

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DOUGLAS J

No 5936 of 2000

THE PUBLIC TRUSTEE OF QUEENSLAND AS            Applicant  
ADMINISTRATOR OF THE WILL OF  
ALBERT ROBERT ROBERTSON

and

LOUIS ROBERT ROBERTSON and                    Respondents  
SUZETTE GAY MURRAY

BRISBANE

..DATE 02/03/2004

ORDER

**WARNING:** The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: This is an application pursuant to section 134 of the Public Trustee Act 1978. It arises in circumstances where the deceased Albert Robert Robertson who died at Mildura on 18 April 1996 had two children Louis Robert Robertson born on 23 March 1942 and Suzette Gay Murray born on 7 January 1947.

Louis Robert Robertson left Australia on 7 November 1986. Despite extensive inquiries there is no evidence that he has returned to Australia. It appeared that he proposed to go to the United States of America on business for six months from his departure card but there is no record of him arriving in the United States in spite of inquiries that have been made to discover whether he did.

A private inquiry agent engaged to make those inquiries has checked a number of data bases, a US telephone disk, has made a surname search in all States, a title search in Honolulu and made inquiries of tax assessors in Illinois and searched Polk's Directories for the last 20 years and made searches through the United States for date of birth and first names with no result. Advertisements have been placed in the Honolulu Advertiser with no result and a title search and other inquiries in the United States have been carried out by an organisation known as Title Search, again with no result.

There is some evidence of him contacting members of his family which indicates that the time of last contact with him is uncertain. Mrs Murray, his sister, last had contact with him in 1986. His daughter Kelie Robertson has had no personal

contact with him since he left Australia except on one occasion in the very early years when he left, although in about 1989 she received a telephone call from a woman claiming to be married to him.

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His wife, Julie Anita Robertson, from whom he was estranged and who died on 29 March 2003 has given different dates for her last contact with him. In a statutory declaration dated 23 September 1997 she said her last contact with him was when he telephoned her six years before, that is, in about 1991. In a Family Court affidavit sworn 21 October 1996 she said her last contact with him was by telephone about eight months before, that is, about February 1996 and in the same affidavit she swore that in 1984 he disappeared from Mildura overnight, but Louis Robertson then residing in Mildura swore an answering affidavit in the Family Court proceedings between him and his wife on 4 October 1985.

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I am informed that Julie Robertson suffered from a psychiatric condition consisting of depression for which she was treated and also for alcohol and drug dependence. Suzette Murray, her sister-in-law, says that, despite being regularly asked by her from 1991 onwards, Julie Robertson told her that she had not heard from Louis Robertson and that on the 14th of March 1996 Julie Robertson told her she had not heard from him for years.

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The will left by Albert Robertson, which is Exhibit B to a statement of facts before me, bequeathed the residue of his estate to his children Suzette and Louis "as shall survive me

for a period of thirty (30) days and if both in equal shares".  
The question that concerned the Public Trustee, which is why  
he referred the matter to Court, relates to the use of section  
132 of the Public Trustee Act 1978. That section provides:

"(1) When the Public Trustee is in doubt as to the  
existence of any person or any class of persons who,  
if in existence at some particular time, would be  
entitled to share in any estate under administration  
by the Public Trustee, or as to the identity of any  
person entitled to any estate or part of an estate,  
the Public Trustee may, after such inquiries,  
including newspaper advertisements, as the Public  
Trustee considers necessary, pay, deliver or  
distribute the assets in the estate having regard  
only to the persons whose claims have then been  
established to the public trustee's satisfaction, or  
who then appear to the Public Trustee to have the  
best claim in law (including, in a case where the  
existence of a person at a particular time has not  
been established to the satisfaction of the Public  
Trustee, persons who would only have a lawful claim  
if such first mentioned person was not in existence  
at such particular time).

(2) Nothing in this section shall affect the right of  
such person or persons to follow the estate or any  
part thereof into the hands of the persons who have  
received the same pursuant to such payment, delivery  
or distribution."

It seems to me to be a remedial section. When this matter  
first came before the Court in August 2000 before Justice  
White her Honour took the view that further inquiries were  
required before she could be satisfied that the Public Trustee  
was entitled to take advantage of his powers under that  
section. It seems to me that the inquiries that have since  
been made do justify him now exercising those powers which  
entitled him, when in doubt, as to the existence of a person  
who would be entitled to share in any estate to distribute the

assets having regard only to the persons whose claims have then been established to his satisfaction or did then appear to him to have the best claim in law including, in a case where the existence of a person at a particular time has not been established to his satisfaction, persons who would only have a lawful claim if the first mentioned person was not in existence at that time.

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This seems to be a lesser test than would be required if, for example, he had to satisfy himself that a person should be presumed to have died. When one examines the facts here, it seems to me that the logical consequence of the evidence to which I have referred is that no member of Louis Robertson's family had spoken to or heard from him since about 1986/1987 which would make it reasonable for the Public Trustee to doubt his continuing existence and to exercise his powers under section 132.

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The next question is whether in exercising those powers he should do so on the basis that section 33(1) of the Succession Act 1981 applies. That section provides that:

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"Unless a contrary intention appears by the will where any beneficial disposition of property is made to any issue of the testator 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 survived the testator for a period of 30 days shall take in the place of that issue".

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Section 33(2) goes on to provide that a general requirement or condition that issue survive the testator or attain a specified age is not a contrary intention for the purpose of this section.

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Mr Nickel, for the Public Trustee, has taken me to a number of authorities dealing with this section particularly with the situation that occurs when a will provides, for example, when referring to a legatee as one who "shall be living at my death", whether that indicates a contrary intention for the purposes of section 33(1).

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When considering section 33's predecessor, section 65 of the Succession Act 1867, Kneipp J in *Re Trenfield* (OS No 52 of 1986; 10 October 1986, unreported) expressed the view, when referring to a will where the testatrix left her dwelling house to be held on trust for such of three of her children as should survive her, that the benefit was not taken by the issue but by the estate of the deceased's legatee or devisee, having said that, "The lapse of a share of a deceased legatee or devisee is prevented only by the survival of issue of the deceased's legatee or devisee".

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In reaching that conclusion his Honour declared that a grandchild took what would otherwise have been her father's interest in the estate which would prima facie have ceased on his predeceasing the testatrix.

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To the contrary Justice Byrne, in *Re Paton* (No 873 of 1994,

5 December 1994, unreported) again dealing with the Succession Act 1867, section 65, expressed the view that similar words, in that case "as shall be living at my death", indicated a contrary intention as language "only consistent with an intention on her part to leave the whole of the estate to those of the named children who survived her".

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The problem with the application of section 33 particularly arises because of the language of section 33(2) that a general requirement or condition that such issue survive the testator is not a contrary intention for the purpose of the section.

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McPherson JA in *Burman v. Burman* [1998] QCA 250 addressed the issue at [6] and said:

"A possible view of the expression 'such of my sons as shall survive me' is, however, that it is neither a requirement nor a condition but rather an essential element in the description of the beneficiaries. If the mere use of the word 'survivor', or some other form of that word, to designate a beneficiary is invariably neutralised by s.33(2) then the effect is to some extent, to restrict the full testamentary freedom which has hitherto existed of disposing of property at death it becomes considerably more difficult to expressly provide for lapse unless an apt synonym can be found for the word 'survivor' or 'survives' that will succeed in escaping any impact of s.33(2)."

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The language in this will goes beyond a general requirement or condition that the issue survived the testator in specifying that the residue goes to such of the children "as shall survive me for a period of 30 days" and goes on to say and "if both in equal shares". The clear inference from that use of

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language is that if one child does not survive the testator for 30 days the other child takes the whole of the residuary estate.

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That seems to me to be something more than a general requirement or condition that the issue survive the testator and if it were necessary I would prefer the views of Justice Byrne to those of Justice Kneipp in the two single Justice decisions to which I have just referred.

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In those circumstances I order that the Public Trustee is reasonably entitled to exercise his powers under section 132 of the Public Trustee Act 1978 in order to determine the persons entitled to share in the estate of Albert Robert Robertson.

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I further order that the estate is to be administered on the basis that Louis Robertson was not alive on 18 May 1996 and I further order that in those circumstances section 33 of the Succession Act 1981 does not apply.

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HIS HONOUR: I order that the costs of all parties of and incidental to the application be taxed on an indemnity basis and paid out of the estate.

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