

SUPREME COURT OF QUEENSLAND

CITATION: *Finnegan & Anor v Garner & Ors* [2019] QSC 100

PARTIES: **FRANK JAMES FINNEGAN AND TAMMY MARISA GARNER** (as executors of the Will of THOMAS McMASTER FINNEGAN deceased)
(applicants)
v
TAMMY MARISA GARNER, DAPHNE JEAN FINNEGAN, FRANK JAMES FINNEGAN, MICHAEL JAMES FINNEGAN, THOMAS MCMASTER FINNEGAN, MAGGIE-MAREE JEAN FINNEGAN, DIANA ROSILA FINNEGAN and ALLAN JOHN CLARKE
(first respondents)

AND

MICHAEL THOMAS FINNEGAN
(second respondent)

AND

JAMES WILLIAM PURCELL & TAMMY MARISA GARNER TRADING AS PURCELL DRIVESHAFT AND BALANCING SERVICES ABN 19 981 086 836
(third respondents)

FILE NO/S: S No 119 of 2019

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Rockhampton

DELIVERED ON: 17 April 2019

DELIVERED AT: Rockhampton

HEARING DATE: 8 March

JUDGE: Crow J

ORDER: **1) Pursuant to s 96 of the *Trusts Act 1973 (Qld)* and s 6 of the *Succession Act 1981 (Qld)*, the applicants as executors and trustees of the deceased's Will dated 24 April 1998 are justified in distributing the estate pursuant to a Deed, dated 28 February 2018 and signed by the applicants and the first respondents,**

notwithstanding the terms of the Will.

- 2) **Pursuant to s 96 of the *Trusts Act 1973 (Qld)* and s 6 of the *Succession Act 1081 (Qld)*, the applicants are justified in not pursuing the second respondent for potential debts owing to the estate:

 - a) **\$131,620.04 which was paid to the Commonwealth Bank of Australia by the estate, for a debt incurred for and on behalf of the second respondent; and**
 - b) **an outstanding loan of \$35,498.15 owing to the Commonwealth Bank of Australia in respect of the purchase of a bus for the use and benefit of the second respondent.****
- 3) **Pursuant to s 68(3) of the *Trusts Act 1973 (Qld)* that the estate of the deceased be dealt with without regard to the claim made by the second respondent.**
- 4) **Pursuant to s 68(3) of the *Trusts Act 1973 (Qld)* that the estate of the deceased be dealt with without regard to the claims made by the third respondents.**
- 5) **The Applicants' costs of and incidental to the proceeding be paid from the estate on the indemnity basis.**

CATCHWORDS: SUCCESSION – TESTAMENTARY INSTRUMENTS – DIRECTIONS - where applicants seek a direction that they are justified in distributing estate pursuant to a deed notwithstanding the terms of the Will – where applicants seek a direction that they are justified in not pursuing the second respondent in respect of debts owed to the estate – where applicants seek orders barring claims brought upon the estate by the second and third respondents enabling the trust property to be dealt with without regard to those claims

Powers of Attorney Act 1998 (Qld) s 107

Trusts Act 1973 (Qld) s 96, s 68

Succession Act 1981 (Qld) s 6

Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66

COUNSEL: C Brewer for the applicants

Tammy Garner appeared in person as first and third respondent
James Purcell appeared in person as third respondent

SOLICITORS: Swanwick Murray Roche for the applicant

Introduction

1. In the mid-1980s Thomas McMaster Finnegan married Diana Rosila Clarke. Ms Clarke brought into the marriage two of her own children, Michael James Clarke and Allan John Clarke. Michael James Clarke was born 11 March 1985 and changed his name by Deed Poll to Michael James Finnegan in about 2004. In addition to the two step-children Thomas and Diana Finnegan produced six children, Frank James Finnegan, Tammy Marisa Garner, Daphne Jean Finnegan, Michael Thomas Finnegan, Thomas McMaster Finnegan and Maggie-Maree Jean Finnegan.
2. By duly executed Will dated 24 April 1998, Mr Finnegan bequeathed real property and all vehicles to his wife and each of his children with the exception of Allan John Clarke. The Will has some other curiosities, namely, in clause 11 of the Will the second respondent is named by his current name Michael Thomas Finnegan. Whereas clause 9 of the Will describes the same person as Thomas Michael Finnegan. Thus in the Finnegan family there was the father Thomas McMaster Finnegan, the son Thomas McMaster Finnegan, the son Michael Thomas Finnegan (also referred to in the Will as Thomas Michael Finnegan) and the step-son Michael James Finnegan previously Michael James Clarke.
3. Prior to the year 2000 Thomas McMaster Finnegan Senior separated from his wife Diana Rosila Finnegan however Thomas Finnegan Sr and Diana Finnegan were never divorced. In the August of 2000, Thomas McMaster Finnegan Senior attended upon John Williams solicitor for the purpose of updating his affairs subsequent to his separation from Diana Rosila Finnegan. Exhibit FJF-2 to the affidavit of Frank Finnegan sworn 14 February 2019, is an Enduring Power of Attorney signed by Thomas Michael Finnegan Senior on 8 August 2000 in the presence of John Michael Williams, solicitor. That Enduring Power of Attorney

appoints the applicants, Frank James Finnegan and Tammy Marisa Garner as the attorneys.

4. Several persons with competing interest attests that Thomas McMaster Finnegan Senior also executed a Will on or about 8 August 2000. Those persons are Frank James Finnegan, Michael Thomas Finnegan, Maggie-Maree Jean Finnegan, Tammy Marisa Garner and an independent witness Cindy Maree Kershaw. Consistent with the separation, Frank James Finnegan swears that he can recall that the Will excluded Diana Rosila Finnegan and then divided the estate evenly between five of the natural children of Thomas McMaster Finnegan and Diana Rosila Finnegan.
5. Frank James Finnegan swears that the two stepsons were excluded as was Michael Thomas Finnegan from the 2000 will.
6. On 13 August 2015 Thomas McMaster Finnegan Senior passed away. There have since been extensive searches undertaken to locate the 2000 Will however it has not been located.
7. On 26 July 2016, Probate of the Will of 24 April 1998 was issued to the applicants Frank James Finnegan and Tammy Marisa Garner. The executors were faced with the daunting task of attempting to discharge their duties in the administration of the Will and the trusts executed by the Will of 24 April 1998.
8. A brief summary of the issues which faced the executors are as follows:-
 - (a) A concern for the executors in administering the Will of 24 April 1998 when they both believed there to be a 2000 Will although despite extensive efforts no one has been able to locate it;
 - (b) The second respondent Michael Thomas Finnegan was indebted to the estate for \$131,620.04 being a payment made by the estate to the Commonwealth Bank of Australia in respect of a home that Michael Thomas Finnegan and the deceased owned as joint tenants. The home was

sold by the mortgagee and a shortfall sum of \$131,620.04 was paid by the estate to the mortgagee;

- (c) A debt owed to the estate by Michael Thomas Finnegan of \$35,498.15 relating to a bus purchased by the deceased for Michael Thomas Finnegan, the bus having been sold and Michael Thomas Finnegan retaining the proceeds for himself;
 - (d) The fact that Michael Thomas Finnegan has no assets nor any capacity to make any payments to the estate such that any litigation to recover the debts would be fruitless;
 - (e) The fact that the second respondent Michael Thomas Finnegan made a claim for further and better provision out of the estate, enlivening claims in respect of all potential beneficiaries including Diana Rosila Finnegan and Allan John Clarke;
 - (f) The difficulty that two of the properties (20 Hellis Street, Yeppoon and 13 Melbourne Street, Yeppoon) the subject of specific gifts in the 1998 Will were sold by the deceased prior to his death;
 - (g) a potential claim pursuant to s 107 of the *Powers of Attorneys Act*.
9. After deducting the debts owed by the second respondent Michael Thomas Finnegan which are not able to be recovered as the estate has a present net value of \$653,795 (\$976,343 minus \$20,000 (extra legal costs) minus \$267,049.85 minus \$35,498.15).
10. In addition to the above issues, the estate faced the prospect of further litigation in respect of claims made upon the estate which will be discussed below. Plainly had some or all of the disputes been resolved by litigation then most if not all of the balance of the estate would have been consumed by legal costs. It is the duty of trustees of the estate not to embark upon expensive litigation which will have the effect of depleting the estate. In *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian*

*Orthodox Diocese of Australia and New Zealand*¹ Gummow ACJ, Kirby, Hayne and Heydon JJ said that:

“a trustee who is sued should take no step in defence of the suit without first obtaining judicial advice about whether it is proper to defend the proceedings.”

11. It is plain in the present case the executors have done their utmost to resolve all of the outstanding issues and no doubt this has not been an easy task. The third respondents James William Purcell and Tammy Marisa Garner have lodged a claim upon the estate in circumstances where Tammy Marisa Garner was also the executor. The conflict has been dealt with by Ms Garner taking no further steps in the administration of the estate leaving Frank James Finnegan as the sole effective executor.

Deed of Agreement

12. On 28 February 2018 each of the parties with the exception of the second respondent Michael Thomas Finnegan signed a Deed of Agreement disposing of all matters in respect of the estate. The second respondent Michael Thomas Finnegan has refused to sign the deed and despite proof of service of the current application he has not appeared in response to the application. The First and Second Respondent appeared in the application, with the Third Respondents making oral and later written submissions.

Directions

13. On 11 February 2018 the applicants filed an application pursuant to s 96 of the *Trusts Act 1973* (Qld) and s 6 of the *Succession Act 1981* (Qld) seeking a direction that they are justified in distributing the estate pursuant to the deed, notwithstanding the terms of the Will and further that the applicants are justified in not pursuing the second respondent, Michael Thomas Finnegan in respect of the debts which he owes to the estate. The application also seeks orders pursuant

¹ (2008) 237 CLR 66 at 74.

to s 68(3) of the *Trusts Act 1973* (Qld) barring claims brought upon the estate by the second and third respondents enabling the trust property to be dealt with without regard to those claims.

14. Section 96 of the *Trusts Act 1973* (Qld) provides:

Right of trustee to apply to court for directions

(1) Any trustee may apply upon a written statement of facts to the court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.

(2) Every application made under this section shall be served upon, and the hearing thereof may be attended by, all persons interested in the application or such of them as the court thinks expedient.

15. Section 6 subsections (1) and (4) of the *Succession Act 1981* (Qld) provide as follows:

“6 Jurisdiction

(1) Subject to this Act, the court has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person; and has jurisdiction to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every such respect.

...

(4) Without restricting the generality of subsections (1) to (3) the court has jurisdiction to make, for the more convenient administration of any property comprised in the estate of a deceased person, any order

which it has jurisdiction to make in relation to the administration of trust property under the provisions of the *Trusts Act 1973*.”

16. In *Macedonian Orthodox Community Church*² the plurality discussed the historical basis of s 96 of the *Trusts Act 1973* (Qld) and the New South Wales equivalent of s 96 of the *Trusts Act 1973* (Qld):³

“On 11 June 1857, in delivering his First Reading Speech on the Trustees Relief Bill, the Bill which when enacted became *Lord St Leonards' Act*, Lord St Leonards said that he proposed⁴:

‘to give trustees a summary right by petition, without rendering it necessary to file bills, to obtain the opinion of the Court of Chancery upon any point which might arise in the administration of the trust estate. This would be a great benefit to trustees, and, by substituting a cheap and simple process of determining questions, prevent the necessity of expensive suits’.”

17. It is plain that had the estate embarked on some or all of the litigation then the remaining assets of the estate would have been depleted significantly if not entirely. The present case provides a good example of the use of s 96 in approving the Deed of Settlement and approving and directing the trustees not to pursue the second respondent in respect of potential debts as this meets the objective in substituting a “cheap and simple process of determining questions, preventing the necessity of expensive suits.” I am satisfied therefore in the circumstances that the directions the subject of paragraphs 1 and 2 of the originating application ought to be made.

Barring of claims

18. Section 68(1), (2), (3) and (4) of the *Trusts Act 1973* (Qld) provides:

“68 Barring of claims

² *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66

³ Gummow A-CJ, Kirby, Hayne and Heydon JJ in *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar* supra at paragraph 62.

⁴ United Kingdom, House of Lords, *Parliamentary Debates* (Hansard), series 3, vol 145, 11 June 1857, col 1557.

(1) Where a trustee wishes to reject a claim (not being a claim in respect of which any insurance is on foot, being insurance required by any Act) which has been made, or which the trustee has reason to believe may be made—

(a) to or against the estate or property which the trustee is administering; or

(b) against the trustee personally, by reason of the trustee being under any liability in respect of which the trustee is entitled to reimburse himself or herself out of the estate or property which the trustee is administering;

The trustee may serve upon the claimant or the person who may become a claimant a notice calling upon the claimant, within a period of 6 months from the date of service of the notice, to take legal proceedings to enforce the claim and also to prosecute the proceedings with all due diligence.

(2) At the expiration of the period stipulated in a notice served under subsection (1), the trustee may apply to the court for an order under subsection (3), and shall serve a copy of the application on the person concerned.

(3) Where, on the hearing of an application made under subsection (2), the person concerned does not satisfy the court that the person has commenced proceedings and is prosecuting them with all due diligence, the court may make an order—

(a) extending the period, or barring the claim or enabling the trust property to be dealt with without regard to the claim; and

(b) imposing such conditions and giving such directions, including a direction as to the payment of the costs of or incidental to the application, as the court thinks fit.

(4) Where a trustee has served any notices under this section in respect of claims on 2 or more persons, and the period specified in each of those notices has expired, the trustee may, if the trustee thinks fit, apply for an order in respect of the claims of those persons by a single application, and the court may, on that application, make an order accordingly.”

19. On 2 February 2016 the third respondents sent to Frank James Finnegan a tax invoice for the amount of \$97,020 for the care and attention of the deceased during his life. On 4 May 2016, the third respondents sent a further tax invoice in the amount of \$23,760 for the removal of the contents from 45 Byron Street, Alpha. On 28 September 2018 the third respondents sent another invoice for the amount of \$23,760 to Frank James Finnegan again for the removal of the contents from 45 Byron Street, Alpha.
20. On 14 April 2018 the third respondents were served with a notice pursuant to s 68(1) of the *Trusts Act* requiring to commence legal proceedings against the estate within six calendar months of the service. On 10 April 2018 the second respondent Michael Thomas Finnegan was served with a notice pursuant to s 68(1) of the *Trusts Act* requiring him also to commence proceedings against the estate within six months of service.
21. Neither the second nor the third respondent has commenced legal proceedings. An application pursuant to s 68(3) of the *Trusts Act* made on 14 February 2019 had been served on the second and third respondents.
22. On the return of the application on 8 March 2019 the third respondents James William Purcell and Tammy Marisa Garner both provided oral submissions. In summary Ms Garner supported her husband Mr Purcell’s submission that Mr Purcell had provided a great deal of care to the late Thomas McMaster Finnegan and had as set forth in the tax invoice and at the late Thomas McMaster Finnegan’s direction that moved all the contents of his residence from 45 Byron Street, Alpha to 5 Tomkins Street, Berserker. Mr James William Purcell explained that he could not afford any lawyers to bring any proceedings.

Accordingly proceedings have not been brought. The third respondents' written submissions filed 15 March 2019 did not advance any matter.

23. Section 68(3) vests in the court a broad discretion to make orders concerning claims brought against the estate. The present case is a most complicated affair. The third respondent Tammy Marisa Garner is an executor of the estate as well as a signatory to the deed effecting a reasonable and proper resolution of the issues outstanding between various members of the Finnegan family. Thomas McMaster Finnegan passed away over three and a half years ago and there is no benefit in delaying matters any further. The provision of care, even at request, in the absence of an allegation of a contract to provide the care, does not sound in a legal or equitable claim. Exhibit FJF-17 to the affidavit of Frank Finnegan sworn 15 February 2019, being the tax invoice for the care does not at all suggest there is any contractual or other agreement or arrangement for the provision of the care. Indeed exhibit FJF-17 records at the time the care was provided the late Thomas McMaster Finnegan was suffering from dementia, a fact Mr James William Purcell verified in his oral submissions. The claim has no prospects of success. The tax invoices for moving the contents of the house from 45 Bryon Street, Alpha to Tomkins Street, Berserker face similar difficulties.⁵ I am satisfied that the second or third respondents have not commenced any proceedings. I am satisfied in all circumstances it is proper to bar the claims of the second and third respondents in respect of any debts or other claims made by the second and third respondents. I am satisfied that the applicants are justified in dealing with the estate and trusts without regard to claims made by the second and third respondents.

24. I make the following orders:

1. Pursuant to s 96 of the *Trusts Act* 1973 (Qld) and s 6 of the *Succession Act* 1981 (Qld), the applicants as executors and trustees of the deceased's Will dated 24 April 1998 are justified in distributing the estate pursuant to a Deed, dated 28 February 2018

⁵ See exhibits FJF-11 and FJF-12 to affidavit of Frank Finnegan filed 14 February 2019.

and signed by the applicants and the first respondents,
notwithstanding the terms of the Will.

2. Pursuant to s 96 of the *Trusts Act 1973 (Qld)* and s 6 of the *Succession Act 1081 (Qld)*, the applicants are justified in not pursuing the second respondent for potential debts owing to the estate:
 - a. \$131,620.04 which was paid to the Commonwealth Bank of Australia by the estate, for a debt incurred for and on behalf of the second respondent; and
 - b. an outstanding loan of \$35,498.15 owing to the Commonwealth Bank of Australia in respect of the purchase of a bus for the use and benefit of the second respondent.
3. Pursuant to s 68(3) of the *Trusts Act 1973 (Qld)* that the estate of the deceased be dealt with without regard to the claim made by the second respondent.
4. Pursuant to s 68(3) of the *Trusts Act 1973 (Qld)* that the estate of the deceased be dealt with without regard to the claims made by the third respondents.
5. The Applicants' costs of and incidental to the proceeding be paid from the estate on the indemnity basis.