

# SUPREME COURT OF QUEENSLAND

CITATION: *Fitzgerald & Anor v Rowley & Anor* [2019] QSC 21

PARTIES: **DAWN MARIE FITZGERALD and  
KRYSTLE LOUISE TOKUNAI**  
(Applicants)  
v  
**DULCIE MARY AGNES ROWLEY (as executor of the  
Will of Marianne Therese Fitzgerald deceased)**  
(First Respondent)

and

**DAWN MARIE FITZGERALD (as executor of the Will of  
William Francis Gim Fitzgerald deceased)**  
(Second Respondent)

FILE NO/S: No 473 of 2018

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 15 February 2019

DELIVERED AT: Cairns

HEARING DATE: 1 February 2019

JUDGE: Henry J

ORDERS:

- 1. Pursuant to s 33(3) *Succession Act 1981* (Qld), the time for the making of an application for an order to rectify the will of William Francis Gim Fitzgerald deceased dated 25 April 2014 (“the will”) be extended to 5 September 2018.**
- 2. That the will be rectified by deleting clause 4 thereof and in lieu thereof, inserting the following clause:**
  - “4. If Marianne survives me:
    - (a) I give the Remaining Trust Fund (as that term is defined in clause 2.6 of the trust deed of the WFG & MT Fitzgerald Family Trust Settlement 2014 (“the deed”)) of the WFG & MT Fitzgerald Family Trust Settlement 2014 that is paid to my estate pursuant to clause 2.6 of the deed to such of

my children as survive me and, if more than one, in equal shares; and

(b) I give the residue of my estate to Marianne.”

**3. I will hear the parties as to costs.**

**CATCHWORDS:** SUCCESSION – MAKING OF A WILL – TESTAMENTARY INSTRUMENTS – MISTAKES AND OMISSIONS – where the deceased instructed a trust deed and a will be created – where upon his death his wife was to be the beneficiary of the trust and his daughters, the applicants, were to be trustees – where the deceased had intended upon the death of his wife for the remaining trust fund to be distributed to the applicants – where all relevant parties believed the trust deed and will gave effect to this intention – where in fact the literal effect of the will did not provide for the distribution of the remaining trust fund – whether the Court ought rectify the will to carry out the intentions of the testator

*Succession Act 1981 (Qld) s 33*

*Rose v Tomkins* [2018] 1 Qd R 549

**COUNSEL:** C Brewer for the applicants  
C Ryall for the first respondent

**SOLICITORS:** The Will & All (formerly Jeneve Frizzo Estate Law) for the applicants  
Murray & Lyons for the first respondent

No separate representative for the second respondent in her capacity as executor

- [1] The applicants seek rectification of their deceased father’s will or, in the alternative, adequate provision be made from the estate of their deceased mother.
- [2] The applicants are the daughters of William Francis Gim Fitzgerald (“Gim”) and Marianne Therese Fitzgerald (“Marianne”). Gim died on 11 December 2014 and Marianne died on 10 December 2017. Gim’s will, executed 25 April 2014, relevantly provided:

“4. Gift of estate to Wife

If Marianne survives me, I give my estate to her.

## 5. Gift of estate to children

If Marianne does not survive me, I give my estate to such of my children as survive me and, if more than one, in equal shares. ...”<sup>1</sup>

- [3] Because Marianne survived Gim, the literal effect of his will was that his estate was gifted to Marianne. His estate included trust proceeds which he actually intended to pass to his daughters, for whom no material provision was made by his wife’s will.
- [4] The preparation of Gim’s will coincided with the establishment of a trust of which Marianne was beneficiary and the applicants were trustees. The trust was created in circumstances where Marianne had a gambling addiction and Gim was concerned to protect his over \$2 million reserves of cash from being gambled away if he was to predecease her.<sup>2</sup> The trust deed dealt with what was to occur on Marianne’s death in the following way:
- “**2.6** On the death of the Primary Beneficiary, the Trustees shall hold the whole of the balance of the net income and Capital of the Trust Fund (“Remaining Trust Fund”) on trust for the Husband as Primary Beneficiary if he survives the Wife by thirty days. If the Husband does not survive the Wife by 30 days the Remaining Trust Fund will be held on trust for the Husband’s deceased estate and distributed as part of the residue of his estate in accordance with his Will.”<sup>3</sup>
- [5] It is odd that clause 2.6 would provide, in the event of Gim’s death preceding Marianne’s, for the return of the remaining trust fund to his estate rather than to Marianne’s estate. If Gim intended, as a literal interpretation of clause 4 of his will suggests, that the whole of his estate was to be gifted to Marianne in any event, it would have been simpler for clause 2.6 to provide for the trust fund to pass directly to Marianne’s estate.
- [6] Gim’s will made no discrete provision for the distribution of the remaining trust fund. The applicants contend that was not in accordance with Gim’s instructions regarding the will and trust and that the will should be rectified so as to give the remaining trust fund to the applicants.
- [7] The existence of the trust was a source of some discontent to Marianne. She continued to have problems with her gambling and management of money, and at times exhibited frustration towards her daughters because of their control of dispersal of funds to her, prompting occasional accusations that her daughters were keeping the fund for their inheritance.
- [8] Marianne’s will, executed 18 October 2017, only bequeathed her personal effects, furniture, jewellery and clothing to her daughters. It made provision for the payment of various sums to some friends and distant relatives and left the residue to the applicants’

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<sup>1</sup> Affidavit of Dawn Marie Fitzgerald court doc 3 p 91.

<sup>2</sup> Affidavit of Roderick Gerard Cunich court doc 15 [5(d)].

<sup>3</sup> Affidavit of Dawn Marie Fitzgerald court doc 3 p 101.

children.<sup>4</sup> Despite her frustrations, Marianne’s apparent decision to bequeath nothing directly to her daughters, other than personal property, does not appear to have been a product of animus but rather her own perception that on her death the trust fund would be inherited by her daughters. Her solicitors shared that perception. For example, a file note by Marianne’s solicitor of an attendance upon her regarding the drafting of her will and enduring power of attorney included the following:

“[E]ssentially, your husband owned all the assets during your life, at the date of his death there was about \$2.5 million worth of assets which included the house in which you now live and \$2.4 million in cash. Before dying, he had set up a trust and all of the assets including the money in the house were transferred into the trust and out of that trust you receive the income for your life and *thereafter it reverted to yours and his daughters. ...*”<sup>5</sup> (emphasis added)

The solicitor who drafted her will explained to Gim’s daughter Dawn, after Marianne’s death, that the applicants were not made material beneficiaries in their mother’s will because, as Marianne had explained to him, they “were set up with the family trust and did not need to benefit from her estate”.<sup>6</sup>

- [9] Dawn had played a material role, discussed hereunder, in the creation by solicitors of the will and trust deed. It is clear from Dawn’s evidence of what she was told by one of those solicitors as to the effect of those documents, and what Dawn in turn repeated to Gim, that Dawn and Gim were of a similarly erroneous understanding as Marianne about the effect of Gim’s will and trust deed upon the fate of the trust assets on Marianne’s death.
- [10] What Marianne’s testamentary intention or instructions may have been is not relevant to whether Gim’s will should be rectified. However, the apparently mutual erroneous understanding of the players explains the delays in realising the problem and bringing this application.
- [11] Pursuant to ss 33(2) and (3) of the *Succession Act 1981* (Qld) (“the Act”) an application for an order to rectify must be made within six months after the date of death unless the Court extends time if it considers it appropriate and the final distribution of the estate has not been made. The issue with which the application is concerned did not come to light until 29 May 2018, after the death of Marianne, when Marianne’s executors’ solicitor wrote to the applicants calling for the balance of the trust to be paid to Marianne’s estate. While the application is substantially beyond six months after Gim’s death, the materials confirm the literal effect of Gim’s will, read with the trust deed, had not been realised by anyone until after Marianne’s death. Against that background of shared misunderstanding and in circumstances where it is not suggested a final distribution of the estate has been made, it is appropriate to extend the time for the making of the application.
- [12] Turning to the substantive requirements of such an application, s 33(1) of the Act provides:

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<sup>4</sup> Affidavit of Dawn Marie Fitzgerald court doc 3 pp 164-165. In fact the residue was devised to Marianne’s grandchildren by it being left to her daughters to hold on trust for them until they turned 25.

<sup>5</sup> Affidavit of Dawn Marie Fitzgerald court doc 7 p 140.

<sup>6</sup> Affidavit of Dawn Marie Fitzgerald court doc 3 [71].

### “33 Court may rectify a will

(1) The Court may make an order to rectify a will to carry out the intentions of the testator if the Court is satisfied that the will does not carry out the testator’s intentions because –

- (a) a clerical error was made; or
- (b) the will does not give effect to the testator’s instructions.”

[13] It is not suggested in this case that a clerical error was made. Rather it is alleged that Gim’s will does not carry out his intentions because it does not give effect to his instructions.

[14] In *Rose v Tomkins*<sup>7</sup> Philippides JA, with whom Morrison JA and Flanagan J agreed, observed:

“The legal principles in respect of the rectification power in s 33(1)(b) of the Act may be summarised as follows:

- (a) The court must ascertain the testator’s intention, that is, the actual intention of the testator reflected in the instructions given by the testator, not what would probably have been the intention in the circumstances that eventuated.
- (b) The court must construe the provision of the will sought to be rectified.
- (c) The court is required to compare the relevant provision of the will properly construed with the testator’s intention as ascertained.
- (d) The court must be satisfied the relevant provision of the will does not carry out the testator’s intention because it does not give effect to the testator’s instructions and that rectification in the terms sought would give effect to those instructions.
- (e) The court must be so satisfied on the balance of probabilities, on clear and convincing proof.”

[15] For the purpose of s 33 “instructions” are something communicated in some manner by one person to another with a view to compliance or obedience by the second person.<sup>8</sup>

[16] It is trite that instructions can be conveyed by an agent. Gim’s will was drafted by a solicitor acting on instructions supplied by Gim’s daughter, Dawn. The solicitor’s firm had a subsidiary conveyancing business at which Dawn worked. Dawn was conveying the instructions on behalf of her father Gim who, while mentally alert,<sup>9</sup> was dying of throat cancer and used an artificial larynx and whiteboard to communicate. Gim’s physical inconvenience, his obvious trust in his daughter and the convenience of Dawn’s work connection with a firm of solicitors combined to have made it uncontroversial that

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<sup>7</sup> [2018] 1 Qd R 549, 561.

<sup>8</sup> *Vescio v Bannister* [2010] NSWSC 1274 per Barret J [12]; cited with approval in *Rose v Tomkins* supra 560.

<sup>9</sup> See for example the content of his text messages in this era, exhibited as DMF-1 to the affidavit of Dawn Marie Fitzgerald court doc 3.

she was conveying instructions to a solicitor on Gim's behalf regarding both the will and the trust deed. It is not suggested she conveyed those instructions inaccurately.

[17] The respondent's counsel properly emphasised that Gim's testamentary capacity and the fact that the will was duly executed raises a presumption Gim knew and approved of the will's content. That such circumstances raised such a presumption is not in contest.<sup>10</sup> Indeed it highlights the need for clear and convincing proof of the testator's instructions in such an application. In the circumstances of this case it transpires that the best evidence of Gim's intention is the evidence of his instructions conveyed through Dawn.

[18] Dawn deposed to the genesis of those instructions:

“9. Dad knew he would die and was concerned to protect the inheritance he would leave behind.

10. Soon after the return of the cancer I recall having a discussion with Dad and his good friend Huey Miller. They told me that Mum had a serious gambling problem. I had not been aware of Mum's gambling at that point. Dad told me that he had given Mum \$200,000 which she had spent on gambling in about 12 months.

11. Huey and Dad were talking about establishing a family trust for the protection of the family wealth. Dad was reluctant to do that at first because he was concerned that Mum would be angry with him for doing it. By the end of the discussion, Dad agreed with Huey that the family trust was needed and asked me to organise the trust and a will through my work.

12. The reason for settling the trust was because of Mum's gambling, which was a significant problem. He wanted to make sure that Mum had a home and income. I recall him specifically saying that if she wanted a new car, that I should assist her financially through the trust to buy her one. He didn't want the funds being spent in full without reason and especially on gambling and that after Mum's death Krystle and I, and our children, would inherit what was left.

13. He said he wanted to appoint me as executor of his will.

14. Because Dad was non-verbal, Dad instructed me to arrange a trust deed and will through Slater and Gordon.”<sup>11</sup>

[19] The instructions Dawn conveyed are not documented, at least in any comprehensive way, within the file of the firm of solicitors which prepared the will and trust deed. The solicitors' firm did take the step of asking Dawn to have her father sign a will and estate planning instruction sheet (which was filled out by Dawn and signed by Gim) but it was a proforma document, unsuited to recording the nature of the instructions conveyed by Dawn Fitzgerald on her father's behalf.

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<sup>10</sup> See, for example, *Hinds v Collins* [2006] 1 Qd R 514 at 516.

<sup>11</sup> Affidavit of Dawn Marie Fitzgerald court doc 3 p 2.

- [20] The instruction sheet did contain a section on residual beneficiaries containing standard questions, such as, “Do you wish the residue of your estate to go to your spouse/partner?”, in response to which the proforma answer “Yes” was circled. In a similar vein, there was a question, “If your spouse/partner were to die before you, or if you do not wish to provide for your spouse/partner ... [d]o you wish your estate to be equally divided between any children you may have?” In response to that question the proforma answer “Yes” was circled and, in a space immediately below, against the proforma endorsement “Reasons:” was written, “After the death of my spouse”.<sup>12</sup>
- [21] Considered without reference to other evidence, the abovementioned entries in the instruction sheet are ambiguous and of neutral effect as evidence of consistency or inconsistency with the instructions which were given on behalf of Gim by Dawn to solicitor Roderick Cunich. On any view they did not purport to record the whole of those instructions and do not detract from the force of the evidence as to what those instructions were.
- [22] Despite the limitations in the content of the file of the solicitors’ firm which received those instructions, such content as there is leaves no reason to doubt the evidence adduced in this application from Mr Cunich.
- [23] Mr Cunich was not required for cross-examination on his affidavit. He deposed, *inter alia*:
- “5. I recall Dawn Fitzgerald contacting me in early 2014 regarding her father’s estate planning and informed me: ...
- (b) Gim and Dawn’s mother Marianne both intended leaving their wealth to Dawn and her sister (or their children *per stirpes*) when the last of them passed away.
  - (c) Unfortunately Marianne had recently developed a gambling addiction.
  - (d) Gim wished to avoid his wealth passing directly to Marianne’s control *if he was to predecease her* as he was concerned she would gamble it away to her own detriment and *the detriment of their children*.
  - (e) To achieve their wishes Gim wanted the majority of his wealth which was cash to be held on trust to provide accommodation and income for Marianne during her life.
  - (f) Although Gim wished to provide accommodation and an income for Marianne during her life, at the same time he wished to protect the “family wealth” from her gambling addiction. The protection was to be for Marianne’s benefit during her life and subsequently their children.
  - (g) After Marianne’s death, Gim’s remaining assets and *the trust assets were to pass to their children* in accordance with the shared wishes of her parents. ...”<sup>13</sup> (emphasis added)

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<sup>12</sup> Affidavit of Dawn Marie Fitzgerald court doc 3 p 83.

<sup>13</sup> Affidavit of Roderick Gerard Cunich court doc 15.

- [24] That evidence is at odds with an argument by the respondent's counsel that Gim, who anticipated he would very likely die before his wife, was content to entrust the fate of what was left of the trust assets on his wife's death to the exercise of her own judgment via her will. Mr Cunich's evidence also does not rest well with the contention of the respondent's counsel that Gim's intention was confined to his "one very narrow concern", driven by concern for his wife's future well-being, that his wife not gamble their fortune away during her lifetime.<sup>14</sup> Mr Cunich's evidence confirms Gim's intention went beyond protecting his wife's financial well-being via the trust while she was alive and included an intention that on her death the trust assets would pass to the applicants.
- [25] Mr Cunich drafted the trust deed but procured another solicitor in his firm, Catherine Ding, to draft the will, a separation of tasks which probably explains the failure of the documents to coalesce in such a way that at least one of those documents ensured the trust fund would pass to the applicants on the death of their mother. It was apparently Ms Ding who subsequently explained the will and trust deed to Dawn, who repeated the effect of that explanation to her father.<sup>15</sup> Dawn deposed the effect of what she explained to her father about the will and trust deed was:
- "Mum won't have access to the money but Krystle and I would be able to give her income and access more if she needed it and once she dies the balance would come to Krystle and I."<sup>16</sup>
- [26] Dawn was cross-examined about that evidence. She did not depart in any material way from it. She was a credible and reliable witness.
- [27] It is correct, as counsel for the respondent emphasises, that what Dawn told her father is not the actual effect of the content of the will and trust deed. However, the fact that Gim had given instructions which were at odds with that content and was erroneously informed the documents carried a meaning consistent with those instructions is powerful evidence against the presumption he knew and approved of the actual effect of those documents in executing his will.
- [28] The evidence readily satisfies me the effect of Gim's instructions, conveyed by Dawn, was that the tandem devices of a trust fund and will were to be adopted so as to provide for a trust fund to be operated for Marianne's benefit until she died and for the remaining assets of that trust to thereafter pass to Gim's two daughters, the applicants. When the trust deed and the will are read in combination, it is clear the will failed to implement the instruction that, after Marianne's death, the trust assets were to pass to the applicants.
- [29] It might be said the trust deed also failed to implement that instruction, but the respondent's counsel did not submit the trust deed contains an error to the exclusion of error in the will. Such a submission might potentially have been viable if the making of the will and the making of the trust deed were supposed to have been unrelated processes. However, both documents were clearly the product of a singular set of instructions to

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<sup>14</sup> T1-36 L39.

<sup>15</sup> Affidavits of Dawn Marie Fitzgerald court doc 3 [23], court doc 7 [35], court doc 8 [4].

<sup>16</sup> Affidavit of Dawn Marie Fitzgerald court doc 8 [4].

which the will, read in light of the trust deed, did not give effect. Because the will does not give effect to Gim's instructions it does not carry out his intention.

[30] It follows the application must succeed, with the will being rectified to provide, as Gim intended, for the trust assets to pass to his daughters.

[31] I will hear the parties as to costs. I express the preliminary view, in light of the known materials and the fact that rectification of Gim's will could only be obtained through a decision of the Court, that Gim's estate should pay the costs of each party on the indemnity basis.

[32] My orders are:

1. Pursuant to s 33(3) *Succession Act 1981* (Qld), the time for the making of an application for an order to rectify the will of William Francis Gim Fitzgerald deceased dated 25 April 2014 ("the will") be extended to 5 September 2018.
2. That the will be rectified by deleting clause 4 thereof and in lieu thereof, inserting the following clause:

"4. If Marianne survives me:

(a) I give the Remaining Trust Fund (as that term is defined in clause 2.6 of the trust deed of the WFG & MT Fitzgerald Family Trust Settlement 2014 ("the deed")) of the WFG & MT Fitzgerald Family Trust Settlement 2014 that is paid to my estate pursuant to clause 2.6 of the deed to such of my children as survive me and, if more than one, in equal shares; and

(b) I give the residue of my estate to Marianne."

3. I will hear the parties as to costs.