SUPREME COURT OF QUEENSLAND

CITATION:	*Coleman v Orr & Ors* [2017] QSC 215
PARTIES:	**NEIL ALFRED COLEMAN (as executor and trustee of the Will of LILLIAN MAY BEATTIE, deceased)** (applicant) **v** **BRUCE DOUGLAS ORR AND OTHERS** (respondents)
FILE NO:	BS5956 of 2017
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	4 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	25 July 2017
JUDGE:	Mullins J
ORDER:	**1. It is declared that, on the proper construction of the will dated 23 April 1998 and the codicil dated 6 April 2005 of Lillian May Beattie deceased, clause 4 of the will confers in respect of any beneficiary named in clause 3 who failed to survive the deceased for 30 days leaving a child or children who survived the deceased for 30 days, an interest in favour of those children, so that they take, and if more than one equally, the share which their parent would have taken, had such parent survived the deceased for 30 days.** **2. The twenty-fifth respondent's costs of the application incurred after 10 July 2017 on the standard basis be paid from the deceased's estate.** **3. The applicant's costs of the application on the indemnity basis be paid out of the deceased's estate.** **4. The applicant have liberty to apply in respect of any other orders which he may be advised to seek in relation to costs.**
CATCHWORDS:	SUCCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – PRINCIPLES OR RULES OF CONSTRUCTION – GENERALLY – where will provided for a substitutional gift to issue, if any named beneficiary

failed to survive the deceased and specified that such issue would take the share which his/her or their mother or father would have taken had such parent survived the deceased – whether the intention of the deceased in using "issue" was to refer to children only and not any remoter descendants

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – PARTIES AND NON-PARTIES – where executor joined the solicitor who drafted the will as a respondent to the application to construe the will – where will provided for a substitutional gift to issue, if any named beneficiary failed to survive the deceased and specified that such issue would take the share which his/her or their mother or father would have taken had such parent survived the deceased – where deceased's estate was small – where it was a forgone conclusion that in the context of the will "issue" would be construed as "children" and not extending to remoter descendants – whether the solicitor who drafted the will should bear the costs of the executor's application for construction of the will

Matthews v Williams (1941) 65 CLR 639, cited
Perpetual Trustee Co Ltd v Wright (1987) 9 NSWLR 18, cited
Sibley v Perry (1802) 32 ER 211, followed
Simpson v Simpson [2011] QSC 196, followed

COUNSEL: R D Williams for the applicant
R T Whiteford for the twenty-fifth respondent

SOLICITORS: Mitchells Solicitors for the applicant
Carter Newell Lawyers for the twenty-fifth respondent

[1] The applicant is the executor of the estate of Mrs Lillian May Beattie who died on 21 August 2015 aged 96 years and whose husband predeceased her. Probate of the deceased's will dated 23 April 1998 and codicil dated 6 April 2005 was granted to the applicant as the surviving executor on 2 December 2016. The applicant is a nephew of the deceased. The codicil only affected the appointment of executors under the will. The net distributable residuary estate is around $170,000 which makes it a relatively small estate.

[2] The applicant applies for a declaration as to whether on the proper construction of the will and codicil, clause 4 of the will confers in respect of any beneficiary named in clause 3 who failed to survive the deceased for 30 days leaving a child or children who survived the deceased for 30 days, an interest in favour of those children, so that they take, and if more than one equally, the share which their parent would have taken had such parent survived the deceased for 30 days.

[3] The first to the twenty-fourth respondents are the children and grandchildren of named beneficiaries who may be affected by the construction of the clause. (It is unfortunate that the applicant failed to take advantage of r 6 of the *Uniform Civil Procedure Rules* 1999 (Qld) to abbreviate the title of the proceeding, other than for the originating application and the final order. As a result of this failure, every document filed in the proceeding and every heading on a certificate of exhibit comprises a complete page to list the complete names of all the parties, instead of using the alternative abbreviated heading found in Form 1 for multiple parties.)

[4] The will had been prepared by the twenty-fifth respondent and the applicant also sought an order that the applicant's costs of the application on the standard basis be paid by the twenty-fifth respondent, and to the extent the applicant's costs of the application on the indemnity basis exceed the amount payable by the twenty-fifth respondent on the standard basis, such excess be paid out of the deceased's estate.

Is there an ambiguity on the face of the will?

[5] As the deceased's husband did not survive her, the effect of clause 3 of the will was to divide the deceased's estate into 12 shares and a separate gift was made of each one-twelfth share under subclauses (a) to (l) of clause 3. The beneficiaries named in the subclauses are brothers, nieces and nephews, a sister-in-law and brothers-in-law.

[6] Clause 4 of the will provides:

> "I DECLARE that if any beneficiary named herein fails to survive me for thirty (30) days leaving issue who do survive me, then such issue shall take and if more than one equally the share which his/her or their mother or father would have taken had such mother or father survived me for thirty (30) days; I further declare that if the gift in any one or more of sub-clauses 3(a) to (1) fails, then the amount in question shall be distributed equally between the sub-clauses that do not fail."

[7] There is no dispute as to the rules that apply to the construction of wills.

[8] The suggested ambiguity in clause 4 is that the word "issue" usually denotes children and remoter issue, but in clause 4 use of the words "mother and father" may indicate the deceased intended "issue" to mean "children".

[9] The question of construction is not academic as the gifts under subclauses (a), (b), (j) and (l) are affected by whether "issue" is construed as limited to "children" rather than the more expansive meaning of children and remoter issue (or lineal descendants). As observed by the court in *Matthews v Williams* (1941) 65 CLR 639 at 650:

> "'Issue' is a word with a clear prima-facie legal meaning. It means descendants or progeny. No doubt 'issue' is a flexible word and its prima-facie application may be restricted by any sufficient indications appearing in the documents…"

[10] Both the applicant and the twenty-fifth respondent contend that the rule in *Sibley v Perry* (1802) 32 ER 211 should be applied in construing the gift.

[11] In *Sibley v Perry*, the relevant clause of the will provided:

> "Thirdly, I will, that my said trustee, whom I do appoint my sole executor, do within three months after my decease transfer £1000 stock in the public funds commonly styled the 3 *per cents*. Consolidated to each of my relations hereafter mentioned; viz. to *Thomas, John, Robert*, and *Mary*, the sons and daughter of Mr. *Thomas Dickson* or *Dixon* and *Elizabeth* his wife, late of *Hannay* in the said county of *Chester*, if they be living at the time of my decease; and if all or any of them shall die before I do, then I will, that the lawful issue of every one of them so dying before me shall share and share alike have and enjoy that £1000 stock, which their respective parents if living would have had and enjoyed."

[12] Lord Eldon interpreted the words "lawful issue" as not extending beyond children, explaining at 213:

> "The testator contemplates the case of persons, of whose existence or non-existence he was not sure; giving to them in the first place: and if they should not be living at the time of his decease he substitutes other persons in their place; and upon all the authorities it must be admitted, that if in the third clause the words 'respective parents' were not inserted, the words 'lawful issue,' must be extended beyond children."

[13] The approach to construction of the expression "issue" in a will was considered by Bryson J in *Perpetual Trustee Co Ltd v Wright* (1987) 9 NSWLR 18 which in turn was considered by Peter Lyons J in *Simpson v Simpson* [2011] QSC 196 at [10], noting the fundamental proposition to emerge from Bryson J's judgment is:

> "… that it is necessary to determine the intention of the testator from the language of the will as a whole, rather than to apply a rule of construction, when dealing with provisions of a will which refer to a 'child' of a testator, 'issue' and 'parent'."

[14] After a specific bequest, clause 3(c) of the will in *Simpson* dealt with the residue of the estate in these terms:

> "(c) to stand possessed of the rest and residue of my estate UPON TRUST to divide the same equally between such of my children as shall survive me and attain the age of eighteen years PROVIDED ALWAYS that if any such child should die without having attained a vested interest hereunder leaving issue who shall survive to attain the age of eighteen (18) years such issue shall take and if more than one equally between them the share in my estate which his her or their parent would have taken had such parent survived to attain a vested interest hereunder."

[15] Peter Lyons J applied the authorities to construe clause 3(c) at [12]:

> "As has been noted, clause 3(c) commences with a disposition to the children of the testatrix who should survive her. The proviso to clause 3(c) identifies as one condition of its operation, the fact that a child of the testatrix has predeceased her. Provision was made in such a case for a disposition to issue of that child. However, that disposition is the share which the parent would have taken, had the parents survived to attain a vested interest under the will. The only people for whom provision is made for the attaining of a vested interest under the will, conditional on their survival, other than the issue to take in substitution, are the children of the testatrix; and these are referred to as the 'parent' of issue who might take in those circumstances. It is therefore clear that the language of the proviso contains a disposition only to issue of children of the deceased, who are themselves children of the deceased's children, and accordingly, grandchildren of the testatrix."

[16] Mr Williams of counsel on behalf of the applicants submitted that *Simpson* does not establish any precedent and relies on the observation made by David M Haines QC in *Construction of Wills in Australia* (LexisNexis Butterworths, Australia, 2007) at [2.6]:

> "Judges should not adopt the words of one judge in one authority which refers to another will as if it were a canon of construction for all wills. A judge should form an opinion apart from the decided cases and then consider whether these decisions require any modification of that opinion. A court should not begin a construction by considering 'how far the will in question resembles other wills upon which decisions have been given'." (*footnotes omitted*)

[17] Mr Whiteford of counsel for the twenty-fifth respondent made the point that the twenty-fifth respondent was not submitting the decisions in previous cases about the meaning of similarly worded wills established binding precedent, but rather the rationale underlying the application of the rule in *Sibley v Perry*, as explained in *Matthews*, was so obviously satisfied in the case of the deceased's will, that there was little or no doubt that the deceased intended the word "issue" to mean "children" and any remaining doubt would have been dispelled by the similarity of the will in the deceased's case with the wills in *Sibley v Perry* and *Simpson*.

[18] There would not have been any question about the construction of clause 4 of the will, if instead of "issue", the drafter had used "children". The use the term "issue" in clause 4 must be construed in the context of the whole will. When the substitutional gift is given to the issue by reference to "the share which his/her or their mother or father would have taken had such mother or father" survived the deceased for 30 days, the indication is that "issue" was intended by the deceased to refer to the children of the named beneficiaries, rather than any remoter descendants. There is nothing in the balance of the will that indicates against giving "issue" the meaning that is consistent with the reference made by the deceased in clause 4 to the "mother or father" of the issue. The construction of the will as a whole does not leave any ambiguity about the intention of the deceased in using "issue" in clause 4 as equivalent to the children only (and not any remoter descendants) of the named beneficiaries. As Mr Whiteford submitted, the rationale underlying the application of the rule in *Sibley v Perry* results in a similar outcome in this case, as the respective courts found in *Sibley v Perry* and *Simpson*, not

because of applying those decisions without regard to the deceased's will, but as a result of construing the deceased's will and, in particular, in this case all the words used in clause 4 of the will.

Inquiries of the solicitor who prepared the will

[19] The applicant's solicitors sought the twenty-fifth respondent's files in relation to the deceased's will and codicil, but Mr Montgomery advised that those files had been destroyed and he did not have any recollection in relation to the preparation of the will.

[20] The submission is made that rectification is therefore not available. That assumes that the will does not give effect to the deceased's instructions and pre-empts the construction of the will.

[21] On 23 March 2017 the applicant's solicitors gave notice to the twenty-fifth respondent that the applicant proposed commencing a proceeding in the Supreme Court to construe clause 4 of the will on the basis there was an ambiguity in the drafting, as the word "issue" usually denotes children and remoter issue, but the words "mother and father" tend to indicate the deceased may have intended "issue" to be read as "children". The applicant had taken advice of counsel that the necessity to bring an application to construe the will arose solely as a result of the drafting of the clause and that it would be appropriate for the twenty-fifth respondent to bear the costs of the application. Notice was given that if the twenty-fifth respondent did not pay the estimated fees for bringing the application, it was proposed to join the twenty-fifth respondent as a party to the application, in order to seek an order for costs. The letter was accompanied by the proposed application, draft order and draft submissions of counsel. Paragraph 18 of those draft submissions included the following:

> "The rule in *Sibley v Perry* applies in the present case. The requirements of the rule are met, in that the words 'mother or father' (which are equivalent to the word 'parent') clearly refer to the beneficiaries named in clauses 3(a) to (l)."

[22] By letter dated 30 March 2017, the twenty-fifth respondent referred the applicant's solicitors to the decision in *Simpson*, making the point that the construction of the deceased's will was no different to that considered in *Simpson*. On the basis the will was not susceptible to any interpretation other than the one contemplated in the applicant's foreshadowed application, the twenty-fifth respondent submitted the application was entirely unnecessary and invited the applicant to withdraw from his proposal to file the application.

[23] The applicant's solicitors responded on 24 April 2017, advising they were aware of the decision in *Simpson*, but considered it was not authority for the proposition that the term "issue" is always to be construed as meaning children of the deceased, where there is a reference to a substitutional gift to issue described by reference to the word "parent". The applicant's solicitors advised there was a clear ambiguity on the face of the will and the applicant had "no choice", but to bring a construction application to resolve the ambiguity. The applicant's solicitors invited the twenty-fifth respondent again to agree

to indemnify the estate for the costs of the application "as the ambiguity was not created by the deceased but by the manner in which your firm drafted the Will".

[24] The originating application was filed on 14 June 2017 and served on 23 June 2017. By letter dated 4 July 2017, the solicitors for the twenty-fifth respondent gave notice to the applicant's solicitors that it was their view there was no ambiguity in the wording of clause 4 of the will and the application was unnecessary and should be discontinued or, if the applicant wished to proceed, then the application should be discontinued against the twenty-fifth respondent. If the application were discontinued against the twenty-fifth respondent by 10 July 2017, the twenty-fifth respondent was prepared to bear its own costs.

Should the solicitors have been joined as the twenty-fifth respondent?

[25] When the application came on for hearing, there were signed acknowledgements of service and an indication that they did not wish to be heard on the application from all but three of the first to twenty-fourth respondents. Of those three, the twenty-second respondent was unable to be located to be served. There was evidence of service on the thirteenth and eighteenth respondents who did not return the acknowledgement of service. The only party who appeared on the application, apart from the applicant, was the twenty-fifth respondent. Both the applicant and the twenty-fifth respondent contended for the same construction of "issue" in clause 4 of the will as referring to the children of the beneficiaries named in clause 3 who predeceased the deceased and not to more remote descendants of those beneficiaries. The dispute between the applicant and the twenty-fifth respondent was over the question of costs.

[26] It was a matter for the applicant on the advice of his lawyers to decide whether to proceed with an application to the court for construction of the will or to rely on the advice of the solicitors and counsel about the proper construction of the will. Relevant considerations for the applicant were no doubt that there were numerous respondents and ultimately one of the respondents was unable to be served, but it was also relevant that it was a small estate. Not all questions of construction of a will have to be referred to the court, if considered advice from an appropriately experienced lawyer is obtained and the outcome of any application for construction of the will is a foregone conclusion. This is particularly so in respect of a small estate.

[27] Although the genesis of the construction question was the choice of language by the drafter of the will, opting for "issue" when "children" was what was intended in light of the balance of clause 4 in the context of the whole will, that does not mean that the twenty-fifth respondent should bear the costs of the application for construction of the will to achieve an outcome that was otherwise common ground.

[28] The number of respondents to the application (apart from the twenty-fifth respondent) was due to the deceased's decision to divide her estate into 12 shares and make a separate gift of each one-twelfth share. In light of the disparate group of beneficiaries, no doubt the applicant felt cautious about proceeding with distribution of the residuary estate, when advised by his lawyers of their view there was an ambiguity in clause 4 of the will. The offer by the twenty-fifth respondent to bear its own costs of the

application, if it were discontinued by 10 July 2017, was a reasonable offer in view of the inevitable outcome of the application for construction of clause 4 of the will. There may have been an argument for the applicant to seek to recover from the twenty-fifth respondent the costs of obtaining the initial advice from his solicitors and counsel on the proper construction of clause 4 of the will, but once that advice was obtained by reference to the rule in *Sibley v Perry*, the applicant could not necessarily seek to hold the twenty-fifth respondent liable for taking the cautious approach of proceeding with the further step of an application for construction of the will.

[29] The twenty-fifth respondent seeks an order that the applicant pay the twenty-fifth respondent's costs of the application on an indemnity basis and that the applicant not be permitted to indemnify himself for those costs from the deceased's estate.

[30] In the circumstances of this case, if the applicant wished to take the cautious approach to the question of construction and pursue the application to court, the twenty-fifth respondent should not have to bear those costs. To allow for the fact that the twenty-fifth respondent could have reasonably offered to pay for the costs incurred by the applicant in obtaining the initial advice on the construction of clause 4 of the will, but should otherwise not be responsible for the applicant's cautious approach to seeking the court's confirmation of the construction advised by the applicant's lawyers, I propose that the costs order in the twenty-fifth respondent's favour out of the deceased's estate be limited to the costs incurred after 10 July 2017 (consistent with the reasonable offer the twenty-fifth respondent's solicitors had made) and, in light of the size of the estate, be further limited to standard costs. I would not deny the applicant the right to be indemnified for his costs out of the deceased's estate as he has been acting on the advice of his lawyers, although the applicant's lawyers may wish to consider their position on the basis of these reasons at least in relation to the costs of the twenty-fifth respondent to be paid out of the deceased's estate. I will therefore give the applicant liberty to apply in respect of any other orders which he may be advised to seek in relation to costs.

Orders

[31] The orders which I make are:

1. It is declared that, on the proper construction of the will dated 23 April 1998 and the codicil dated 6 April 2005 of Lillian May Beattie deceased, clause 4 of the will confers in respect of any beneficiary named in clause 3 who failed to survive the deceased for 30 days leaving a child or children who survived the deceased for 30 days, an interest in favour of those children, so that they take, and if more than one equally, the share which their parent would have taken, had such parent survived the deceased for 30 days.

2. The twenty-fifth respondent's costs of the application incurred after 10 July 2017 on the standard basis be paid from the deceased's estate.

3. The applicant's costs of the application on the indemnity basis be paid out of the deceased's estate.

The applicant have liberty to apply in respect of any other orders which he may be advised to seek in relation to costs.