herself and to treat Lot 81 as the respondent's entitlement. Mrs Stenders compensated to some extent for her improper use of Lot 81, by paying personally for the rates attributable to Lot 81 until that lot was sold, to the extent that she had not used the remainder of funds attributable to the deceased's estate for that purpose, and by taking for herself Lot 2 which was valued slightly less than Lot 81, when separate valuations were done in 2002.

[27] The question is therefore whether Mrs Stenders by her conduct assented to the vesting in equity of Lot 2 in herself as a beneficiary of the residuary estate under the deceased's will.

[28] It may be that it was as early as Mrs Stenders' conduct in causing separate titles to be issued for each of Lots 2 and 81 in pursuance of her proposal the respondent take Lot 81 as his share of the residuary estate, that there may have been assent to the vesting in equity of Lot 2 in herself for her share of the residuary estate under the deceased's will. Any doubt about Mrs Stenders' intention to vest Lots 2 and 81 respectively in herself and the respondent was resolved by the respondent's approval of the sale of Lot 81 to Leena and his receipt by 28 June 2002 of the balance of the proceeds of sale of Lot 81. Arguably, Mrs Stenders did not need to concern herself about distributing the proceeds of Lot 81 to the respondent before he attained the age of 25 years, as his interest in the residuary estate vested at the date of the deceased's death, and in accordance with the rule in *Saunders v Vautier* (1841) 49 ER 282, the respondent was entitled to claim his benefit when he reached the age of majority of 18 years.

[29] The payment by Mrs Stenders of the sum of $49,500 representing the balance proceeds of sale of Lot 81 to the respondent was therefore a complete distribution to the respondent of his entitlement as a beneficiary of the residuary estate under the deceased's will.

**Orders**

[30] Ms Gunn as administrator and trustee of the deceased's estate seeks an order that her costs of the application be assessed and paid from the estate. This application for directions was brought by Ms Gunn in her capacity as the administrator and trustee of the deceased's

estate and not as the administrator of her mother's estate. As a result of the conclusion that Lot 2 was vested in equity in Mrs Stenders as the beneficiary under the deceased's will from the time that she distributed the proceeds of sale of Lot 81 to the respondent (in June 2002), the proceeds of sale of Lot 2 are held by Ms Gunn in her capacity as the administrator of her mother's estate. The bringing of this application was necessary to facilitate the finalisation of both estates.

[31] The respondent, Leena and Katrina were on notice that in bringing this application for directions Ms Gunn was seeking an order that indemnity costs be paid out of the deceased's estate. In view of my conclusion that the balance of the proceeds of sale of Lot 2 are held by Ms Gunn in her capacity as the administrator of her mother's estate, that must be the source of the funds for meeting the costs of bringing this application. I will hear submissions on whether that should be formalised by an order. In the meantime I propose making the following declaration and directions:

1. It is declared that the gift of the residuary estate in clause 4(b) of the last will of Karlis Herbert Stenders deceased dated 24 October 1990 is construed as a gift to Denisa Stenders and Paulis Stenders as tenants in common in equal shares, and not as joint tenants.

2. It is directed that the applicant is justified in treating the distribution of $49,500 made to the respondent of the proceeds of sale of Lot 81 on RP29509 County of Stanley, Parish of Oxley as a final distribution to him as a beneficiary of the estate of Karlis Herbert Stenders deceased.

3. It is directed that the applicant is justified in treating the land at 34 Tavistock Street, Oxley (Lot 2 on RP29515 County of Stanley, Parish of Oxley) as having been vested in equity in Denisa Stenders as a beneficiary of the estate of Karlis Herberts Stenders at the latest on 28 June 2002.