CITATION: *The Estate of Yunupingu* [2022] NTSC 4

PARTIES: THE ESTATE OF THE LATE GURRUMUL YUNUPINGU

ON REFERENCE from the Registrar of the Supreme Court of the Northern Territory

TITLE OF COURT: SUPREME COURT OF THE NORTHERN TERRITORY

JURISDICTION: SUPREME COURT exercising Territory jurisdiction

FILE NO: 2021-03111-SC

DELIVERED: 19 January 2022

HEARING DATE: Reference from Registrar Blanch

JUDGMENT OF: Kelly J

CATCHWORDS:

Administration and Probate Act 1969 (NT) – Application for letters of administration with the will annexed – applicant a friend not a person mentioned in *Administration and Probate Act 1969* (NT) s 22 – need for consent of or service on all eligible applicants.

Application for letters of administration with the will annexed – probable partial intestacy – need for affidavit of assets and liabilities as at date of death – need to identify and serve wife and de facto spouse.

Wills Act 2000 (NT) – will contains a bequest of “my income” – need to determine meaning of bequest – need to determine whether void for infringing the rule against perpetuities.

Administration and Probate Act 1969 (NT) – whether Public Trustee should be appointed administrator *pendente lite* – directions given for future conduct of application.

Administration and Probate Act 1969 (NT), s 22, s 22(1), s 22(1)(d), s 32, s 33, s 61, s 66, Schedule 6
Administration and Probate Regulations 1983 (NT), Reg 3
Family Provision Act 1970 (NT)
Law of Property Act 2000 (NT), s 183, s 198(2), s 198(5)
Supreme Court Rules 1987 (NT), Rule 88.24, Rule 88.24(2)
Wills Act 2000 (NT), s 8, s 8(4)

Hardingham, Neave and Ford, *The Law of Wills*

Re Male [1934] VLR 318; *Re O'Dwyer* (1904) 7 GLR 64; *Re Smith* [1939] VLR 213, referred to

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Estate of Yunupingu [2022] NTSC 4

No. 2021-03111-SC

THE ESTATE OF THE LATE **GURRUMUL YUNUPINGU** late of Galiwinku Community Elcho Island in the Northern Territory of Australia, artist, deceased.

ON REFERENCE from the Registrar of the Supreme Court of the Northern Territory

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 19 January 2022)

[1] Gurrumul Yunupingu ("the deceased") late of Galiwinku Community, Elcho Island, died on 25 July 2017.

[2] The deceased left a will which appears to have been signed by the deceased and three witnesses. Section 8 of the *Wills Act* 2000 (NT) ("*Wills Act*") provides:

> (1) A will is not valid unless:
>
> (a) it is in writing and signed by the testator or by some other person in the presence of and at the direction of the testator;
>
> (b) the signature is made or acknowledged by the testator in the presence of 2 or more witnesses present at the same time; and

(c) at least 2 of those witnesses attest and sign the will in the presence of the testator.

(2) It is not necessary for the 2 witnesses referred to in subsection (1)(c) to attest and sign the will in the presence of each other.

(3) The signature of the testator:

(a) must be made with the intention of executing the will; and

(b) is not required to be made at the foot of the will.

(4) It is not necessary for a will to have an attestation clause.

[3] The will does not recite that these witnesses were present together with the deceased when the will was executed as required by s 8, but an attestation clause is not required.[1] The signing of the will was video recorded and the video shows that all of the witnesses were in fact present when the deceased signed the will.[2]

[4] The will does not appoint an executor. It provides as follows:

> I Jeffrey Gurrumul Yunupingu wish to make my Will so that when I die my family will understand what I want to do with the money that comes to me from Royalties and other sources.
>
> I want half (50%) of my income to go to my daughter Jasmine Yunupingu of Elcho Island. The other half (50%) of my income I want paid into the Gurrumul Yunupingu Foundation.
>
> I understand what I have signed and fully agree with it.
>
> Signed Witness
>
> Jeffrey Gurrumul Yunupingu
>
> Mark T Grose
>
> Darwin
>
> 22/04/2015[3]

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1 Section 8(4)

2 A witness is in the presence of the testator if the witness is in a position to see what he is doing or, if the testator is blind, as the deceased was, if he could have seen what the witness was doing if he were gifted with eyesight. *Re O'Dwyer* (1904) 7 GLR 64 ; Hardingham, Neave and Ford, *The Law of Wills* p 24

3 In the death certificate of the deceased his daughter is named as Jasmine Dhakalnga.

[5] Underneath the words “Witness” is a signature but no printed name identifying the signatory. Under the words “Jeffrey Gurrumul Yunupingu” is what looks like a diagonal line.[4] Under the words “Mark T Grose” is what appears to be the signature of Mark T Grose. Next to that is a handwritten notation:

> I Caron Farrell have witness the above been read out and under stood.
> Caron Farrell
> Civil Celebrant

Above the words “Caron Farrell” is what appears to be the signature “C Farrell”.

[6] In an affidavit dated 28 September 2021, Kirralee May Pavy, Legal Practitioner of Hunt & Hunt, Lawyers has deposed:

> From my review of the will and the Affidavit of Applicant, promised 28 September 2021 and filed in these proceedings, I am advised and understand those signatures to belong to the following:
>
> a) The testator, Gurrumul Yunupingu;
>
> b) Witness, Mark Grose (Managing Director);
>
> c) Witness, Carol (sic) Farrel(sic) (Civil Celebrant);
>
> d) Witness, Michael Hohnen (Creative Director).
>
> …

[7] Mr Mark Grose, friend and former business manager of the deceased is applying for letters of administration with the will annexed.

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4 For the purposes of the *Wills Act*, a signature can be a mark. What is necessary is that it be placed on the document by its owner with a view to authenticating what precedes it as his will. *Re Male* [1934] VLR 318 at 320 per Lowe J

[8] The power of the Court to appoint an administrator to a deceased estate is set out in s 33 of the *Administration and Probate Act 1969* (NT) ("*Administration and Probate Act*") which provides:

> The Court may, in any case where a person dies:
>
> (a) intestate;
>
> (b) leaving a will, but without having appointed an executor thereof; or
>
> (c) leaving a will and having appointed an executor thereof, who:
>
> (i) is not willing and competent to take probate; or
>
> (ii) is resident out of the Territory,
>
> if it thinks it necessary or convenient, appoint some person to be the administrator of the estate of the deceased person or of any part of the estate, upon his or her giving such security (if any) as the Court directs, and every such administration may be limited as the Court thinks fit.

[9] Section 22 provides certain limitations on who may be appointed administrator of an intestate estate. These limitations do not apply where the deceased leaves a will but does not appoint an executor, at least where there is not a partial intestacy. In any event, the people to whom letters of administration may be granted include "such person, whether a creditor or not of the deceased person, as the Court thinks fit".[5]

[10] In an affidavit dated 28 September 2021, Mr Grose has provided the following information about the circumstances surrounding the making of the will.

> 5. In approximately 2011 Gurrumul's health started to decline. He was suffering the effects of kidney disease following childhood hepatitis B.

5 *Administration and Probate Act* s 22(1)(d)

6. On 22 April 2015, Gurrumul made a will. Gurrumul could not read, so the will was read out to him and he gave his confirmation verbally and initialed (sic) the document indicating that the will reflected his wishes in respect of his estate.
7. The will was witnessed by me and two other witnesses and a video recording of this process was also kept. I attach the written will at the document marked "A" and the recording at the document marked "B".
8. The will was not prepared by a legal practitioner and we did not receive legal advice about the administrative aspects of making a will. As such the will did not name an executor.
9. Before this will was made I had on numerous occasions encouraged Gurrumul to make an appointment with a legal practitioner, but he declined each time.
10. The will does however exhaustively deal with all assets in Gurrumul's estate. The only asset in Gurrumul's estate are royalties owing from his music. He left half of all royalties to his daughter Jasmine Yunupingu ("Jasmine") and half of all royalties to his charity, Gurrumul Yunupingu Foundation.
11. After a short hospitalisation, Gurrumul died on 25 July 2017

[11] The will does not contain a residuary provision or make any provision for disposing of assets other than "my income". Accordingly, depending on what assets the deceased owned as at the date of his death and precisely what is meant by "my income" there may well be a partial intestacy. Royalty income is generated by the intellectual property in the recordings made by the deceased. That property may have substantial value and it does not seem to have been dealt with in the will.[6]

[12] Neither does the will deal with other personal property such as musical instruments owned by the deceased which, because of their origin, might

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6 It might possibly be argued that by leaving "the income" in half shares to the two beneficiaries the deceased intended to leave them the intellectual property but that does not appear from the plain words of the will.

also have substantial value. Further, unless the deceased had a nil bank balance at the date of his death, any money in his bank account/s at the date of death would have been an asset of the estate which does not seem to have been dealt with by the will. There may well be other personal property.

[13] The affidavit of assets and liabilities deposed to by Mr Grose does not set out the assets and liabilities as at the date of death, but rather "all the assets and liabilities of the deceased of which at the date of swearing this affidavit I am aware". The assets disclosed are "Royalties accumulated $11,167.01", liabilities nil.

[14] The affidavit of Mark Grose dated 28 September 2021 and headed "Affidavit of Applicant" makes it clear that the $11,167.01 is the current value of the estate as at the date of the affidavit. In his affidavit headed "Affidavit of Delay" Mr Grose deposes that since the death of the deceased he has collected and distributed $95,835.86 in royalties – distributing the "net royalties" in equal parts to the deceased's daughter Jasmine and the Gurrumul Yunupingu Foundation. He does not depose to what is meant by "net royalties" and what payments (if any) he made from the income before distributing it.

[15] In order to form a view as to the extent of the partial intestacy, it will be necessary to ascertain what assets the deceased had at the date of his death – including personal property and the balance of any bank accounts, and the value of those assets. Rule 88.24 of the *Supreme Court Rules 1987* (NT)

("*Supreme Court Rules*") requires an affidavit to be filed on an application for administration setting out the assets and liabilities of the estate as at the date of death. The Rule prescribes the details required in that affidavit. That Rule has not been complied with.

[16] It seems fairly clear that there is, in this case, a partial intestacy.

[17] Under s 61 of the *Administration and Probate Act* "intestate" means a deceased person who either does not leave a will or leaves a will but does not dispose effectively, by the will, of the whole or part of his or her real or personal property; and "intestate estate", means, in the case of an intestate who leaves a will, the real and personal property of the intestate that is not effectively disposed of by the will.

[18] Section 66 of the *Administration and Probate Act* provides that the persons entitled to a distribution of the intestate estate are those set out in Schedule 6. Schedule 6 provides, essentially, that "the spouse" is entitled to the estate up to the "prescribed amount"[7] and, where there is one child, the spouse and the child are each entitled to one half of the balance. The death certificate states that the deceased is married to Angela Mularawuy Gurruwiwi and gives his marital status as "separated now Defacto Relationship". (Where the deceased is survived by both a wife and a de facto spouse, there are rules to determine who is entitled as between them,

7 The "prescribed amount" is the first $350,000 of the intestate estate. (*Administration and Probate Regulations 1983 (NT)* Reg 3)

and special rules in the case of Aboriginal deceased who may be survived by more than one spouse.)

[19] Presuming that the intestate estate includes the intellectual property which gives rise to the income, the intestate estate to be distributed under Schedule 6 could amount to a considerable sum.

[20] Where the grant of letters of administration is applied for by fewer than all the persons who are in the Territory and are entitled to a grant of administration, Rule 88.24(2) requires the application to be supported by:

(a) the consent, in accordance with Form 88L, of each person entitled to a grant but not applying for the grant, to the grant being made to the applicant, with an affidavit in accordance with Form 88M verifying the consent endorsed on the document containing the consent; or

(b) an affidavit as to service, not later than 14 days before the proceeding is commenced, on each of those persons whose consent to the grant is not filed, of notice of intention to make the application.

[21] Section 22(1) of the *Administration and Probate Act* provides that administration may be granted to the spouse or de facto partner and one or more of the next of kin. An affidavit has been filed annexing the consent of the deceased's daughter Jasmine to the granting of letters of administration

to the applicant. However, as letters of administration may be granted to either the wife or the de facto partner, evidence of their consent to the making of the application by the applicant should be obtained, or an affidavit of service upon them of the application and supporting documents should be filed.

[22] Further, if there is not a partial intestacy, or if the intestate estate is not substantial, and adequate provision has not been made for the de facto spouse from the estate (which may well be the case given the terms of the will), the de facto spouse may have a right to make application to the Court for an order that provision be made for her under the *Family Provision Act 1970* (NT).

[23] For all of these reasons, the wife and de facto spouse of the deceased will need to be served with this application and supporting documents.

[24] There is another complicating factor, and that is that the provision in the will may be void as infringing the rule against perpetuities. Under that rule, a trust (which includes a trust created by will)[8] is invalid unless the property the subject of the trust is certain to vest within the perpetuity period.[9] The perpetuity period is either a life in being plus 21 years or 80 years depending on what is specified in the instrument creating the trust.[10] In this

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8 *Law of Property Act 2000* (NT) ("*Law of Property Act*") s 183

9 Section 183 of the *Law of Property Act* defines the "rule against perpetual trusts" in terms of the common law rule against perpetuities. That Act does not abrogate the rule. It simply ameliorates some of its more extreme effects.

10 *Law of Property Act* s 198(2)

case the will purports to leave the income from the deceased's intellectual property to his daughter and the Gurrumul Yunupingu Foundation without making any provision for the intellectual property to vest in anyone, and it does not specify a perpetuity period – not that a perpetuity period would take effect as there is no provision for the property to vest - ever. That would appear to infringe the rule against perpetuities and, if so, that would render the bequest to the daughter, at least, void. The bequest to the Gurrumul Yunupingu Foundation may or may not fall with the bequest to the daughter. That may depend on the construction of the bequest and whether the bequest to the Foundation is for a charitable purpose.[11] That will need to be established by evidence.

[25] Questions of the construction of a will are not usually dealt with on an application for probate or letters of administration except for the purpose of determining whether probate or administration should be granted.[12] Such questions are normally dealt with after probate or letters of administration has been granted, on an application by the administrator or a beneficiary or potential beneficiary. However, questions of construction may need to be dealt with on an application for administration if it is necessary to do so to determine the validity of the will. In this case, there is an issue about whether the will may be void for infringing the rule against perpetuities. It therefore seems to me that it is necessary to deal with the question of what

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11 *Law of Property Act* s 198(5)

12 *Re Smith* [1939] VLR 213, 221, 223 per O'Bryan AJ

is meant by the bequest of “my income” in all of the circumstances, including the explanatory words in the opening paragraph of the will on the application for administration. The related question of whether the bequest in the will or part of the bequest in the will is void for infringing the rule against perpetuities will also need to be dealt with on the present application, as will the question of who is the appropriate administrator in the circumstances.

[26] A complicating factor in the determination of who should administer the estate is that, on Mr Grose’s own evidence, he has been intermeddling in the estate for years and making distributions without the authority of letters of administration and may be obliged to account to the estate for those distributions, or some of them. That would put him in a situation of conflict of interest if he were to be appointed as administrator with a duty to enforce that obligation to account. In those circumstances it may be preferable for the Public Trustee to administer the estate if the daughter of the deceased continues not to want the role and neither the wife nor the de facto spouse wants to apply. However, Mr Grose has a right to be heard on that issue.

[27] Because of the above concerns, I requested the Registrar of Probate to request further information from the applicant. By email dated 27 October 2021 to the applicant’s solicitors, the Registrar asked for the following further information from the applicant:

- In your Affidavit, dated 28 September 2021, that is headed “Affidavit of Assets and Liabilities” you depose at paragraph 2

that it comprises a true statement of "all the assets and liabilities of the deceased of which at the date of swearing this affidavit I am aware".

What assets and liabilities, if any, did Mr Yunupingu have at the *date of his death*? This includes personal property and the balance of any bank accounts.

- In your Affidavit, dated 28 September 2021, that is headed "Affidavit of Delay" you depose at paragraphs 20 and 21 that since the death of Mr Yunupingu you have collected and distributed $95,835.86 in royalties, being "net royalties" in equal parts to Jasmine and the Foundation.

What is meant by "net royalties"?

[28] The Registrar did not receive a reply and, on 1 November 2021, she sent a follow up email to the applicant's solicitor. On the same date the solicitor responded to the Registrar:

> Dear Registrar
>
> Thank you for your email, I do apologise for not confirming sooner.
>
> I have received the below and provided same to my client as requested.
>
> I am meeting with him to discuss these queries today and hope to be able to get back to you shortly.

[29] The Registrar did not receive a further response and sent a further follow up email to the solicitor on 12 January 2022. The Registrar received a reply stating that "an affidavit will be filed shortly" but has still not received the requested information from the applicant. In the meantime, given the matters deposed to in his affidavit, there is every reason to suppose that the applicant, without the authority of letters of administration, is continuing to intermeddle in the estate.

[30] I do not consider it appropriate to grant the application for letters of administration on the present available information. I therefore make the following directions for the future conduct of the application:

(a) The applicant is to provide a response to the Registrar's request for information by 16 February 2022).

(b) The applicant is to serve a copy of the application for probate and supporting documents and a copy of these reasons on the de facto spouse of the deceased and on Angela Mularawuy Gurruwiwi by 16 February 2022.

(c) By 2 March 2022, the applicant is to file a further affidavit providing details of:

(i) the name and contact details of the deceased's de facto spouse;

(ii) the deceased's bank accounts at the date of his death;

(iii) any other assets owned by the deceased at the date of his death;

(iv) any liabilities the deceased had at the date of his death; and

(v) all dealings the applicant has had with estate property since the date of death of the deceased;

in each case annexing copies of all relevant documents (bank statements etc).

(d) The applicant is to serve a copy of that affidavit on the de facto spouse of the deceased and on Angela Mularawuy Gurruwiwi within seven days of filing the affidavit.

[31] I also propose appointing the Public Trustee as administrator *pendente lite* of the estate pursuant to s 32 of the *Administration and Probate Act.* That section provides that pending any suit touching the validity of the will of a deceased person, or for obtaining probate or a grant of administration, the Court may appoint a person as administrator of the personal estate (and receiver of the real estate) of the deceased person, with such full or limited powers as the Court thinks fit. (The Court may make such orders for the remuneration of the administrator or receiver out of the personal and real estate of the deceased person as it thinks right.) However, is not appropriate to make that appointment without hearing from the applicant and the Public Trustee. The matter is therefore listed for mention before me at 9.00 am on Wednesday 2 February 2022. At that time, a decision will be made on the proposal to appoint the Public Trustee as administrator *pendente lite* and any necessary adjustments can be made to the directions for the future conduct of the proceeding.