

# SUPREME COURT OF QUEENSLAND

CITATION: *The Public Trustee of Queensland v Roberts & Ors* [2004] QSC 199

PARTIES: **THE PUBLIC TRUSTEE OF QUEENSLAND**  
(applicant)  
v  
**ALLANAH GRACE ROBERTS, LISA BALDWIN AND PAUL BALDWIN**  
(respondents)

FILE NO: S2706 of 2004

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 29 June 2004

DELIVERED AT: Brisbane

HEARING DATE: 11 May 2004

JUDGE: Wilson J

ORDER: **Application dismissed**

CATCHWORDS: SUCCESSION – WILLS, PROBATE AND LETTERS OF ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CHANGING, TRANSPOSING, OMITTING OR SUPPLYING WORDS – Whether s 33 of the *Succession Act* 1981 applies – Absence of contrary intention in will – Whether omission to include expression of contrary intention was accidental or inadvertent and contrary to the testatrix’s instructions and intention.

SUCCESSION – WILLS, PROBATE AND LETTERS OF ADMINISTRATION – PROBATE AND LETTERS OF ADMINISTRATION – JURISDICTION AND DISCRETION OF THE COURT – QUEENSLAND – STATUTORY POWER TO INSERT MATERIAL IN PROBATE COPY OF WILL – Whether s 31 of the *Succession Act* 1981 to be applied – Whether mistake by drafter of the will – Where notes made when taking instructions for will are equivocal.

*Succession Act* 1981 (Qld) ss. 31, 33

*Re Allen* [1988] 1 Qd R 1

*Re Hess* [1992] 1 Qd R 176

COUNSEL: B Nickel for the applicant  
M Wilson for the respondent AG Roberts  
DR Murphy for the respondents L Baldwin & P Baldwin

SOLICITORS: Official Solicitor for the Public Trustee for the applicant  
de Groot for the respondent AG Roberts  
McKays for the respondents LBaldwin & P Baldwin

- [1] **WILSON J:** Mary Grace Baldwin died on 1 August 2003 aged 94 years. At the time of her death she was a widow, her husband William Baldwin having died about nine years previously. She was survived by her adopted daughter Allannah Grace Roberts (formerly Agafonoff). Her son John William Baldwin had died a little over a year before. He had two children who survived him and their grandmother.
- [2] The testatrix had made a will on 27 July 1987, and on 24 September 2003 the Public Trustee obtained an order to administer her estate.
- [3] By her will the testatrix made the following dispositions –

“3. I DEVISE AND BEQUEATH the whole of my estate both real and personal UNTO my said husband WILLIAM BALDWIN if he shall survive me for a period of thirty (30) days BUT should he fail to attain a vested interest in my estate under this my Will then but not otherwise the following clauses of this my Will shall take effect

4. I DEVISE AND BEQUEATH my land dwelling and improvements at and known as number 27 Prince Street The Grange Brisbane aforesaid together with all my household furniture and household effects (other than motor vehicles) therein or thereon at my death UNTO my son JOHN WILLIAM BALDWIN if he shall survive me for a period of thirty (30) days

5. I DEVISE AND BEQUEATH the rest and residue of my estate both real and personal UNTO such of them my children the said JOHN WILLIAM BALDWIN and ALLANAH GRACE AGAFONOFF as shall survive me for a period of thirty (30) days and if both in equal shares”

- [4] Both her husband and her son predeceased her. By s 33 of the *Succession Act* 1981-

**“33 Statutory substitutional provisions in the event of lapse**

(1) Unless a contrary intention appears by the will, where any beneficial disposition of property is made to any issue of the testator (whether as an individual or as a member of a class) for an estate or interest not determinable at or before the death of that issue and that issue is dead at the time of the execution of the will or does not survive the testator for a period of 30 days, the nearest issue of that issue who survive the testator for a period of 30 days shall take in the place of that issue and if more than 1 nearest issue so survive, shall take in equal shares and the more remote issue of that issue who survive the testator for a period of 30 days shall take by representation.

(2) A general requirement or condition that such issue survive the testator or attain a specified age is not a contrary intention for the purpose of this section.

(3) This section applies only to wills executed or republished after the commencement of this Act.”

Thus, in the absence of a contrary intention in the will, the children of the testatrix's son take his interest under the will.

- [5] This application (which was filed on 24 March 2004) is to rectify the will by inserting after clause 5 the words -

"If the benefits given to any of my children do not take effect then no further substitution arising by law is to apply to my Will".

Of course, there was nothing in the will to show an intention that the substitutional provisions in s 33 of the *Succession Act* were not to apply. The Court is asked to find that such omission was accidental and inadvertent, and contrary to the testatrix's instructions and intention.

- [6] There is a strong presumption arising from the due execution of a will that the testator knew and approved its contents. Nevertheless, the Court has limited power to rectify mistakes in a will. By s 31 of the *Succession Act* -

**“31 Power of court to rectify wills**

(1) As from the commencement of this Act the court shall have the same jurisdiction to insert in the probate copy of a will material which was accidentally or inadvertently omitted from the will when it was made as it was hitherto exercised to omit from the probate copy of a will material which was accidentally or inadvertently inserted in the will when it was made.

(2) Unless the court otherwise directs, no application shall be heard by the court to have inserted in or omitted from the probate copy of a will material which was accidentally or inadvertently omitted from or inserted in the will when it was made unless proceedings for such application are instituted before or within 6 months after the date of the grant in Queensland.”

It is a power which is exercised with great caution. The best (if not only) evidence on which the Court will act is that of the person who took instructions for the will. Generally it will not receive evidence of the testator's actual intentions at an earlier stage or subsequently to the completion of the will: *Re Allen* [1988] 1 Qd R 1; *Re Hess* [1992] 1 Qd R 176.

- [7] In the present case the testatrix gave instructions for her will to an officer of the Public Trustee, the will was prepared in the Public Trustee's office, and it was duly witnessed by two other officers of the Public Trustee. The officer who took the instructions, Ann Eileen Devine, has no recollection of the testatrix. Of those who witnessed its execution, one (Phillip Neville Brown) has no recollection of her, and

there is no evidence that the other (Elizabeth Helen Staples) has any recollection of her.

- [8] There is evidence of the system employed in the Public Trustee's office at the time. A client's instructions would be recorded by an officer on a will instruction sheet, which was a printed form containing a series of questions relating to the client's personal particulars, any previous will, his or her spouse, children, and assets, and how he or she wished to dispose of his assets, and space for answers either by ticking boxes or handwriting. The client would be asked to wait while the will was prepared or to return after a short time. The will would then be typed out by a secretary, checked by a legal officer, and returned to the reception area to be presented to the client for execution. In most cases the will would be presented to the client on the same day the instructions were taken. According to Ms Devine, any amendments to the initial instructions would be recorded on a further instruction sheet which would be attached to the initial instruction sheet. According to Mr Brown, he would ask the client to read the will before signing it and to ask questions if he or she were not happy with it. Any change in instructions would be written on the will instruction sheet. The will instruction sheet or sheets and the will (or wills if more than one) would all be kept in the same will packet.
- [9] Ms Devine says that she followed the usual practice in the preparation of the testatrix's will. The will packet contained only the completed will instruction sheet and the will. Ms Devine has identified all the writing on the will instruction sheet as hers.
- [10] Question 13(b) on the will instruction sheet and the answer to it were as follows -

<p>13 ....</p> <p>(b) If the testator benefits issue the provisions of S. 33 Succession Act must be explained. S. 33 should not be relied upon as an alternative to express substitutionary provision.</p> <p>....</p>	<p><input checked="" type="checkbox"/> Provisions explained</p> <p style="text-align: center;"><i>S.33 <u>Not</u> to Apply</i></p> <p style="text-align: right;">Leave blank if no gift to issue.</p>
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- [11] There is no direct evidence how the words "S.33 Not to Apply" came to be written on the instruction sheet, but I infer that they were written there when the instructions were taken.
- [12] The words themselves are equivocal: they may mean that the substitutional provisions in s 33 were not to apply, or they may mean that there was not to be any provision expressing a contrary intention within the meaning of the section.
- [13] The will contains no dispositive provision if the testatrix's son and daughter both predeceased her - in which event her son's children and her daughter's children would all have taken on intestacy. That would have been somewhat inconsistent

with an intention to negate the substitutional provision (effected by s 33) in favour of her son's children if he predeceased her.

- [14] There are errors in the information recorded in answer to some of the questions in the will instruction sheet. Question 6 inquired as to the testatrix's date and place of birth, but the information recorded related to her husband and not to her. Similarly, question 7 inquired as to the testatrix's parents, but the answer given related to her parents-in-law. Question 10 inquired which children, if any, had been adopted; a line was struck through the answer column, although her daughter was adopted. There is no apparent explanation for these inaccuracies.
- [15] There is no evidence whether the will was executed on the same day the instructions were taken, or how the will was actually taken from the instruction stage to the engrossment and execution stages.
- [16] In all the circumstances the evidence is insufficient to persuade me that the omission of the provision sought to be inserted was accidental or inadvertent.
- [17] For completeness, I record that I uphold the objection taken to the second sentence of paragraph 7 and paragraph 8 of the affidavit of Ms Devine sworn on 10 May 2004.
- [18] The application should be dismissed. I will hear counsel on costs.