SUPREME COURT OF QUEENSLAND

CITATION:	*The Public Trustee of Queensland v Neary & Ors* [2018] QSC 9
PARTIES:	**THE PUBLIC TRUSTEE OF QUEENSLAND AS TRUSTEE OF THE TRUST ESTABLISHED BY THE WILL OF NEIL BEVERLEY JONES, DECEASED DATED 18 JUNE 2002** (applicant) **v** **LIAM NEARY AND OTHERS** (respondents)
FILE NO:	4782 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	31 January 2018
DELIVERED AT:	Brisbane
HEARING DATE:	29 August 2017
JUDGE:	Douglas J
ORDER:	**1. Upon the proper construction of the Will of Neil Beverley Jones, deceased, dated 18 June 2002, the first respondents are the beneficiaries of the trust created by cl 3 thereof.** 2. **The costs of all parties of and incidental to this application be paid from the assets of the aforesaid trust on the indemnity basis.**
CATCHWORDS:	SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – PRINCIPLES OR RULES OF CONSTRUCTION – WHERE UNCERTAINTY – AS TO PERSON OR OBJECT – where testator died without issue – where legatees where listed by name – where legatees were described as 'great nieces and nephews' and 'grand children' interchangeably – where some named legatees were not great nieces or great nephews *Succession Act* 1981, s 33C *Donnolley v Clarke* [2008] NSWSC 522, followed *Fell v Fell* (1922) 31 CLR 268; [1922] HCA 55, cited

Public Trustee v Loney [2009] SASC 17, followed
Re Thomson [2010] QSC 167, followed
Thomson v Thomson [2008] VSC 375, followed
Trust Company Ltd v Zdilar [2011] QSC 5, cited

COUNSEL: Mr R T Whiteford for the applicant
Mr D J Morgan for the second respondents
Mrs G Payne (née Jones) appeared on her own behalf
Mr P Jones appeared on his own behalf
Mrs W Thomson appeared on her own behalf
No appearance for the remaining third respondents
Mr R D Cumming for the first to sixteenth, fourth respondents
Mrs B Labinsky appeared on her own behalf as litigation guardian for the seventeenth and eighteenth, fourth respondents

SOLICITORS: Official Solicitor for the Public Trustee for the applicant
Gleeson Lawyers for the second respondents
Mr P Jones appeared on his own behalf
Mrs W Thomson appeared on her own behalf
No appearance for the remaining third respondents
McCullough Robertson for the first to sixteenth, fourth respondents
Mrs B Labinsky appeared on her own behalf as litigation guardian for the seventeenth and eighteenth, fourth respondents

[1] Neil Jones' Will was handwritten by a solicitor on 18 June 2002, slightly more than three weeks before Mr Jones died on 11 July 2002. He died without issue but had very many living relations, some of whom at least he wished to benefit under his Will. The problem that has arisen is that the terms of his Will are confusing. After leaving his residence to a niece, whom he also made his executor and the beneficiary of his residuary estate, he made the following bequests on trust to her:

> "3. To hold all shares held by me at date of death for all my great nieces and nephews provided that none of same shall receive his or her share until he or she has attained the age of 21 years. particulars [sic] as follows as to 1/8 share thereof to each of the following grand children
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> 1. LIAM NEARY.
> 2. LUKE NEARY.
> 3. COOPER NEARY.
> 4. MADELINE HUNT.
> 5. JASMINE HUNT.
> 6. SHERIDEN HUNT.

7. NADINE PAYNE.

8. SIMON PAYNE."

[2] Mr Jones' niece has now been replaced as trustee by the Public Trustee who has brought this application for the proper construction of that clause of the Will. The estate has been administered, except for the shares referred to in that clause, which were said to be worth something more than $600,000 when this application was heard.

[3] The obvious construction problems that arise on the face of the Will, bearing in mind the relevant extrinsic circumstances, arise from the use of the words "all my great nieces and nephews" and the words "grand children".

The available evidence

[4] At the date of the Will and at the date of the testator's death he had 69 great nephews and great nieces but the clause subsequently gives the shares held by him at the date of his death to eight named people, only two of whom (Nadine Payne and Simon Payne) can be described as a great nephew or a great niece. The other six are his great great nephews and nieces of whom 22 existed at that time. It is also relevant that the deceased died without issue so that the eight named people described as "grand children" were not able to be described correctly in that fashion.

[5] Mr Whiteford for the Public Trustee contended that the only sensible interpretation of the words "all my great nieces and nephews" was that the word "great" qualified both "nephews" and "nieces". There was no dissent from that submission by any of the other parties.

[6] There was no very satisfactory evidence available of the testator's intention at the time he executed the Will, even if such evidence were admissible. Attempts to contact the solicitor who drafted the Will and to obtain his file have been unsuccessful.

[7] Some evidence from two nieces and a nephew of the deceased was filed in affidavit form speaking of the testator's intentions to benefit either his nieces and nephews or great nieces and great nephews at various stages of his life. One niece visited the deceased in hospital the day before he made his Will and he told her that all his shares would go to all his great nieces and nephews living at the time of his death. He said the solicitor was going to come the next day to write his Will and that his intention was to let the great nieces and nephews have their share at 21 years of age rather than 18 so that each could "buy a car".

[8] There is a basic problem that the evidence is inadmissible as to the testator's intention because of the rules of interpretation that applied at the time of the making of the Will. Some of the evidence is hearsay, particularly in the case of the evidence of the nephew, or of little weight. The evidence of the niece who saw the deceased the day before he made the Will does not suffer from those problems but is inconsistent with the plain words in the Will leaving one eighth of the shares held by the testator at the date of his death to each of eight named persons, six of whom were great great nieces and nephews. Nor is there any evidence of the deceased's knowledge of how many great nieces and nephews he had except that he told one witness that there were a "lot".

Applicable principles of interpretation

[9] As the deceased died before 1 April 2006, s 33C of the *Succession Act* 1981 does not govern the interpretation of the Will so that I am limited in the nature of the extrinsic evidence that I can take into account in construing this clause.

[10] The applicant submitted, therefore, that the relevant principles applicable to construe this Will were that I should discover the testator's intention by examination of the words used in the Will according to their usual meaning in the context in which they appear. If their usual meaning is clear then that meaning is given. If not, then resort may be had to such extrinsic evidence as is traditionally applied by the courts in construing the Will. The Will must be construed as a whole.[1]

[11] The evidence which is admissible is simply that which explains what the testator has written. No evidence can be admissible which in its nature or effect is applicable to the purpose of showing merely what he intended to have written so that the focus is on what is the meaning of the testator's words.[2] Extrinsic evidence of the factual matrix in which a testator made his Will to explain what he has written and show the meaning of the words he has used is admissible as distinct from evidence sought to be applied to prove the testator's intention as an independent fact in cases of ambiguity.[3]

[12] Mention was also made of the "equivocation rule" described by Wigram as follows:

> "… where the object of the testator's bounty … (i.e. *the person* … intended), is described in terms which are applicable indifferently to more than one person …, evidence is admissible to prove which of the persons … so described was intended by the testator …"[4]

[13] Finally, the applicant submitted that I should ascertain the basic scheme which the testator had conceived for dealing with his estate and then construe the Will so as to give effect to that scheme.[5] It was also submitted by Mr Whiteford that I should read the Will so as to give effect to all of its provisions, treating no word as otiose unless doing so would violate the general purpose of the Will or result in absurdity.[6] So, therefore, when the main purpose and intention of the testator has been ascertained to the Court's satisfaction, particular

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1 See *Re Thomson* [2010] QSC 167 at [10], [11], [13] and [19].

2 Wigram, J An Examination of the Rules of Law Respecting the Admission of Extrinsic Evidence in Aid of the Interpretation of Wills 4th ed Butterworths, London, 1858 at 8.

3 *Trust Company Ltd v Zdilar* [2011] QSC 5 at [21].

4 Wigram at 12–13.

5 Haines, D M Construction of Wills in Australia LexisNexis Butterworths, Australia, 2007 at [5.9].

6 *Public Trustee v Loney* [2009] SASC 17 at [13].

expressions in the Will which are inconsistent with such intention may be "rejected" in the process of interpretation.[7]

[14] Again there was no significant controversy from the other parties about the proper approach to interpretation in these circumstances.

Public Trustee's suggested solution

[15] The submission for the Public Trustee was that, on the proper interpretation of the Will, the gift in clause 3 should be construed to be a gift to the eight persons named in the clause.

[16] The reasons advanced by Mr Whiteford for supporting that conclusion were as follows:

> "9. First:
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> (a) the first sentence of the clause directs that 'all shares' owned by the deceased are to be held on trust for 'all of my great nephews and nieces';
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> (b) the second sentence provides that there be a gift (on trust) of '1/8 share *thereof* to *each* of' the eight named persons. The word 'thereof' refers to the 'shares' mentioned to in the first sentence;
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> (c) so, the second sentence does not merely a make a gift of 1/8 of the shares to the eight named persons. Rather, it is a gift of 1/8 of the shares to *each* of the eight named persons. That is, the second sentence makes those eight named persons the *only* beneficiaries.
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> 10. Second, the words 'particulars as follows' are consistent with the deceased intending the second sentence to identify (i.e. particularise) who are the beneficiaries of the gift in the first sentence. Put another way, it is proper to read the first sentence as providing that the shares were to be held on trust for 'all of my great nephews and nieces *who are particularised below*'.
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> 11. Third, support for this interpretation is found by reading the Will as a whole and in conjunction with the family tree. The deceased appointed Eileen Neary as his executor and trustee and, by clause 2 and the residue clause, conferred significant benefit on her. Therefore, it is likely that he had a reasonably good relationship with her. The first six of the persons named in the clause 3 are her grandchildren. It is not at all surprising that he would intend her descendants to be preferred over the descendants of (all but one of) his other siblings.

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[7] *Fell v Fell* (1922) 31 CLR 268 at 274; [1922] HCA 55.

12. Fourth, this interpretation can also be supported by the 'rule of despair' that where to clauses of gifts in a Will are irreconcilable, the last prevails.[8] In this case, the last gift in the clause is to the eight named persons only and, under this rule, this prevails over any previous gift to all great nieces and nephews. This rule is highly technical and does not prevail if another intention can be inferred from the wording in the Will. But here, the rule *confirms* rather than *conflicts with* the intention apparent from the words of the clause when the Will is read as a whole.

13. Fifth, the use of the descriptions 'great nephews and nieces' and 'grandchildren' is no obstacle to the suggested interpretation as those descriptions clearly have been used in error. Whatever else the clause means, it confers some benefit on eight people:

    (a) six of whom are *great great* nephews and nieces of the deceased; and

    (b) none of whom are *grandchildren* of the deceased. It is unlikely the deceased used the word 'grandchildren' meaning that the eight-named people were the grandchild of someone else, because:

        (i) in the only other place in the Will where beneficiaries are identified by their relationship to another person (i.e. the first sentence of the clause), they are identified by reference to him (i.e. '*my* great nieces and nephews');

        (ii) the eight persons were named and it was unnecessary to further identify them by reference to them being someone's grandchildren;

        (iii) the first six named beneficiaries have different grandparents to the last two named beneficiaries.

    Accordingly, allowing those terms to control the interpretation of the clause would violate the deceased's intention, not give effect to it.

14. Sixth, extrinsic evidence of intention does not compel a different result.

    Extrinsic evidence of intention inadmissible

(a) there is no 'equivocation' in this case which justifies the reception of extrinsic evidence of intention. An equivocation 'is not simply to be equated with either ambiguity or mere difficulty of interpretation, for otherwise the rules of interpretation and construction would be otiose'.[9] Rather, an equivocation occurs when 'the testamentary language may be

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[8] Jennings, R, Jarman on Wills, Sweet & Maxwell, United Kingdom, 8th ed, 1986 at 576 and 581; *Thomson v Thomson* [2008] VSC 375 at [13]–[23]; *Donnolley v Clarke* [2008] NSWSC 522 at [22]–[23].

[9] Dal Pont, G & Mackie, K Law of Succession, LexisNexis, Australia, 2ed, 2017 at [8.42].

> applied equally to each of two or more persons or things',[10] for example if a Will leaves money to 'my nephew John' and the deceased has two nephews named John.[11] That is not what has occurred here. The deceased has not used an expression capable of referring to two or more beneficiaries. Rather, he has used contradictory expressions to identify his beneficiaries."

The respondents' submissions

[17] Mr Cumming, for the fourth respondents, submitted that there were seven arguable constructions as to which class of beneficiaries the shares should be distributed to.

[18] Without going into each of those possible options in detail, I should say something about his submissions in respect of the solution advanced for the Public Trustee. Essentially, he argued that construing the clause so as to distribute the bequest amongst the eight named beneficiaries ignored the use of the words "all my great nieces and nephews". That was in the context where only one beneficiary of those named was a great niece. One was also a great nephew while the remainder were great great nieces or great great nephews. None were grandchildren of the testator.

[19] In the context, where the testator died without issue, it seems clear that the reference to grandchildren can be excised as it is meaningless.

[20] Mr Cumming submitted it would not be appropriate to ignore the words "all my great nieces and nephews" as it would have been perfectly open to the testator either to delete those words or express them more precisely to cover the persons named. It was submitted that he must, therefore, have intended the words to have meaning.

Discussion

[21] In my view, however, the use of the words "as to 1/8 share thereof", in what appears to be a clear reference back to the "shares held by me at date of death", is only capable of being given a sensible meaning if a one eighth share is left to each of the eight named beneficiaries. The critical word is "thereof" which emphasises the reference back to the asset consisting of the shares which are to be distributed.

[22] That seems to me the basic scheme which the testator had conceived in dealing with his shares, namely to give one eighth share of them to each of the eight persons named in the Will. To that extent it is appropriate to treat the words "for all my great nieces and nephews" as meaningless or surplusage. If necessary, I would also have applied the "rule of despair" that where two clauses or gifts in a Will are irreconcilable, the last prevails.[12] The appropriate

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[10] Dal Pont, ibid.

[11] Martyn J R et al. Theobald on Wills, Sweet & Maxwell, United Kingdom, 17th ed, 2010 at [14-011].

[12] Jennings, R, Jarman on Wills, Sweet & Maxwell, United Kingdom, 8th ed, 1986 at 576 and 581; *Thompson v Thompson* [2008] VSC 375 at [13]–[23] and *Donnolley v Clarke* [2008] NSWSC 522 at [22]–[23].

result can be achieved, however, by ascertaining the testator's basic scheme of dividing that asset, the shares held by him on his death, in eight equal shares among the eight named beneficiaries.

Order

[23] I shall order, therefore, that:

1. Upon the proper construction of the Will of Neil Beverley Jones, deceased, dated 18 June 2002, the first respondents are the beneficiaries of the trust created by cl 3 thereof.

2. The costs of all parties of and incidental to this application be paid from the assets of the aforesaid trust on the indemnity basis.