SUPREME COURT OF QUEENSLAND

CITATION:	*Wain v Wain* [2009] QSC 320
PARTIES:	**KATHLEEN RUTH WAIN** (plaintiff) **v** **DARRYL ALLAN WAIN** (defendant)
FILE NO/S:	BS 5305 of 2009
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 October 2009
DELIVERED AT:	Brisbane
HEARING DATE:	4 August 2009
JUDGE:	McMurdo J
ORDER:	**There will be a grant of Letters of Administration on intestacy in favour of the plaintiff.**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – THE MAKING OF A WILL – REVOCATION – METHODS OF REVOCATION – MARRIAGE OR DIVORCE – where the *Succession Act* 1981 (Qld) as it then stood provided that a will made before a marriage is revoked by that marriage unless it contains "an expression of contemplation of that marriage" and that extrinsic evidence is admissible to establish that "an expression contained in the will" constitutes such expression – where the will provides for a disposition to four persons who were the testator's children and the testator's future wife – where the will referred to the testator's future wife by name only – whether this constitutes "an expression of contemplation of that marriage" *Law Reform (Wills) Act* 1962 (Qld), s 3 *Succession Act* 1981 (Qld), s 14, s 17 *Succession Amendment Act* 2006 (Qld), s 10 *Uniform Civil Procedure Rules* 1999 (Qld), r 292 *Keong v Keong* [1973] Qd R 516, distinguished

Layer v Burns Philp Trustee Co. Ltd (1986) 6 NSWLR 60, distinguished

Re Coleman [1976] Ch 1, cited

Will of Foss [1973] 1 NSWLR 180, distinguished

COUNSEL: D J Schneidewin for the plaintiff
D C Rangiah SC for the defendant

SOLICITORS: White Jordin for the plaintiff
Piper Alderman for the defendant

[1] This case concerns a will made by the late Mr Leonard Allan Wain in 1993. He and the plaintiff were married on 24 June 1995. They separated but the marriage was not dissolved. He died on 8 February 2009. The question is whether the will was revoked by this marriage.

[2] He was survived by three adult children, one of whom is the defendant who was named as the sole executor and trustee under the will. The will provided that in the event that the plaintiff survived the testator for 30 days from his death, then she and each of his three children would receive a one-quarter share of the estate. This is a relatively small estate, the net value of which is a little over $500,000.

[3] If this will was revoked by the testator's marriage, then he died intestate, so that the plaintiff, as the lawful spouse of the deceased at the time of his death, would take priority in applying for Letters of Administration which she seeks by these proceedings. She applies for summary judgment pursuant to *UCPR* r 292.

[4] The relevant clause of the will is as follows:

> "2. *I GIVE DEVISE AND BEQUEATH* the whole my real and personal estate of whatsoever nature or kind and wheresoever situate of which I may die seized or possessed or over which I may have any power of disposition or control *UNTO* my said Son *DARRYL ALLAN WAIN*, my Daughters *SUSAN MAREE WAIN* and *WENDY ANN SMITH* and *KATHLEEN RUTH JACKSON* [the plaintiff] in equal shares as tenants in common for their respective use and benefit absolutely."

[5] Until 2006, the effect of a subsequent marriage on a will was according to what was then s 17 of the *Succession Act* 1981 (Qld), which provided, in part, as follows:

> "**17 Revocation of will by marriage**
>
> (1) Subject to subsection (2), where a person marries after making a will, the will is revoked by the marriage unless it contains an expression of contemplation of that marriage; and extrinsic evidence, including evidence of statements made by the testator, is admissible to establish than an expression contained in the will is an expression of contemplation of that marriage."

In that and other respects the Act was amended by the *Succession Amendment Act* 2006 (Qld). However, by s 10 of that Act, it was provided that what had been s 17 would continue to apply to a will made before "the commencement", which was 1 April 2006,[1] in relation to a marriage solemnised before that date. Accordingly, as is common ground, it is the previous s 17 which must be applied in this case.

[6] This will was revoked by the testator's marriage unless it could be said to have contained "an expression of contemplation of that marriage". The plaintiff's case is that there was no such expression in this will. In particular there was no indication in the testator's references to the plaintiff as a beneficiary that he was contemplating a marriage between them. The matter of any marriage, actual or prospective, was simply not referred to at all.

[7] The defendant's argument is that the possibility of marriage did not have to be expressed within the will. It is submitted that it was sufficient to engage the proviso if the extrinsic evidence would establish that an expression contained in the will, being the gift to the plaintiff, was "an expression of contemplation of that marriage".

[8] The plaintiff's argument refers to cases decided in this court and others which held that there must be something within the will itself which is capable of being interpreted as an expression of contemplation of the marriage. According to none of these cases would it be sufficient for the testator's proposed wife to be named in the will as a beneficiary, without an indication of the marriage being contemplated. None of those cases concerned a provision in precisely the terms of s 17(1), but the argument is that they indicate the context in which it was enacted.

[9] In *Lee's Manual of Queensland Succession Law*,[2] the author described the enactment in 1981 of s 17(1) as representing a

> "relaxation of the statutory provision, derived from an English precedent, which [it] replaced which required the will itself to be 'expressed to be made in contemplation' of the marriage. That requirement seemed to exclude the possibility of admitting extrinsic evidence to show what the testator's intention really was, in using possibly referential language."

The author refers to *Re Coleman*,[3] in which such extrinsic evidence was held to be inadmissible and to the judgments of the Full Court of this court in *Keong v Keong*[4] and in the Supreme Court of New South Wales in the *Will of Foss*,[5] in which extrinsic evidence was admitted.

[10] In *Keong*, the deceased executed a will on the eve of his marriage to a woman with whom he had lived for many years. During that time he had never referred to her as his wife, but throughout the will he did so. In particular he left the whole of his estate "for my wife the said Lorna Joan Keong". The relevant provision then was s 3 of the *Law Reform (Wills) Act* 1962 (Qld), which provided that a will which was expressed to be made in contemplation of marriage was not to be revoked by the

---

1 Being the date of commencement of s 7 as inserted by the *Succession Amendment Act* 2006.
2 (2007, 6th ed) at [5.30].
3 [1976] Ch 1.
4 [1973] Qd R 516.
5 [1973] 1 NSWLR 180.

solemnisation of the marriage contemplated. Unlike s 17(1) it contained no reference to the use of extrinsic evidence. The primary judge (Lucas J) and the Full Court were unanimous in concluding that evidence of the circumstances of the testator at the time of the execution of the will could be admitted to construe what the testator meant by the expression "my wife", and that with the benefit of evidence that he did not have a wife and that he was living with this beneficiary whom he had arranged to marry on the following day, it was to be concluded that by using the expression "my wife" the had testator meant to say "my intended wife".[6] So by referring to her as if he had said "my intended wife", he made an expression in contemplation of a marriage with her.

[11] In the *Will of Foss*, the testator made a will a week prior to his marriage, in which he left all of his property "to my wife (Mrs P Foss)". Helsham J, applying what was then a provision equivalent to that considered in *Keong*, reached a similar view. He said:

> "… Whilst it is correct to say that the fact that a marriage was contemplated must appear by some expression in the will itself, it is also correct to say that whether the will contained such an expression must depend upon the construction of the will. If the will clearly contains such an expression, then there is no problem. If it does not, there are some words which may or may not amount to such an expression, then the will must be construed so as to find its true meaning. In order to ascertain the meaning of the words used by a testator it is permissible to construe the document in the light of the surrounding circumstances. This is the law in relation to ambiguities of language used in a testamentary document, and applies no less to the aspect of whether a testator has expressed the fact that his marriage was contemplated as to any other."[7]

[12] The plaintiff has submitted that s 17(1) was intended to resolve the conflict in the case law described in that passage from *Lee's Manual on Succession Law*. That may have been unnecessary in Queensland following the Full Court's judgment in *Keong*. But the cases cited in the plaintiff's argument, which include a judgment of the New South Wales Court of Appeal in 1986 in *Layer v Burns Philp Trustee Co. Ltd*,[8] exemplify what is said to be the intended operation of this section. Extrinsic evidence is to be admitted as an aid in construing the words used, if they are capable of a construction which expresses a contemplation of the marriage. The evidence is not to be used to prove the contemplation of a marriage which was not, on any construction, expressed in the will.

[13] The defendant's argument is that these cases are distinguishable and there is no case which has considered the defendant's argument on the interpretation of s 17(1). However, I am unable to accept that interpretation. Section 17(1) requires a consideration of what is *expressed* within the will. In my view that requires language which is capable of being construed as a contemplation of the marriage. Where, as in the present case, there is nothing which is capable of that construction, the proviso cannot be engaged by proving what the testator had in mind. The proviso permits extrinsic evidence as an aid to construction rather than to add to the

---

6 [1973] Qd R 516, 524.
7 [1973] 1 NSWLR 180 at 183.
8 (1986) 6 NSWLR 60.

will that which has not been expressed. In each of those to which I have referred, for example, the testator had referred to his intended wife as his wife. There is no such indication in this will.

[14] The difference between s 17 and the defendant's argument is illustrated by the terms of the present provision, which is s 14 of the *Succession Act*, inserted in 2006. It provides that a will is revoked by the testator's marriage but that:

> "(3) …
>
> (a) a will made in contemplation of a marriage, whether or not that contemplation is stated in the will, is not revoked by the solemnisation of the marriage contemplated …"

[15] The result is that the defendant's case could not be improved by a consideration of the extrinsic evidence. The plaintiff has demonstrated that the will was revoked by the subsequent marriage. Accordingly, the deceased died intestate and the plaintiff has priority in applying for a grant of Letters of Administration. There will be a grant of Letters of Administration on intestacy in favour of the plaintiff. I will hear the parties as to costs.