SUPREME COURT OF QUEENSLAND

CITATION:	*Verrall v Jackson* [2006] QSC 309
PARTIES:	**LAURELLE IRENE VERRALL (as executor of the will dated 2002 of SHANE MICHAEL JACKSON deceased)** (plaintiff) v **PATRICK JOHN HARTLEY JACKSON** (defendant) and **SCOTT ANDREW DAY** (intervener)
FILE NO:	BS 6974/04
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	23 October 2006
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	6, 7, 8, 15 June 2005, 18 November 2005, 17, 18 July 2006
JUDGE:	Wilson J
ORDER:	**The orders are:** **i) on the claim, an order that subject to the formal requirements of the Registrar, a grant of probate of the will of Shane Michael Jackson dated 2002 issue to Laurelle Irene Verrall, the executrix named in the said will;** **ii) on the counterclaim, declarations –** **(a) that in the events that have happened the gift of the residue of the estate to the plaintiff in clause 5 of the will of Shane Michael Jackson dated 2002 is void;** **(b) that in the events that have happened and on the proper construction of the will of Shane Michael Jackson dated 2002 there is an intestacy as to the residue of the estate.** **The orders as to costs are:** **i) That the plaintiff executrix's costs of and incidental to the claim and the counterclaim be paid out of the estate on the indemnity basis;** **ii) That the defendant's costs of and incidental to the claim and the counterclaim be paid out of the estate on the standard basis;** **iii) That the intervener's costs of and incidental to the claim and the counterclaim be paid out of**

the estate on the standard basis.

CATCHWORDS: WILLS, PROBATE AND ADMINISTRATION – TESTAMENTARY INSTRUMENTS – WHERE THERE ARE SEVERAL INSTRUMENTS – GRANT OF SINGLE PROBATE – PARTICULAR CASES – where there were two wills bearing the signature of the testator – where the beneficiary under the later will (the testator's de facto partner and the plaintiff in this matter) filled out that will in her own handwriting – whether the plaintiff did so after the testator's death, or on the testator's instruction while he was alive – whether probate should be granted of the later will

WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – GENERALLY – GENERAL PRINCIPLES OF CONSTRUCTION – ASCERTAINMENT OF TESTATOR'S INTENTION AS EXPRESSED OR IMPLIED BY WORDS OF WILL – where the gift to the plaintiff was void because she was an attesting witness to the will – where there is a gift over in the event of the plaintiff predeceasing the testator – whether the rule in *Jones v Westcomb* applies so as to activate the gift over in the present circumstances – whether the failed gift passes according to the intestacy rules

Succession Act 1981 (Qld) Reprint 5C (revised edition) s 15, s 35, schedule 2

Bool v Bool [1941] St R Qd 26, cited
In the Will of Rowney Unreported, QSC, Cooper J, 19 March 1992, considered
Jones v Westcomb (1711) Prec Ch 316; 24 ER 149, considered
Nock v Austin (1918) 25 CLR 519, cited
Re Fox's Estate; Dawes v Druitt; Phoenix Assurance Co Ltd v Fox [1937] 4 All ER 664, considered
Re Keid [1980] Qd R 610, considered
Re Stacey, Deceased; *Stacey v Forsyth* [1949] St R Qd 244, cited
Vernon v Watson; Re Estate of Quigley (Dec'd) [2002] NSWSC 600, cited

COUNSEL: R D Peterson for the plaintiff
M Gynther for the defendant
N E Ulrick for the intervener

SOLICITORS: de Groots for the plaintiff
ffrench.commercial lawyers for the defendant
Bartels for the intervener

[1] **WILSON J**: Shane Michael Jackson ("the testator") was a primary producer who owned a property called "Woodstock" at Lamington via Beaudesert. On 6 June

2003 he suffered a fatal heart attack while riding a quad motor bike on his property. He was aged 53. He was survived by his de facto partner of more than 12 years, Laurelle Irene Verrall (the plaintiff), a son of an earlier relationship – Scott Andrew Day who was born on 20 July 1972 – and six siblings. The principal asset in his estate is the "Woodstock" property, which was valued at $600,000 in October 2005.

[2] The testator had executed a will on 17 September 1986 by which he had left his estate to his parents or if they predeceased him (as they did) to his two sisters and four brothers ("the 1986 will").[1]

[3] In this proceeding the plaintiff seeks probate in solemn form of a later will dated "2002" ("the 2002 will").[2] By that will the plaintiff was appointed as executrix of the will and trustee of the testator's estate, and the following dispositions were made –

> "4. Special Gifts
>
> I make the following special gifts (legacies, bequests and devises):
>
> *15 head of Cattle to Casey – Karen – Shaun Verrall each*
>
> 5. Residuary/Residue of my Estate
>
> I give the residue of my estate to *Laurelle Irene Verrall*
>
> but if he/she/they predecease me then I give the residue of my estate to
>
> *House & 20 acres to Casey – Karen – Shaun Verrall.*
> *Rest of my estate to my brothers & sisters share equal after all debts.*"

[4] The 2002 will is on a printed form which folds out from a booklet entitled *The Prepare-Your-Own Legal Will Pack*.[3] The printing on the form provided an outline of the matters to be included in the will (name and address of testator, appointment of executor, dispositive provisions, funeral directions, body organ donations, etc) and provision for insertion of the date of execution, and then execution by the maker of the will and by witnesses. The form bore the signature of the testator. The plaintiff filled in the body of the will on behalf of the testator but the circumstances in which she did so and those in which she and a friend of the testator, Richard Charles Ludwig ("Mr Ludwig"), signed as witnesses to its execution are in contest. The defendant, who is one of the testator's brothers, contends that the 2002 will is invalid and seeks letters of administration of the 1986 will. There is also an issue as to the proper construction of the residuary clause in the 2002 will if that will is valid.

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1 Exhibit AS1 to Affidavit of Allan Stringer, sworn 6 June 2005 (Exhibit 11).

2 Exhibit 2

3 Nation Wise Products Pty Ltd (2001).

[5] There is a third will form headed *Australian Legal Will Kit* signed by the testator.[4] Apart from the insertion of the testator's name and address, the form was not filled in and it was not dated. Of course it is quite ineffectual.

Background

[6] The testator was born on 20 August 1950. He grew up on the family property "Woodstock". In about 1980 he and his brother Anthony bought the property from their father and operated it in partnership. Five or six years later the partnership was dissolved, each taking part of the land and agreeing upon a financial settlement. The testator took a parcel consisting of three lots totalling 120.825 hectares (a little under 300 acres). The parcel of land Anthony took was smaller: it consisted of two lots and included the farmhouse. Their father continued to live in the farmhouse with the testator, Anthony living on the Gold Coast with their mother.

[7] The testator was married briefly between 1985 and 1987.

[8] The plaintiff left school at the age of 14, having acquired limited literacy skills. She married in about 1980 and had three children. She and her husband separated in late 1989 and were divorced in 1991. After the separation she and her children went to live in a caravan park at Rathdowney and then in a house on a property adjoining "Woodstock". She formed friendships with the testator and his father, who helped look after her children while she did shift work at the local meatworks. For a time she was in receipt of a pension. The friendship between the testator and the plaintiff developed into a connubial relationship, and they began living together. Subsequently they bought a removal house which they relocated to part of the testator's land at "Woodstock" taking out a joint loan for this purpose. Both of them worked at the meatworks from time to time both before and after their relationship commenced.

[9] In 1995 the testator's father died. Neither he nor Anthony took any benefit under his father's will. There is some evidence that the testator was resentful about this, although there is other evidence that he and Anthony had acquired their father's property during his life on favourable terms.[5]

[10] The ensuing years were hard times for the testator and the plaintiff. Drought and the closure of the meatworks led to his working on an adjoining property and for Tony Ludwig (Mr Ludwig's son), and to her working early morning and afternoon shifts milking on a property some distance away.

[11] The relationship between the testator and the plaintiff was a stable, committed one. Her children grew up in the same household; by the time of the testator's death they were aged about 22, 20 and 18, and had all left home. The plaintiff described the testator as old fashioned in his relationship with the children; in her words, his approach was one of "Don't do as I do, do as I say."[6] He thought the children did not help on the farm to the extent they ought.

[12] After his father died in 1995 the testator spoke about making a new will from time to time. Several things seemed to arouse his wish to do so – that on the night his

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4 Exhibit 5

5 Transcript of the proceeding, p 155.

6 Transcript of the proceeding, p 17.

father died, he did not have the opportunity to collect his rosary beads, which were apparently taken by his siblings; that he was not left any share of that estate, although all of his siblings except Anthony benefited; and that he was nevertheless expected to contribute to the upkeep of his parents' grave.[7] He and the plaintiff could not afford to retain a solicitor, and the testator used to say to the plaintiff, "Scribble it on a piece of paper and I can sign it and it still stands. It's yours, you're my partner."[8]

[13] The testator and the plaintiff resolved to obtain some will kits. In about 2000 or 2001 the plaintiff was in the Rathdowney post office where she saw will kits for sale. They were on special – two for the price of one. They were in the form of booklets, with the will form at the back. She purchased two for about $30 and took them home. She and the testator kept their tax documents and other important papers in a cupboard in the bedroom. It had three drawers – one for the testator's papers, one for hers and the bottom drawer in which they placed all other papers. She placed the will kits in the drawer where they kept their tax and other important papers.[9]

[14] The Jackson family had a family plot at the Catholic Church at Hillview (also known as the Christmas Creek Catholic Church) where the testator's parents were buried. As I have said, the testator had two sisters (Gaynor Scott and Geraldine Stringer) and four brothers (Anthony, Leon, Patrick and Daniel). At least some of the siblings[10] contributed to costs associated with the grave. His sisters and brothers accepted his relationship with the plaintiff, although contact was infrequent except in the case of Anthony, the only one who lived in the immediate vicinity. The testator used cattle yards on Anthony's property; in return he paid the electricity bills for sheds and a coldroom used by Anthony.[11] Also, he and Anthony had a common interest in breeding and racing greyhounds, which he owned and Anthony trained. Geraldine Stringer and her husband Allan lived on the Gold Coast, where Mr Stringer worked in the hotel industry. Years earlier the plaintiff had lived with them for six months. The plaintiff said she got on well with Geraldine,[12] although Mrs Stringer's evidence was that while she was close to the testator, she was not close to the plaintiff.[13] The plaintiff said she got on well with Gaynor Scott, whom she says "spent the week" with them before the testator died.[14] Patrick was a property manager on the Gold Coast. He had previously lived in the United States for three years, returning in 1988; he and the plaintiff do not seem to have maintained any contact. The plaintiff said she saw a lot more of Leon, who lived with the testator and her for six months.[15] Daniel was a restaurant manager, who lived on the Gold Coast for 20 to 25 years before buying a cottage in Beaudesert in mid 2001.

[15] The testator was named as the father of Denise Frances Day's son Scott Andrew on a birth certificate held in the Registry of Births, Deaths & Marriages, and the

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7 Transcript of the proceeding, pp 20-23.
8 Transcript of the proceeding, p 23.
9 Transcript of the proceeding, pp 24-25.
10 The testator, Patrick and Gaynor: transcript of the proceeding, pp 48, 156.
11 Transcript of the proceeding, p 302.
12 Transcript of the proceeding, pp 83-84.
13 Transcript of the proceeding, 294-295.
14 Transcript of the proceeding, p 50.
15 Transcript of the proceeding, pp 83-84.

certificate bore his signature beside that of the mother in the space for "Signature of Informant".[16] There is no evidence that the testator maintained any contact with his son.

[16] In his counterclaim[17] the defendant alleged that the testator did not have any children, one of a number of allegations which the plaintiff did not admit because, after reasonable inquiries, she was uncertain as to their truth.[18] A rumour that the testator had an illegitimate child was mentioned during Daniel's evidence-in-chief.[19] It was then revealed that a person claiming to be the testator's son had attended his funeral and served notice of a claim on the estate upon the plaintiff's solicitors. Family members had been aware of the rumour for many years, but had not accepted its veracity. They knew the person's identity – Scotty Day. The trial was adjourned so that Mr Day could be given notice of the proceeding and the opportunity to be heard. Some five months later, the hearing resumed. Mr Day was represented by counsel. I accepted that there had been no attempt deliberately to mislead the Court or in any other way to engage in unprofessional conduct in not bringing this matter to the attention of the Court.[20] It was nevertheless a serious matter, and one that did not reflect well on those on either side of the record. As I shall explain, on one construction of the residuary clause in the 2002 will Mr Day would take a substantial interest under the intestacy rules; further he is eligible to apply for family provision under Part 4 of the *Succession Act 1981* (Qld). The parties joined in asking the Court to declare that Mr Day is a child of the deceased. He was given leave to intervene, and directions were given for the further conduct of the trial, which was again adjourned. In the event Mr Day elected to abide the order of the Court on the probate applications and on the construction of the residuary clause in the 2002 will.

[17] Mr Ludwig had known both the testator and the plaintiff for many years. He had worked with the testator at the meatworks, and they shared an interest in horse racing and dog racing. Mr Ludwig was a horse trainer. He used to place bets for the testator, and would call in on the testator unannounced to deliver his winnings and to exchange local gossip. The plaintiff did not always know about the gambling.[21]

[18] Daniel described the testator as someone who liked to do things properly – someone who had a good dentist and a good doctor. He said they shared the same financial adviser.[22] The 1986 will was drawn by Brisbane solicitors Chambers McNab Tully & Wilson – the same firm which acted for the testator in his divorce proceedings which were about the same time. Be that as it may, I am satisfied that in later years he and the plaintiff struggled financially, and he probably could not have afforded to retain a solicitor to draw a new will.

[19] The testator was particular about the use of pens. According to the plaintiff, "He just liked one that worked and worked properly."[23] Patrick had not observed him with a special pen that he carried around with him, although he recalled a pen 15 or 20

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16 Exhibit 17.
17 Filed 10 September 2004, para 6(b).
18 Reply and answer filed 28 September 2004, para 8.
19 Transcript of the proceeding, p 214.
20 Transcript of the proceeding, p 228.
21 Transcript of the proceeding, p 27.
22 Transcript of the proceeding, p 206.
23 Transcript of the proceeding, p 31.

years before.[24] Anthony remembered "quite a flash pen" that the testator had received as a 50th birthday present and which he used to sign dog papers.[25]

The defendant's allegations about the 2002 will

[20] The defendant denies that the 2002 will is that of the deceased and that the plaintiff is entitled to a grant of probate as executrix. In his counterclaim[26] he alleges –

> "7. At the time that the deceased signed the form of the 2002 will, clauses 1 to 5 of that document had not been completed.
>
> 8. In the circumstances alleged in paragraph 7 above, the deceased did not have knowledge of, or approve the contents of the will.
>
> 9. Further and alternatively, in respect of the 2002 will the following circumstances applied:
>
> (a) The principal beneficiary (under clause 5 of the 2002 will) (the plaintiff) is a witness to the will, there being only 2 witnesses.
>
> (b) The plaintiff (being principal beneficiary) prepared the will (in completing blank spaces).
>
> (c) The principal asset, the subject of the residuary estate was 'Woodstock' via Lamington in the State of Queensland, a rural property comprising 3 lots.
>
> (d) In about 1980, the deceased and brother Anthony Thomas Jackson had purchased the land the subject of the deceased's estate and adjoining land now owned by Anthony Jackson. That land was known then as 'Woodstock'. Subsequently in about 1986 the lands were subdivided, the deceased thereafter being registered proprietor of the land the subject of the estate, and Anthony Jackson thereafter being registered proprietor of adjoining land.
>
> (e) The persons referred to in clause 4 and clause 5 of the will – Casey, Karen and Shaun Verrall, were the children of the plaintiff.
>
> (f) clause 1 of the will has been completed with 3 different coloured writing instruments:
>
> i. 'Pen 1' – the words 'Lamington <u>via</u> Beaudesert';
>
> ii. 'Pen 2' – the words 'Qld' and '4285';

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24 Transcript of the proceeding, p 153.

25 Transcript of the proceeding, p 306.

26 Second further amended defence and counterclaim of the defendant filed by leave 18 July 2006.

iii. 'Pen 3' – all other print-script writings in clause 1.

(g) all other print script writings on the will, including signatures and print-script writings beside names and signatures of witnesses have been completed with Pen 3.

(h) the signature of the deceased (testator) has been written with a different (fourth colour) writing instrument.

(i) the date the will was signed has not been completed, save for the year '2002', of which the expression '02' is hand-writing (with Pen 3) (the remainder of that expression comprising part of the printed form).

(j) the deceased remained on good familial terms with his siblings until the date of death.

10. In the circumstances alleged in paragraphs 7, 8 and 9 above, it would not be righteous to grant probate of the 2002 will.

…

12. Further and alternatively:

(a) the plaintiff witnessed the 2002 will (together with one Richard Charles Ludwig);

(b) the plaintiff is named as beneficiary of the residuary estate pursuant to clause 5 thereof;

(c) the gift to the plaintiff is void by virtue of the operation of s 15(1) of the *Succession Act 1981*;

(d) on the proper construction of the 2002 will, in particular the gift-over in clause 5, the residuary estate thereunder devolves to Casey, Karen and Shaun Verrall and the siblings of the deceased in accordance with the provisions in that regard in clause 5."

[21] In her amended reply and answer the plaintiff denied the allegation that clauses 1 - 5 of the 2002 will had not been completed when the testator signed the document.[27] She pleaded –

"4. As to paragraph 7 of the Counterclaim the Plaintiff:

(a) Denies the allegations contained therein on the basis that those allegations are untrue;

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[27] Second further amended defence and counterclaim of the defendant filed by leave 18 July 2006, para 7.

(b) Pleads that prior to executing the 2002 will the testator gave specific instructions to the Plaintiff who completed the respective clauses in accordance with the testator's instructions;

(c) Pleads in the premises the clauses form part of the last will which expresses the testamentary intentions of the testator.

(d) Pleads that the will was duly executed by the testator in the presence of the Plaintiff and one other witness who signed as witnesses to the will."[28]

She denied that allegation that the testator did not have knowledge of or approve the contents of the will.[29] She pleaded –

"6. As to sub-paragraph 9(b) of the Counterclaim the Plaintiff completed the clauses in her own handwriting but pleads that all of the clauses were in accordance with the testator's specific instructions and otherwise denies the suggestion or any implication to the effect that the Plaintiff prepared the will of the testator."[30]

She admitted the allegations in sub-paras 9(f), (g), (h) and (i) of the further amended defence and counterclaim about the completion of the will form with 3 different coloured writing instruments.[31] She admitted that the gift to her was void.[32]

Execution of the 2002 will

[22] On Sunday 18 August 2002 Mr Ludwig called on the testator at "Woodstock". He arrived in the late morning to deliver $140 which were the proceeds of a bet on a horse he had placed for the testator the previous Wednesday. He was met by the plaintiff who happened to be outside, and went into the house where he had a conversation with the testator at the kitchen table. I accept Mr Ludwig's evidence that on other occasions they had talked about making wills in the context of the testator's father having been killed in a tractor accident and the testator saying that he had not made a new will since his marriage. On this day they could see Tony Ludwig coming down a hill on a tractor; the testator expressed concern for his safety and said he should be warned he could be killed. When Mr Ludwig observed that his son did not have a will, the testator remarked that he had still not made a new one.[33]

[23] According to the plaintiff and Mr Ludwig's oral testimony, when the plaintiff came into the room the testator asked her to fetch the will kits.[34] Mr Ludwig recalled the testator going with her into another room, and her coming back with the will kit.[35]

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28 Amended reply and answer filed 14 July 2006, para 4.
29 Amended reply and answer filed 14 July 2006, para 5.
30 Amended reply and answer filed 14 July 2006, para 6.
31 Amended reply and answer filed 14 July 2006, para 3(b).
32 Amended reply and answer filed 14 July 2006, para 3(b).
33 Transcript of the proceeding, pp 88-89.
34 Transcript of the proceeding, pp 28, 89.
35 Transcript of the proceeding, p 89.

When cross-examined about the version contained in a letter from the plaintiff's solicitors to the defendant's solicitors dated 22 March 2005[36] –

> "To the best of Mr Ludwig's recollection, the deceased got up and got the will kit from another room",

Mr Ludwig maintained –

> "Shane got up with Laurelle and went into another room but he asked Laurelle to get it and he went with her. Laurelle come back with the will kit, Shane didn't come back with it.
>
> ...
>
> ... it was virtually they both got up, I don't know who actually got it but Laurelle come back with it."[37]

His attention was also drawn to an affidavit sworn by him on 18 August 2003[38] in which he had referred to visiting to give the testator his winnings and had gone on –

> "2. … While I was there we started talking about wills and I said to the deceased he should get his done. He said he had a form there and asked Laurelle to get it for him.
>
> 3. The deceased told Laurelle what to write in his will and she filled it out for him.
>
> 4. The deceased then signed the will in the presence of both myself and Laurelle, both of us being present at the same time, and we then attested and signed the will in the presence of the deceased and of each other."

In neither the affidavit nor the version in the solicitors' letter was there mention of the conversation about wills being triggered by the sight of Mr Ludwig's son coming down the hill on a tractor, but Mr Ludwig stood by his oral evidence.[39]

[24] The plaintiff did not say that the testator went with her.

[25] The three of them sat around the kitchen table, and the testator told the plaintiff to fill in the will form.

[26] According to the plaintiff she got a pen from a cupboard near the stove (where she kept her cookbooks) and started to fill in the form.[40] She described the pen –

> "It's just a biro, just a blue, pale blue biro. They were just those cheap packs that you buy."[41]

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36 Exhibit 9.
37 Transcript of the proceeding, p 107. See also pp 129-130.
38 Exhibit 10.
39 Transcript of the proceeding, p 129.
40 Transcript of the proceeding, pp 29, 53.
41 Transcript of the proceeding, p 32.

Clause 1 (as filled in) read as follows –

> "1. This is the last Will of me, *SHANE MICHAEL JACKSON* of '*WOODSTOCK*' *LAMINGTON VIA BEAUDESERT* Postcode *4285* in the State/Territory of *QLD* which commences on this page and which concludes where the words 'This is the end of my Will' appear.
> By this Will, I revoke all previous Wills and testamentary acts and disposition."

She had commenced filling in this clause when the testator said he did not like the pen she was using[42] and so she went into the bedroom and got 3 or 4 different pens which she brought back and put on to the table.[43] She went on filling out clause 1. The plaintiff said that she completed the words "Shane Michael Jackson" and "Woodstock" with the first pen, and then changed pens.[44] She said that she could not recall how much she had written with the second pen or what word she was writing when it played up.[45] The testator had told her to "get some decent pens and throw the – those ones out the window".[46]

[27] According to Mr Ludwig's evidence in chief the plaintiff had started filling out the form when one biro played up; she lent behind her and got another pen from a cupboard near the stove. Mr Ludwig said he did not take any notice[47] and she proceeded to complete the form in the course of conversation between her and the testator. Later he said that the plaintiff got the first pen from a cupboard behind her and started writing with it.[48] After a while (and he did not know how far through the form), the pen had stopped writing and the testator had said, "Throw that fucking thing out the window … [a]nd get some decent biros," whereupon the plaintiff had left the room and returned with a couple of biros which she threw on the table saying "Here, use one of them." Mr Ludwig said, "she picked one up and started using it, then the will was filled out."[49]

[28] According to both the plaintiff and Mr Ludwig she the proceeded to fill out the provision for the appointment of executors and the dispositive provisions.[50] She read each provision out aloud and the testator told her what he wanted inserted.[51] Mr Ludwig said he was trying not to listen in – he did not want to be part of other people's business or to have any input into somebody else's will.[52]

[29] When they came to clause 3 (special gifts), the testator initially said he was not going to leave anything special to anybody, but she said he should leave something to her children –

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42 Transcript of the proceeding, pp 29, 32.
43 Transcript of the proceeding, pp 29, 32.
44 Transcript of the proceeding, pp 54-55.
45 Transcript of the proceeding, p 55.
46 Transcript of the proceeding, p 55.
47 Transcript of the proceeding, p 92.
48 Transcript of the proceeding, p 95.
49 Transcript of the proceeding, p 95.
50 Transcript of the proceeding, pp 31, 94.
51 Transcript of the proceeding, p 33.
52 Transcript of the proceeding, pp 94, 101.

> "And then that's when he come up with the 15 head of cattle [each]"[53]

According to Mr Ludwig, the plaintiff suggested the testator should leave something to her children; he said he did not want to leave them the property, which was hers, she suggested that he leave them some cattle, and they came to some agreement about how many head of cattle.[54]

[30] The plaintiff said she asked the testator to whom he wanted to leave his estate, including whether he wanted to split it. He replied that it should go to her alone observing that the family never helped on the family farm.[55] So she completed the first part of clause 5 by inserting her own name.

[31] According to the plaintiff she then asked the testator what he wanted to happen if anything happened to her –

> "… and then that's when he told me that he wanted the house and the 20 acres left to the children and the rest to go to the siblings, after the debts, so that's what I inserted.
>
> ... After the debts, after all the debts, the rest was supposed to go back to the family."[56]

She completed the second part of clause 5 accordingly. Mr Ludwig's version in cross-examination was as follows –

> "Do you remember if Shane and Laurelle had any discussion about whether anyone else apart from Laurelle's children ought to receive the benefit?-- Yes, there was, yes.
>
> What was that?-- Well, down the – going on, after the cattle was discussed, Laurelle said to Shane, 'What happens if we both get killed in a car accident?', and both died at the same time, 'you don't want the children to have the property', and he said to leave it to his brothers.
>
> Okay. So if both killed it was to be left to the brothers?-- Yes.
>
> Did he say the brothers?-- He didn't say any names, he just said the brothers."[57]

[32] Clause 3, for the appointment of a guardian for minor children, was filled in with the word 'nil'. There were some provisions not filled in – trust for minors (clause 6), funeral directions (clause 8) and body organ donations (clause 9). Nothing was said about these.[58]

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53 Transcript of the proceeding, pp 33-34.
54 Transcript of the proceeding, pp 94-95, 102.
55 Transcript of the proceeding, p 34.
56 Transcript of the proceeding, p 34.
57 Transcript of the proceeding, p 101.
58 Transcript of the proceeding, p 35.

[33] The plaintiff said the testator cast a quick glance over the document, signed it, and passed it to Mr Ludwig who signed it as a witness. Mr Ludwig passed it back to the testator, who passed it in turn to the plaintiff and she signed it as witness.[59] She could not say whether the testator had his reading glasses on.[60] According to Mr Ludwig the testator looked at the document for a couple of minutes,[61] but he was not sure whether he was wearing his reading glasses.[62] The testator signed it, handed it to Mr Ludwig and asked him to witness it, Mr Ludwig did so and handed it back to the plaintiff[63] or to the testator who handed it to the plaintiff[64] and she signed it.

[34] After the will had been signed and witnessed, Mr Ludwig observed that perhaps it should have been witnessed by a Justice of the Peace in order to be valid. There was mention of a neighbour's sister who was a JP.[65] This seems to have concerned the plaintiff.[66]

[35] The plaintiff was also concerned about her own signature being on the will. The testator reassured her –

> "We'll get it fixed up."[67]

[36] The defendant's case that when the testator signed the will clauses 1 - 5 had not been completed was put to the plaintiff in cross examination, and refuted by her.

> "Was it the case, Ms Verrall, that Shane had actually signed this document with his signature in blank on a particular day?--No.
>
> And later on when Mr – just wait till I finish the question, later on when Mr Ludwig came around, it was thought to be a convenient time to have you and Mr Ludwig witness that signature?-- No.
>
> Is it possible that you have difficulty remembering this, the event happening some three years ago now?—It's hard to recall everything, I've had a lot happen since Shane's death.
>
> All right. Well, is it possible that the true position was that the will was signed in blank before Shane's death and you filled out clauses 1 and 2 and 3 and 4 and 5?-- No.
>
> And had Mr Ludwig witness it?-- No.
>
> …

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59 Transcript of the proceeding, pp 35-36.
60 Transcript of the proceeding, p 74.
61 Transcript of the proceeding, p 95.
62 Transcript of the proceeding, p 132.
63 Transcript of the proceeding, p 95.
64 Transcript of the proceeding, p 96.
65 Transcript of the proceeding, pp 36, 96-97, 101.
66 Transcript of the proceeding, pp 65, 96-97.
67 Transcript of the proceeding, p 65.

> Ms Verrall, is it possible that the will was signed by Shane before his death and that later after his death, Mr Ludwig came around and it was thought to be a convenient time for him to witness the signature?-- No.
>
> …
>
> Let's go back a step please, Ms Verrall. Is it the case that Shane had put his signature on the will before his death but the will had not been filled out by anyone as far as clause 1, 2, 3, 4 or 5 is concerned?-- No.
>
> Well, is it the case that Shane again had put his signature on the will and clause 1, 2, 3, 4 and 5 had not been filled out and after his death Mr Ludwig called around-----?-- No.
>
> -----and it was thought then by you and perhaps Mr Ludwig to be a convenient time to witness the will?-- No.
>
> All right. Well, is it the case that you and Mr Ludwig witnessed Shane's will before his death but clauses 1, 2, 3, 4 and 5 had not been filled out and they were filled out after his death?-- No."[68]

[37] These allegations were not put to Mr Ludwig.

Forensic evidence

[38] The defendant caused the 2002 will to be examined by Gregory Keith Marheine, a forensic document examiner. Mr Marheine examined the document on 3 occasions, twice in the Supreme Court Registry in 2003 and then during the trial (on the day before he gave evidence).[69]

On the first two occasions he utilised portable equipment – a number of different magnifying lenses and a small Magitorch. On the third occasion he did not have the benefit of any equipment beyond the overhead lighting in the courtroom.[70] His initial instructions were to determine whether the testator's signature had been forged.[71] He concluded that it was a genuine signature.[72] The second time he examined the writings appearing on the document and made the following observations –

> "➢ Paragraph 1 of the Will has been completed with three (3) different coloured writing instruments:
>
> Pen 1: the words 'Lamington VIA Beaudesert'
>
> Pen 2: the words 'Qld 4285'

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68 Transcript of the proceeding, pp 60-62.
69 Transcript of the proceeding, pp 173-174.
70 Transcript of the proceeding, pp 174-175.
71 Transcript of the proceeding, p 172.
72 Report by Gregory K Marheine, Exhibit GKM3 to Exhibit 12, p 7.

Pen 3: all other writings, printscript writings, and signatures of Witnesses, including the year '02' appearing on page 2.

- The signature of the Testator on Page 2 of the Will has been written with a fourth coloured ink pen

- The date the Will was signed is not complete (written as '02')

- The printscript writings appearing on Page 1 and Page 2 of the Will, except the printscript writings beside the signature Richard Charles LUDWIG, have been written by the one and same writer. In the absence of any proven handwriting of individuals I am unable to identify the author of such writings

- The date (02) written beside the Testators signature on page 2 is insufficient in handwriting characteristics to enable its author to be identified."[73]

His observations about the use of different coloured writing instruments were repeated in the second further amended defence and counterclaim[74] and admitted by the plaintiff in the amended reply and answer.[75] In his oral evidence he conceded that he really did not know how many pens had been used; he said –

> "…When I say four pens used what I'm saying is there's four different coloured pens used. I can't say, for example, all the writings that I attribute to pen number 3 were done with that one same pen. They could have been a Bic ballpoint – a Bic fine point out of a box. Any one of those pens could have created that same ink style for pen number 3.
>
> I see. So it could have been more than – pen 3, for example, or what's attributed to pen 3 could have been done with more than one pen of the same type and the same ink?- - Yes.
>
> So you really don't know how many pens were used? - - No."[76]

On the third occasion he examined the document to determine if there was evidence of defects in the writing instruments or of their running out of ink. He reported –

> "I have also examined the nature of the writing instruments used in the preparation of the Will, that is four (4) different bluish ink coloured ball point pens. I make the observation that there does not appear to be any evidence in any of the writing instruments used being defective or failing in their distribution of the ink in the writing process. It is a general feature of defective ball point pen writings to observe splintered ink lines, uneven distribution of ink, gouging of

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73 Report by Gregory K Marheine, Exhibit GKM3 to Exhibit 12, pp 7-8.
74 filed by leave 18 July 2006, para 9(f)-(i).
75 filed 14 July 2006, para 3(b).
76 Transcript of the proceeding, p 181.

> the paper, track marks (striations) where the ball leaves a visible impression beside an ink line, (in effect a split image…one ink and one impression, gooping (build up of ink on certain stroke dynamics)."[77]

[39] In cross-examination Mr Marheine agreed that different pen pressure can create a different distribution of ink[78] and that every pen has its own characteristics when used on a piece of paper and when used by a different individual.[79] People hold pens differently. There can be variations depending on the paper used and whether the pen has been sitting idle for some time.[80] These were not the sort of things he had had in mind when considering whether there was evidence of defective pens[81] but they could result in lighter ink distributions.[82]

[40] Mr Marheine agreed that in the word "Woodstock" the ink distribution in the letters S and T was lighter than in the other letters[83] and ultimately that that demonstrated that the writer had experienced difficulty with the pen.[84]

[41] The postcode "4285" and the state "QLD" were written with the same pen. Mr Marheine agreed that the "QLD" seemed to be a lightly different colour from the "4285"[85] but said that on examination with a lens in proper lighting, he had concluded they had been written with the same pen.[86] From the technical perspective, it did not seem to be a case of the pen running out of ink[87] but he could not exclude the possibility that the writer had thought that was what was happening.[88]

After the testator's death

[42] After the testator died, the plaintiff who had gone to look for him found his body on the mountain with the bike on top of it. His brother Anthony informed his family. The plaintiff waited back at the house for the ambulance and the police and took them in turn to the body.[89] When she finally got back to the house Anthony and Daniel were there, and the Stringers and Leon arrived from the Gold Coast later in the evening. The plaintiff's children and various neighbours were there. Mr and Mrs Ludwig arrived. When the testator's body was brought down to the road, Mr Ludwig went with the plaintiff who wanted to see it before it was taken away. They were gone from the house for about half an hour to an hour.[90]

[43] There is conflict between the evidence of Mrs Ludwig on the one hand and that of the family on the other as to whether family members searched for the testator's will while the plaintiff and Mr Ludwig were gone. Mrs Ludwig had been to the house on

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77 Report by Gregory K Marheine, Exhibit GKM3 to Exhibit 12, p 8.
78 Transcript of the proceeding , p 177.
79 Transcript of the proceeding, pp 177-178.
80 Transcript of the proceeding, p 179.
81 Transcript of the proceeding, pp 177-178.
82 Transcript of the proceeding, p 177.
83 Transcript of the proceeding, pp 175-177.
84 Transcript of the proceeding, p 179.
85 Transcript of the proceeding, p 179.
86 Transcript of the proceeding , pp 179-180.
87 Transcript of the proceeding, pp 180-181.
88 Transcript of the proceeding, p 182.
89 Transcript of the proceeding, pp 38-39.
90 Transcript of the proceeding, pp 97-98.

social occasions many times before, but Anthony was the only one of the testator's siblings she knew.[91] When the Ludwigs arrived, there were numerous people in the house, whom Mrs Ludwig assumed to be relatives of the testator as well as neighbours. The plaintiff's daughters made Mrs Ludwig a cup of tea and they sat around the table talking. She was not introduced to the siblings, but she knew who they were.[92] She recalled someone, she thought Daniel, asked "whether he had one"[93] and then the siblings all walked outside, leaving her in the room by herself. She got up, went to the kitchen door and looked into the lounge room, where she saw Daniel and the Stringers going through drawers in a cupboard and heard one of them say "Would it be in here?" Mrs Ludwig said she put her cup back on the table and went out to the front verandah where everybody else was.[94] When her husband returned, she spoke to him and went and waited in their car. He went into the house and returned with a brown envelope.[95]

[44] Mr Ludwig said that after his wife spoke to him on his return to the house, he spoke with the plaintiff who gave him a brown envelope. He took it home where he kept it (without opening it) until the plaintiff came and collected it a week or so later.[96]

[45] The plaintiff said that when she returned to the house with Mr Ludwig, she had a conversation with Mr and Mrs Ludwig and then went into the room, put the 2002 will in a brown envelope and handed it to Mr Ludwig. He took it home with him and kept it until she collected it and sent it by post to her solicitors.[97]

[46] Allan Stringer was named as executor in the 1986 will, and the Stringers had a copy of it in the writing desk in their house.[98] They did not know of any later will.[99] Daniel knew about the 1986 will and that he and his siblings were the beneficiaries under it, but he did not know whether the testator had made a later will.[100] The Stringers and Daniel all vigorously denied searching for a will on the night of the testator's death.[101]

Alleged admissions by the plaintiff

[47] The testator died on Friday 6 June. Monday 9 June was a public holiday. On Tuesday 10 June the plaintiff, Anthony and Daniel went to see the parish priest about the funeral. They travelled together, Anthony driving, the plaintiff in the front passenger seat and Daniel in the back seat.[102]

[48] According to Daniel, totally out of the blue[103] the plaintiff said –

> "Shane's left everything to youse"

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91 Transcript of the proceeding, p 135.
92 Transcript of the proceeding, p 139.
93 Transcript of the proceeding, pp 136, 139.
94 Transcript of the proceeding, pp 136-137.
95 Transcript of the proceeding, pp 137-138.
96 Transcript of the proceeding, p 98.
97 Transcript of the proceeding, pp 81-82.
98 Transcript of the proceeding, pp 203 (Allan Stringer), 297 (Geraldine Stringer).
99 Transcript of the proceeding, pp 202 (Allan Stringer), 291 (Geraldine Stringer).
100 Transcript of the proceeding, p 277.
101 Transcript of the proceeding, pp 195, 201 (Allan Stringer), 211, 269, 272 (Daniel Jackson), 294, 297 (Geraldine Stringer).
102 Transcript of the proceeding, pp 74, 212.
103 Transcript of the proceeding, p 271.

to which he responded –

> "Oh, what, he's left it to the boys"

and she said –

> "No, your sisters as well."[104]

Daniel said he then asked who was the executor of the will and the plaintiff replied that it was Allan Stringer.[105]

[49] When this was put to the plaintiff in cross-examination, she said that they had asked about the testator's will, and she had replied that under the 1986 will everything was left to the siblings. She agreed that she had been asked whether she meant everything went to the brothers, and she had replied that the sisters would also benefit out of the 1986 will. She agreed that she had mentioned that Allan Stringer was named as executor in the will. Then she said that the discussion about the 1986 will had taken place about a week later when they were on their way to view the testator's body.[106]

[50] Anthony's version of the conversation on the way to see the priest was that the plaintiff said –

> "There is two wills and I am going to put the both of them in."[107]

He said Daniel asked about the 2 wills and to whom the testator had left his estate. The plaintiff replied –

> "It's all left to youse, the brothers and sisters."

He thought he asked who was the executor. The plaintiff mentioned 2 wills –

> "Yes, the other one is a Will Kit and I'm putting it in too and it's left to me."

She said she had both wills in her handbag.[108]

[51] About 2 or 3 weeks after the testator's death Geraldine rang the plaintiff and inquired how she was getting along.[109]

[52] According to Geraldine, she asked whether there was anything her husband Allan Stringer needed to attend to as executor.[110] The plaintiff responded –

> "He's friggin' well left it to all of youse. ... I will fight you for it"

to which Geraldine responded –

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104 Transcript of the proceeding, p 212. See also p 271.
105 Transcript of the proceeding, p 212.
106 Transcript of the proceeding, pp 74-76.
107 Transcript of the proceeding, pp 302, 313.
108 Transcript of the proceeding, pp 313-314.
109 Transcript of the proceeding, pp 76, 292.
110 Transcript of the proceeding, p 292.

> "Well, there's no need to fight; all you have to do is communicate with us."[111]

According to Geraldine she called the plaintiff again about a week later to see what was happening and the plaintiff said –

> "Oh, there's another will and I'm the executor of the other will."

Geraldine asked who was the solicitor "that the will was with", and the plaintiff gave her the name and telephone number of her solicitor.[112]

[53] In cross-examination the plaintiff said that in the first conversation Geraldine said she was coming up to sort out the family farm; when asked if Geraldine had asked whether there was anything for Allan to do, the plaintiff said she really did not know whether that was said as she was under so much pressure.[113] She said she told Geraldine that there was another will and explained that it was not witnessed by a JP, and that Geraldine had queried how anyone could have signed it. She was not sure whether there was more than one conversation. She denied saying "He's friggin' well left it to all of youse and I'm going to fight you for it." She denied that Geraldine said there need not be a fight, that all the parties needed to do was to communicate. She denied that Geraldine asked who was the executor of the other will and that she replied she was.[114]

[54] In the 6 months or so following the testator's death the plaintiff and Daniel maintained contact by telephone and through face to face meetings, sometimes at Anthony's and sometimes at Daniel's cottage in Beaudesert.[115] In cross-examination it was put to the plaintiff that in one of the telephone conversations Daniel had suggested to her that she had written the 2002 will after the testator's death, that she had replied, "What would you have done, Danny?" and that Daniel had then accused her of being greedy. She agreed that Daniel had made an accusation along the line that she had written the 2002 will after the testator's death, but denied that she had responded in the terms suggested. She agreed that Daniel had accused her of being greedy.[116]

[55] Daniel recalled a particular conversation in July 2003, which he initially described in these terms –

> "She was quite – that was the beginning of her getting quite nasty with me, and she made a threat that Shane was meant to have an illegitimate child, and she was going to go in with him and go against the family."[117]

[56] Until then there had been no mention in the trial of the deceased having any children, and it was adjourned while the issue was investigated.[118] When Daniel's evidence resumed some months later, he was questioned further about the

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111 Transcript of the proceeding, p 292.
112 Transcript of the proceeding, pp 292-293.
113 Transcript of the proceeding, pp 76-77.
114 Transcript of the proceeding, p 77.
115 Transcript of the proceeding, pp 76, 213.
116 Transcript of the proceeding, p 76.
117 Transcript of the proceeding, pp 213-214.
118 See paras 15-16 above.

conversation in July 2003. He said he had been most upset by the allegation, which had distressed his late mother and that the plaintiff had said she was grasping at straws.[119] He said he then said to the plaintiff –

> "Laurelle, you wrote the will after Shane died and you know that I know that"

to which she responded –

> "What else could I do?"[120]

Then he hung up. After that conversation "it got really nasty", and he had little to do with the plaintiff.[121]

[57] In cross-examination Daniel said that he had made the allegation that the plaintiff had written the will after the testator's death after his brother Patrick had shown him a copy of the 2002 will which he had obtained from the Court. He said that as soon as he saw it he "could see clearly that it wasn't right."[122] He did not recall whether Patrick told him the will had been examined by a document examiner. "Blind Freddie could see it was forged."[123]

[58] Patrick knew about the 1986 will: the testator had given him a copy of it on his return from the United States.[124] He engaged solicitors and filed a caveat on 5 August 2003[125] before the plaintiff filed an application for probate of the 2002 will[126] because Daniel had told him the plaintiff was going to present 2 wills – the 1986 will and what he called the will kit – and he had tried unsuccessfully to obtain a copy of the second will from the plaintiff's solicitors. After the application for probate of the 2002 will was filed, he inspected it in the Supreme Court Registry and suspected that the signature on it was not that of the testator.[127] A notice in support of the caveat was filed on 9 September 2003.[128] In it Patrick claimed an interest in the estate as a beneficiary pursuant to the 1986 will which was described as "the true will of the deceased", alternatively an interest in the residuary estate pursuant to the 2002 will. He required the 2002 will to be proved in solemn form on the ground that it did not bear the signature of the deceased and was therefore not his true will, alternatively that there were suspicious circumstances surrounding the making of the will. Mr Marheine was engaged about that time, and in his first report, which was dated 24 September 2003, he concluded that the signature on the will was genuinely that of the testator. Patrick agreed that from September 2003 he had no reason to doubt that the signature was that of the testator.[129] Nevertheless when the caveat was renewed in February 2004, the same grounds were relied on to support it.[130] The proceeding for probate in solemn form[131] was commenced on 13

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119 Transcript of the proceeding, p 266.
120 Transcript of the proceeding, pp 266-267.
121 Transcript of the proceeding, p 267.
122 Transcript of the proceeding, p 280.
123 Transcript of the proceeding, p 283.
124 Transcript of the proceeding, p 160.
125 Exhibit 13; Transcript of the proceeding, pp 159-160.
126 Application for probate filed 19 August 2003.
127 Transcript of the proceeding, pp 160-161.
128 Exhibit 14.
129 Transcript of the proceeding, pp 162-163.
130 Supreme Court file BS 1034/04 Notice in Support of Caveat filed 2 February 2004.

August 2004, and in his defence and counterclaim[132] filed on 10 September 2004 Patrick said he no longer pursued the allegation that the signature was not that of the testator.

[59] The objective evidence of when Patrick lodged a caveat and when he first saw the 2002 will suggests that Daniel was mistaken about the date of the conversation in which he accused the plaintiff of writing the will after the testator's death.

[60] Daniel gave evidence, which was not put to the plaintiff, of her admitting having written the will after the testator's death on several other occasions – once in her back garden after a "blessing of the graves" ceremony performed by the local priest,[133] once during a telephone conversation when Daniel had painters in the house[134] and on one or two other occasions.[135] He said she always said there were 2 wills, and sometimes said they were in her handbag.[136]

[61] If Daniel's recollection of the conversation when the painters were present is correct, it probably occurred after Mr Marheine's first report because when he accused her of writing the will after the testator's death, she referred to the signature, and the conversation proceeded –

> Daniel: "I don't care about the signature. The signature may have been on there, it could have been signed blank, but you filled that out."
>
> Plaintiff: "Well, I did. What would you have done? I was desperate."[137]

On Daniel's evidence this was in the context of an exchange about the possibility of settling the matter, the plaintiff being nasty and vindictive and wanting to drain the estate.[138]

[62] Anthony gave evidence of being given a copy of the 2002 will by Patrick. Two matters aroused his suspicion about its validity – that the plaintiff was one of the attesting witnesses and that the plaintiff's children were named in it as beneficiaries. He knew that an attesting witness could not take a benefit under a will, and did not think that the testator would have allowed the plaintiff to witness the will.[139] Only a few days before his death the testator had spoken to him about the plaintiff's children, particularly about something Shaun had done. The testator had said that he had tried to help them over the years, but they would not help him. Anthony said that he had observed, "Oh, well, they'll get it when you die," but the testator had been adamant that he had left them nothing.[140]

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131 BS 6974/04.
132 para 2.
133 Transcript of the proceeding, pp 283-285.
134 Transcript of the proceeding, pp 285-286.
135 Transcript of the proceeding, p 288.
136 Transcript of the proceeding, p 286.
137 Transcript of the proceeding, p 287.
138 Transcript of the proceeding, pp 286-287.
139 Transcript of the proceeding, p 303.
140 Transcript of the proceeding, pp 303, 307-308.

[63] Anthony said that after he received a copy of the will, he was speaking with the plaintiff, when he said that they should have been able to settle the dispute before engaging solicitors and barristers, and that he put to her, "You wrote this out after he died." She did not respond.[141]

[64] This was not put to the plaintiff.

Resolution of issues of credit

[65] The plaintiff was nervous and ill at ease in the courtroom; it was obviously not a milieu with which she was familiar or comfortable. She was understandably deeply concerned emotionally and financially with the outcome of the litigation in which she was pitted against the combined opposition of her late partner's siblings. She was an unsophisticated woman of limited education, and with no apparent experience of business or legal documents (apart from her own divorce). She knew that the 1986 will had been drawn by solicitors, and she had a niggling worry (prompted originally by Mr Ludwig) that the 2002 will might not be valid because it had not been witnessed by a JP. Overall she impressed me as an honest woman who did her best to recall the details surrounding the execution of the 2002 will and conversations after the testator's death.

[66] Mr Ludwig candidly admitted his friendship with both the testator and the plaintiff. He had nothing to gain whatever the outcome of the litigation. He gave his evidence in a forthright manner. While it differed from that of the plaintiff in some respects, given the passage of time and the different parts they said they played on the day the will was allegedly made, exact correspondence in their accounts would have been surprising.

[67] There is general consistency between the version of the plaintiff and that of Mr Ludwig as to the completion of the will form and its execution. They gave similar accounts of Mr Ludwig's being at Woodstock to deliver the winnings from a bet he had placed for the testator, and of he and the testator sitting round the kitchen table chatting and having a cup of tea when the testator called on the plaintiff to fetch the will kit. I do not think anything turns on the slight differences in their accounts as to whether the testator followed her into the bedroom. They gave similar, although not precisely identical, accounts of her commencing to fill in the form and having a problem with the pen – of the testator not liking the pen she was using and telling her to throw it out of the window and get some decent pens, and of her going and getting several pens. They gave similar accounts of the plaintiff asking the testator how he wanted the various provisions completed. Where they differed significantly was in their recollections of the testator's instructions for the residuary disposition if the plaintiff predeceased him. The plaintiff's version that the house and 20 acres should go to her three children and the rest (after debts) to the testator's brothers and sisters in equal shares was consistent with what was inserted in clause 5. Mr Ludwig's version that it should go to the testator's brothers was consistent with the testator's expressed disdain for the children. But I am satisfied that Mr Ludwig was not listening intently to the instructions the testator was giving the plaintiff. As he conceded, he did not want to be involved in other people's business. Further, on both versions, the testator had in any event agreed to leave the children a few head of cattle each. And there is no reason to think that the testator would have wanted to

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141 Transcript of the proceeding, pp 305, 307, 312.

benefit his brothers to the exclusion of his sisters. In the circumstances, the plaintiff's version seems the more likely.

[68] The results of Mr Marheine's forensic examination of the will were consistent with the evidence of the plaintiff and Mr Ludwig that a number of pens were used, but apart from identifying 4 differently coloured inks, Mr Marheine could not say how many pens had been used. While he considered there was not evidence of one or more of the pens being defective in the technical sense, he agreed that there was evidence of differing ink distributions – something which I am persuaded may have caused a lay person to be dissatisfied with the performance of the pens. The testator was, I find, particular about the pens he used.

[69] On at least one other occasion – which has not been pinpointed – the testator signed a blank will form.[142] As I have set out in paragraph 35, the plaintiff denied –

(i) that the testator signed the 2002 will in blank;

(ii) that she filled in clauses 1, 2, 3, 4, and 5 after the testator's death, and that she and Mr Ludwig witnessed it after his death;

(iii) that she and Mr Ludwig witnessed the will, which was blank, before the testator's death and that those clauses were filled in after his death.[143]

[70] I would have expected these matters to be put to Mr Ludwig in any substantial attack on his credibility, but they were not. The cross-examination of him went no further than testing his recall of details of what occurred on the day in August 2002 when the will is alleged to have been executed.

[71] I turn to the evidence of what occurred in the house at Woodstock on the night of the testator's death.

[72] Two years passed between the testator's death and the commencement of the trial. Over that time the relationship between the plaintiff on the one hand and various members of the testator's family on the other deteriorated. It soon became one of mutual distrust and suspicion, and was probably exacerbated by the pending litigation.

[73] In assessing the conflicting evidence about whether the plaintiff made admissions to members of the testator's family that she had completed the will form after his death, it is necessary to consider the credibility of Geraldine and Daniel. The evidence of what occurred at the house when the family and others gathered round after the testator's death is relevant to their credibility.

[74] I do not think that the Stringers and Daniel made false denials of searching for a will that night. As I shall explain, I think that there is reason to doubt some of Daniel's evidence about conversations he had with the plaintiff in the months after the testator's death. Geraldine and Allan Stringer gave the impression of being financially better off and of having a greater measure of business sophistication and experience than the plaintiff, but I have found no reason to reject the evidence of either of them in any respect.

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142 Exhibit 5.

143 Transcript of the proceeding. pp 60-62.

[75] Mrs Ludwig was a timid witness, but not a deliberately dishonest one. There were a lot of people in the house that night, probably all of them, to differing degrees, shocked and distressed by the testator's death. Anthony was the only one of the testator's family Mrs Ludwig knew, although she thought she could identify others. She did not have any conversation with the Stringers or Daniel. She may have been mistaken in thinking that she heard Daniel ask "whether he had one"[144] and that she saw the Stringers and Daniel going through drawers and one of them saying, "Would it be in here?" [145] Even if she was not mistaken, the evidence is equivocal: there was no express mention of a will, and they could have been referring to any incidental item (eg a pen, a piece of cutlery, etc).

[76] In short, I am not satisfied that the Stringers and Daniel searched for the testator's will on the night he died.

[77] I find that on the night the testator died the plaintiff gave the 2002 will to Mr Ludwig for safekeeping, and that she later retrieved it from him and posted it to her solicitors.

[78] Daniel's evidence was marked by excitability and antipathy towards the plaintiff. It was his assertion that she "made a threat" that the testator had an illegitimate son which led to the adjournment of the trial and the joinder of Mr Day as a party. When his evidence resumed some months later, the dynamics of the litigation had altered. There was a palpably rising stridency in his presentation and he seemed determined to paint the plaintiff as dishonest and scheming.

[79] Anthony was an honest witness, who recounted events to the best of his recollection. I accept his evidence that a few days before he died the testator spoke disparagingly of the plaintiff's children, and said they would not receive anything when he died. This was said in the context of Shaun (one of the children) having displeased the testator, and while it must be weighed with the other evidence about the making of the 2002 will, I do not regard it as having great significance. Anthony may well have accused the plaintiff of filling out the will form after the testator died, but that was in the course of a conversation in which he was expressing his displeasure that the matter had not been resolved without recourse to lawyers, and importantly he did not allege that the plaintiff made any admission that she had done so.

[80] Patrick is the defendant in this proceeding. He seeks to prove the 1986 will, as Allan Stringer has renounced any right to be the executor. He was suspicious of the 2002 will's validity from the time he first heard about it, and set about obtaining a copy and having it examined, more than once, by Mr Marheine. His suspicions and the results of the forensic examinations he arranged were shared with at least some of his siblings, including Daniel. There was nothing inherently wrong in the way he acted, and as he was not a participant in any of the disputed conversations, his credibility is not in issue.

[81] I find that in the conversation between the plaintiff, Daniel and Anthony on their way to see the parish priest about the funeral the plaintiff said that the testator had left his estate to his brothers and sisters and appointed Allan Stringer as his executor. She may have mentioned that there was a second will under which she

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144 Transcript of the proceeding, pp 136, 139.

145 Transcript of the proceeding, pp 136-137.

took, but I am unable to be satisfied of this on the balance of probabilities, given the inconsistency between the evidence of the plaintiff and Daniel on the one hand and Anthony on the other.

[82] I find that in the first telephone conversation with Geraldine the plaintiff said that the testator had left his estate to his brothers and sisters, that there was a second will by which she was appointed executor, that the second will had not been witnessed by a JP, and that she was going to "fight [the brothers and sisters] for it."

[83] I find that the plaintiff's relationship with Daniel deteriorated in the months following the testator's death in parallel with her revelation that there was a second will and the investigations undertaken by Patrick. Daniel was mistaken in fixing the date of his first contentious telephone conversation with the plaintiff as July 2003. Given his evidence that it was after Patrick had shown him a copy of the 2002 will, it could not have occurred before mid-August 2003. I find that the exchange became heated and that he accused her of writing the will after the testator's death and of being greedy, but I am not satisfied on the balance of probabilities that she replied, "What would you have done, Danny?" or "What else could I do?"

[84] Daniel's evidence of subsequent conversations with the plaintiff in which she allegedly made admissions of writing the will after the testator's death was not put to her. For this reason, coupled with the reservations I have already expressed about his evidence generally, I reject Daniel's evidence of subsequent admissions by the plaintiff that she wrote the will after the testator's death.

Conclusion on the validity of the 2002 will

[85] Courts have consistently stressed the need for clear and decisive proof of a will executed in suspicious circumstances.[146] I am satisfied that the plaintiff has discharged the onus of proving the 2002 will to that high standard.

[86] I find –

(a) that the 2002 will was written by the completion of the printed form on or about 18 August 2002;

(b) that the form was filled in by the plaintiff in accordance with instructions given to her by the testator and that the testator knew and approved of its contents;

(c) that the form was filled in before the testator signed it;

(d) that the testator signed the will in the presence of the plaintiff and Mr Ludwig on that day, and that they thereupon signed it as attesting witnesses.

Residuary Clause

[87] The plaintiff has admitted that the gift to her in clause 5 of the 2002 will is void, because she was an attesting witness.[147] That concession was rightly made in light

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146 *Nock v Austin* (1918) 25 CLR 519 at 528; *Bool v Bool* [1941] St R Qd 26 at 39; *Vernon v Watson; Re Estate of Quigley (Dec'd)* [2002] NSWSC 600.

147 Amended reply and answer filed 14 July 2006, para 3.

of s 15 of the *Succession Act 1981* (Qld), which provided at the time of the testator's death[148] –

> "**15 Gifts to attesting witnesses to be void**
>
> **(1)** Where any disposition of property (other than a charge or direction for the payment of any debt or for the payment of proper remuneration to any person, whether executor, administrator, solicitor or conveyancer, for acting in or about the administration of the estate of the testator) is, by will, made in favour of a person who attested the signing of the will, or the spouse of such person, to be held by that person or, as the case may be, that spouse beneficially, the disposition is null and void to the extent that it entitles that person, the spouse of that person or another person claiming under that person or that spouse to take property under it.
>
> **(2)** The attestation of a will by a person to whom or to whose spouse there is made any disposition as aforesaid shall be disregarded if the will is duly executed without the person's attestation and without that of any other such person, whether or not the attestation was made upon the execution of a will before the passing of this Act."

[88] Clause 5 of the 2002 will provided for a gift over to the plaintiff's children and the testator's siblings if the plaintiff predeceased the testator. That contingency did not occur.

[89] Counsel for the defendant submitted that the gift over to the plaintiff's children and the testator's siblings took effect in the circumstances of this case by the application of the rule in *Jones v Westcomb*.[149]

[90] As Cooper J observed in *In the Will of Rowney*[150] –

> "The general principle is that where there is a gift over on certain alternative contingencies, it will not take effect unless one or other of those exact contingencies happens.[151]"

[91] In *Jones v Westcomb* a man left a benefit to his wife for life and after her death to the child with whom she was then pregnant, but if the child died before attaining the age of 21, one-third of the benefit was to go to the wife. Although the wife was not in fact pregnant at the relevant time, and so the contingency expressed in the will (the child with whom she was pregnant dying before reaching 21) never happened, the gift to her of one-third of the benefit took effect. The rule was explained by Sir Wilfrid Greene MR in *Re Fox's Estate*[152] in this way –

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148 6 June 2003. The relevant reprint of the legislation is 5C (revised edition). Note that in the current reprint of the *Succession Act* 1981 (Qld) (6C, effective 1 April 2006) these provisions have been redrafted: see s 11.

149 (1711) Prec Ch 316; 24 ER 149

150 Unreported, QSC, Cooper J, 19 March 1992.

151 *In Re Sinclair Deceased; Lloyds Bank PLC v Imperial Cancer Research Fund* [1985] Ch 446 at 455; *In Re Koeppler Will Trusts; Barclays Bank Trust Co PLC v Slack* [1984] 1 Ch 243 at 265; reversed on appeal on another ground [1986] Ch 423; *In Re Bailey; Barrett v Hyder* [1951] Ch 407 at 412)

152 *Re Fox's Estate; Dawes v Druitt; Phoenix Assurance Co Ltd v Fox* [1937] 4 All ER 664 at 666.

> "Where a testator has provided for the determination of an estate in any of two or more events, and has then given a gift over expressly to take place in one only of those events, the court will, in the absence of any indication to the contrary, imply, by way of necessary implication, an intention on the part of the testator that the gift over shall take effect, nor merely in the specified event, but on the happening of any of the events which were to determine the previous estate."

In the same case Romer LJ said –

> "The principle is applicable, therefore, only in those cases where the court, looking at all the relevant circumstances of the case, including, of course, the will itself, comes to the conclusion that the testator must *a fortiori* have intended the disposition over to take effect in the event which has actually happened, although it is not the event which he has specified in his will as the one in which the gift over is to take effect."[153]

This statement was cited with approval by the Full Court of the Supreme Court of Queensland in *Re Stacey, Deceased*.[154]

[92] Counsel for the plaintiff submitted that the rule in *Jones v Westcomb* is inapplicable in the present case, with the result that the residuary estate is to be distributed in accordance with the intestacy rules. If this is so, it will be shared by the plaintiff[155] and the intervener (Scott Andrew Day) in accordance with the provisions of s 35 and schedule 2 of the *Succession Act 1981* (Qld) in force at the date of the testator's death[156] – that is, the plaintiff will take $150,000 and the household chattels, and the balance of the residuary estate will be divided equally between her and the intervener.

[93] In *Rowney* Cooper J adopted the approach of Wanstall CJ in *Re Keid*[157] and looked for "the contingency against which the testatrix really had to guard". His Honour said –

> "If it can be said that the testatrix must *a fortiori* have intended the disposition to take effect in the event which actually happened (although it is not the event which she specified in the will) because the event which happened fell within the real contingency guarded against, then the rule in *Jones v Westcomb* may be applied. In this way it may be said that the application of the rule is not inconsistent with the express terms of the will because the real contingency guarded against, when ascertained, includes both the express and the implied event."

Later he said –

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153 [1937] 4 All ER 664 at 669.

154 *Re Stacey, Deceased; Stacey v Forsyth* [1949] St R Qd 244 at 247. (Note that the passage was slightly misquoted, without any substantive changes.)

155 The plaintiff was a "spouse" within the meaning of s 5AA of the *Succession Act 1981* (Qld).

156 See *Succession Act 1981* (Qld) Reprint No 5C (revised edition).

157 [1980] Qd R 610 at 614.

> "The rule in *Jones v Westcomb* is merely a rule of construction which, where it has an operation, operates as an exception to the general principle which I have set out above. Each case turns on the terms used in the will…"

[94] The meaning of the will is dependent upon the intention of the testator, and the primary evidence of that intention is to be found in the will itself.[158] Declarations of intention (for example, a statement by the testator when the will was made that he wanted to benefit a particular person in a particular circumstance or that he did not want someone to benefit in a particular circumstance) are inadmissible except in a case of latent ambiguity (or equivocation as it is sometimes called).[159] This is not such a case.

[95] In *Rowney* clause 4 of the testatrix's will was in these terms –

> "4. *IF MY HUSBAND BE NOT PROVED TO HAVE SURVIVED ME FOR ONE CALENDAR MONTH* then I devise and bequeath all my real and personal estate unto and to the use of my trustees *UPON TRUST* to pay or transfer the same to my daughter absolutely *PROVIDED THAT* if she predeceases me whether before or after the date of my Will leaving a child or children who shall survive me then the last mentioned child or children shall take and if more than one equally the share which his her or their mother would have taken under this my Will had she survived me."

The deceased's daughter was an attesting witness to the will, and like the present plaintiff disentitled from taking the benefit left to her by force of s 15 of the *Succession Act 1981* (Qld). Cooper J was satisfied that the real contingency guarded against was the failure of the gift to the daughter which would leave the testatrix intestate and deny to the grandchildren the provision which she intended they take in the event that the gift did not pass to the daughter. His Honour said –

> "So much follows, in my view, from the words 'the share which his or her mother would have taken under this will had she survived me'. It is highly unlikely that, in the event her daughter predeceased her, it was the testatrix's intention to die intestate. Nor is there any reason, to suppose that the testatrix intended to limit narrowly the circumstances in which the gift over would occur so as to deprive the grandchildren of her benefaction where the mother did not take the interest given for a reason other than death."

[96] In *Re Keid*[160] the testatrix's will contained the following residuary provision –

> "(i) THAT my Trustees shall pay the net income derived there from to my son the said SELWYN PETER KEID until he

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158 C H Sherrin, R F D Barlow, R A Wallington, S L Meadway and M Waterworth, *Williams on Wills* (8th ed, 2002) vol 1, [57.2].

159 *Public Trustee v Hayles* (1993) 33 NSWLR 154 at 170 – 171; C H Sherrin, R F D Barlow, R A Wallington, S L Meadway and M Waterworth, *Williams on Wills* (8th ed, 2002) vol 1, [57.18], [57.21].

160 [1980] Qd R 610.

> shall attain the age of forty years, PROVIDED HOW EVER that before paying such income to my said son my Trustees shall pay my said son's insurance premiums to The Mutual Life and Citizens' Assurance Company Limited on Policy Number 0620-4488P and any other policies and medical benefits Registered Number 560477 therefrom;
>
> (ii) THAT upon my said son SELWYN PETER KEID attaining the age of forty years my Trustees shall pay and transfer the same unto my said son for his own sole and separate use absolutely;
>
> (iii) SHOULD my said son predecease me or though surviving me not survive to attain a vested interest in possession here under leaving issue who shall be living at my death and who shall survive to attain the age of twenty-one years such issue shall take upon attaining the age of twenty-one years and if more than one as tenants in common in equal shares the share in my estate my said son would have taken had he survived to attain a vested interest in possession hereunder.
>
> (iv) SHOULD no grandchild of mine survive as aforesaid then my Trustees shall stand possessed of my residuary estate UPON TRUST for such of them my sisters the said JEAN DAVIS, LORNA ATHERTON and JOY MILLER as shall survive me and if more than one as tenants in common in equal shares."

The testatrix was murdered by her son Selwyn Peter Keid, and he was disentitled from taking a benefit under the will by public policy. Wanstall CJ said –

> "When read together, these two paragraphs (iii) and (iv) make provision for the following contingencies:
>
> In the event of the death of the son in his mother's lifetime:
>
> 1. That he leave children living at the death of the testatrix who survive to attain the age of 21 years;
> 2. That he leave children living at her death but not surviving to that age.
>
> In the first event, the surviving children would take the son's gift; in the second event, the gift over to the sisters would take effect literally. But there is a third event, that the son would predecease his mother and leave no children living at her death. The argument for the respondent must deny, in that event, that there would be any gift over to the sisters, because sub-paragraph (iv) could not then operate literally.
>
> The contingency against which the testatrix really had to guard was the failure of the gift to her son so that she would be left intestate. That being so, the court should look to that contingency and give effect to the will if it should happen. I have pointed out one event,

> i.e., the prior death of the son without issue, in which there would be a clear case for giving effect to the gift over to the sisters as the *a fortiori* intention of the testatrix.[161]
>
> Likewise, I think that in the event which has in fact happened here, the failure of the son's gift for the reason of public policy, the court should give effect to the gift over to the sisters so as to meet the same contingency, i.e., the failure of the gift to the son.[162]
>
> I hold that upon the true construction of the will, there is no intestacy and that the residuary estate has become divisible equally amongst the three sisters in accordance with Clause 3(ii)(f)(iv)."[163]

[97] The 2002 will was not a home-made will in the strict sense; rather it was comprised of a printed form with handwritten insertions. In clause 5 the testator's intention with respect to the primary disposition of his residuary estate was made quite clear by a combination of the printed words "I give the residue of my estate to" and the handwritten words "Laurelle Irene Verrall". This was immediately followed by the printed words "but if he/she/they predecease me then I give the residue of my estate to" after which the dispositions to the plaintiff's children and the testator's siblings were handwritten. The contingency was simple and straightforward, as was the substitute gift. In *Stacey*[164] and *Keid*[165] the Court considered factual scenarios having some flavour in common with those expressly provided for by the testators and which it thought the testators should be taken to have intended to include in the contingencies upon which the substitute gifts took effect. In *Rowney*[166] it found guidance as to the true extent of the contingency guarded against in the very wording of the substitute gift. Neither of those avenues presents itself in the present case. I have concluded that the rule in *Jones v Westcomb* is not applicable in this case, and that the residuary estate passed in accordance with the intestacy rules.

Orders

[98] I make the following orders:

(i) on the claim, an order that subject to the formal requirements of the Registrar, a grant of probate of the will of Shane Michael Jackson dated 2002 issue to Laurelle Irene Verrall, the executrix named in the said will;

(ii) on the counterclaim, declarations –

(a) that in the events that have happened the gift of the residue of the estate to the plaintiff in clause 5 of the will of Shane Michael Jackson dated 2002 is void;

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161 cf *Re Bowen* [1949] Ch 67; and *In re Fox's Estate* [1937] 4 All ER 664.

162 cf *Re Stacey* [1949] St R Qd 244.

163 [1980] Qd R 610 at 614-615. The respondent was the guardian ad litem of the testatrix's only other next of kin – her elderly mother.

164 [1949] St R Qd 244.

165 [1980] Qd R 610.

166 Unreported, QSC, Cooper J, 19 March 1992.

(b) that in the events that have happened and on the proper construction of the will of Shane Michael Jackson dated 2002 there is an intestacy as to the residue of the estate.

I will hear the parties on costs.