

*The Estate of Alma Pasion* [2014] NTSC 16

PARTIES: THE ESTATE of ALMA PASION

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING TERRITORY  
JURISDICTION

FILE NO: 72 of 2014 (21416879)

DELIVERED: 29 April 2014

HEARING DATE: 15 April 2014

JUDGMENT OF: BARR J

**CATCHWORDS:**

CIVIL LAW – Probate - valid will – partial intestacy – deceased had neither a spouse nor a de facto partner – two children of the deceased – probate granted – intestate estate of deceased to be distributed by executor in accordance with Schedule 6 *Administration and Probate Act* without the need for letters of administration to be separately applied for

*In Estate of Tkaczuk (deceased); Dobryden v Wagner and the Association of Ukrainians in South Australia Inc.* [2004] SASC 413; (2004) 90 SASR 515, followed.

*Administration and Probate Act 1969* (NT) s 17, s 17(2)(c), s 52(c), s 61(1), s 62, s 66(1), s 66(3), Schedule 6

*Wills Act 2000* (NT) s 27(1).

**REPRESENTATION:**

*Counsel:*

Applicant: C Triggs

*Solicitors:*

Applicant: Halfpennys

Judgment category classification: C

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

*The Estate of Alma Pasion* [2014] NTSC 16  
No. 72 of 2014 (21416879)

THE ESTATE of **ALMA PASION**

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 29 April 2014)

- [1] This matter was referred to the Court by the Registrar pursuant to s 17(2)(c) *Administration and Probate Act* (NT) (“the Act”) because the Registrar was doubtful whether probate should be granted.
- [2] The deceased died on 13 December 2013. On 9 April 2013, she had made a will on a form which was attached to the inside back cover of a booklet entitled “The Prepare-Your-Own Legal Will Pack”.
- [3] There is no issue with the validity of the will. The deceased signed her will in the presence of two witnesses in the presence of one another. The deceased appointed her sister, Maria Flores Van Kruyssen, to be her executrix.
- [4] Under the terms of the will, paragraph 4, the deceased made a number of special gifts: she gave her car to Socorro Cubillo, one of her sisters; she gave a diamond bracelet, rings and earrings to her daughter, Maria

Antoniette Harrison; and she directed that the remainder of her jewellery was to be divided between a specified niece and nephew.

[5] In addition to the property specially gifted under paragraph 4 of the will, referred to in [4], the deceased had some cash or coins at home, monies in a bank account and a Credit Union account, an interest in a superannuation fund and an insurance policy. The value of the residual estate was \$61,196 (or thereabouts) of a total gross value of \$66,846.19.<sup>1</sup>

[6] Paragraph 5 of the will read as follows:

5. Residuary/Residue of my Estate

I direct my Executor(s) to pay all my debts and then I give the residue of my estate to ...

*Westpac Bank Casuarina Branch*

*ANZ bank Casuarina Branch*

*To collect my life insurance from ANZ Bank Casuarina Branch  
Number [sic] Life Insurance ANZ Life 2130 8672 A*

*My member number 3340 3144 – TWU Super*

*My funeral expenses TWU Super*

*Standard Death cover \$18,890.00*

*Standard TPD cover \$2,810.00.*

[7] Those parts of paragraph 5 of the will reproduced in italics in [6] were in the handwriting of the deceased. It appears that she helpfully listed her assets

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<sup>1</sup> Taken from the applicant's affidavit of assets and liabilities sworn 3 April 2014.

and where they might be found, but mistakenly set them out in that part of her will form where she should have nominated her residual beneficiaries. Unfortunately, the deceased did not anywhere else specify the intended beneficiaries of her residual estate. The result was a partial intestacy.

[8] The persons entitled to take an interest in the intestate estate of an intestate, and the interest those persons are entitled to take, are to be ascertained by reference to s 66(1) and Schedule 6 of the Act.<sup>2</sup> In the present case, Part IV of Schedule 6 would apply if the deceased was survived by neither a spouse nor a de facto partner but was survived by issue. In that case, Item 1 of Part IV of Schedule 6 would apply, with the result that the issue would be entitled to the whole of the intestate estate.

[9] The value of the intestate estate is ascertained by deducting from the gross value of the intestate estate an amount equal to the debts and liabilities of the estate, funeral and testamentary expenses, and the costs and expenses in administering the estate (as well as any estate duties, succession duties or other duties in fees payable in relation to the estate as are payable out of the intestate estate).<sup>3</sup>

[10] At the time of the hearing on 15 April, I indicated my view that the Will should be rectified pursuant to s 27(1) of the *Wills Act* to remove the content of paragraph 5 and include it as an explanatory addendum. I appreciated that

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<sup>2</sup> See s 66(1) *Administration and Probate Act* (NT). An “intestate” is defined in s 61(1) of the Act to include a deceased person who leaves a will but does not dispose effectively, by the will, of the whole or part of his or her property.

<sup>3</sup> S 66(3) *Administration and Probate Act* (NT).

that would not resolve the problem of the partial intestacy, but I did not consider that I could make formal orders in favour of the children of the deceased (or other specific orders) because I did not have evidence at that time to enable me to be satisfied that Part IV, Item 1 of Schedule 6 applied. I adjourned the matter to enable further affidavit evidence to be filed, and I invited counsel to make submissions as to whether, if an order were made granting probate, the executrix could then administer the intestate estate and distribute it in accordance with Part IV, Item 1 of Schedule 6 without further court order (or without letters of administration relating to the intestate estate).

[11] An affidavit was subsequently filed on behalf of the executrix which has satisfied me that the deceased had neither a spouse nor a de facto partner at the date of her death; further that the deceased had two children, both of whom survived her: Maria Antoniette Harrison and Jeffrey T. Nator.<sup>4</sup>

[12] Miss Triggs, counsel for the applicant, has drawn my attention to the decision of Duggan J in *Dobryden v Wagner*,<sup>5</sup> and submits that it is appropriate that (1) probate of the will of the deceased be granted to the executrix and that (2) the executrix should then administer the intestate estate in accordance with the provisions of Schedule 6 of the Act.

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<sup>4</sup> Affidavit Maria Flores Van Kruyssen sworn 17 April 2014, paragraphs 5 and 7.

<sup>5</sup> *In Estate of Tkaczuk (deceased); Dobryden v Wagner and the Association of Ukrainians in South Australia Inc.* [2004] SASC 413; (2004) 90 SASR 515.

[13] In *Dobryden*, there was a partial intestacy of the residue of the estate, and the judge ordered that the residue was to be distributed (by the plaintiff executor) in accordance with the intestacy provisions of the South Australian equivalent of the Northern Territory *Administration and Probate Act*. This was done without the need for letters of administration to be separately applied for.

[14] I agree, with respect, with his Honour's approach. It is logical that the executor of the will of a deceased person should be the one who distributes any intestate estate of the deceased. Under s 52(c) of the Act, once probate of a will has been granted in a case of partial intestacy, all of the deceased's property vests in the executor.<sup>6</sup> Under s 62 of the Act, the executor then holds the intestate estate on trust for the persons entitled in accordance with Division 4 of Part III of the Act, in which s 66 is contained.

[15] The formal orders I propose to make are as follows:

1. Order pursuant to s 17 *Administration and Probate Act* authorising the Registrar to issue probate of the will of the late Alma Pasion, deceased, dated 9 April 2013, to Maria Flores Van Kruyssen.
2. Order pursuant to s 27(1) *Wills Act* to rectify the deceased's will such that the italicised content of paragraph 5 of the will extracted in [6] above be removed from paragraph 5 and be treated as an explanatory addendum to the will.
3. Order that the intestate estate of the deceased, namely the residue of the estate referred to in [5] and [6] above, is to be distributed by the executor as on a partial intestacy in accordance with Part IV, Item 1 of Schedule 6 *Administration and Probate Act* (NT).

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<sup>6</sup> On testacy to the executor under s 52(a), and on partial intestacy to the executor under s 52(c).

4. Declaration that Maria Antoniette Harrison and Jeffrey T. Nator are the issue of the deceased entitled to the whole of the intestate estate in accordance with Part IV, Item 1 of Schedule 6 *Administration and Probate Act* (NT).
5. That the executrix has leave to apply.

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