SUPREME COURT OF QUEENSLAND

CITATION:	*Re Thomson & Anor (as trustees of the trusts established pursuant to the will of Shine (deceased))* [2010] QSC 167
PARTIES:	**ELIN MARY THOMSON and MARGARET MARY SILVA (as trustees of the trusts established pursuant to the Will of Daniel William Shine Deceased) (applicants)** **AND** **All next of kin and other persons interested in the construction of the will (respondents)**
FILE NO/S:	14523 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 May 2010
DELIVERED AT:	Brisbane
HEARING DATE:	9 February 2010
JUDGE:	Atkinson J
ORDER:	**Order that the applicants' costs be paid on an indemnity basis from the estate.** **It is directed that the property held on trust as to three quarters of the estate be distributed to the personal representatives of Edward Joseph Shine, Ellen Mary Watson, Annie Catherine Shine, James Joseph Shine and Mary Agnes Ryan.**
CATCHWORDS:	SUCCESSION – 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 – construction of a will – where gift was to "children" of the deceased's siblings that survived the deceased's daughter – where children of the deceased's siblings did not survive the deceased's daughter – where court considered the ordinary meaning of the word "children" to be children of the first generation – where there was a partial intestacy

Succession Act 1981 (Qld), s 33C, s 33N, s 37(1)(a)

Fell v Fell (1922) 31 CLR 268, cited
Key v Key (1853) 4 De GM & G 73, cited
Langston v Langston (1834) 2 Cl & F 194, cited
Leader v Duffy (1888) 13 App Cas 294, cited
Perrin v Morgan [1943] AC 399, cited
Ralph v Carrick (1879) 11 Ch D 873, cited
Re Atkinson; Pybus v Boyd [1918] 2 Ch 138 at 143, cited
Re East, Deceased [1964] QW 16, cited
Reeves v Brymer (1799) 4 Ves 692, cited
Re Harrison, Turner v Hellard (1885) 30 Ch D 390, cited
The Public Trustee of Queensland v Smith [2008] QSC 339, cited

COUNSEL: R D Peterson for the applicants
No appearance by the respondents

SOLICITORS: Hede Byrne & Hall for the applicants
No appearance by the respondents

[1] The trustees, Ms Thomson and Ms Silva, applied to the court to determine the true and proper construction of the last will of Daniel William Shine ("the will") dated 26 April 1934 and give directions to the trustees established pursuant to the will. In particular they asked the court to construe and give directions with regard to clause 3 of the will and the gift and bequest by the testator set out in clause 3.

[2] Daniel William Shine died in Brisbane on 2 May 1934 at the age of 49. He was a farmer who lived at Fernvale and executed his last will on 26 April 1934 only a week before his death. By clause 1 of his will, he appointed his nephew, Daniel Joseph Shine, also a farmer, and a bank officer, William Stokes, to be his executors and trustees. He appointed his sister-in-law, Johanna Maria Shine, to be the guardian of his infant daughter, Agnes Catherine Shine. When the deceased died his daughter Agnes was only 12 years old. The deceased's wife and Agnes's mother had already died. Agnes was his only child.

Family circumstances

[3] It is necessary to say something of the Shine family history. Daniel William Shine was the youngest of the children of Daniel Shine who died on 5 August 1932. He had eight older brothers and sisters, five of whom survived him: Edward Joseph Shine, who died on 10 October 1949; Ellen Mary Watson, who died on 20 August 1957; Annie Catherine Shine, who died on 25 June 1939; James Joseph Shine, who died on 5 August 1962; and Mary Agnes Ryan, who died on 2 February 1949. None of the three siblings who pre-deceased him had children of their own. Of Daniel William Shine's brothers and sisters, three married and had children. They were his sisters, Ellen Mary Watson and Mary Agnes Ryan, and his brother James Joseph Shine. His daughter, Agnes Catherine Shine, married and changed her name on marriage to Agnes Catherine Heid. She died on 2 January 2006 leaving no issue.

[4] Each of the children of Daniel William Shine's two sisters and brother died before Agnes Heid died. Ellen Mary Watson had five children, James Joseph Shine had seven children and Mary Ryan had four children. Of Ellen Mary Watson's five children, three of them had children: Robert Aloysius Watson had three children, Samuel Dhonal Watson had two children and Francis Xavier Watson had four children. All of Robert, Samuel and Francis's children survived Agnes Heid.

[5] Of James Joseph Shine's seven children, four of them had children. Daniel Joseph Shine had five children, four of which were alive at the date of Agnes Heid's death; James Leo Shine had five children who were alive at the date of Agnes Heid's death; Mary Catherine Elson-Green had three children (two of whom survived and are the applicant trustees); and Maurice Edward Shine had three surviving children.

[6] All of Mary Agnes Ryan's four children had children. Kevin Ryan had one child who survived Agnes Heid; Margaret Mary Crowe had five children who survived Agnes Heid; Cecily Maureen Conroy had three children who survived Agnes Heid; and Catherine Anastasia Dooley had three children who survived Agnes Heid.

[7] These family details are relevant to clause 3 of the will which is the clause which is the subject of this application. The relevant part of clause 3 provides:

> "I GIVE DEVISE AND BEQUEATH all my real and personal estate, property, effects and other things whatsoever and wheresoever the same may be unto the said Daniel Shine and William Stokes (hereinafter called 'my said Trustees') to hold the same upon the following trusts that is to say –
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> (a) As to one-fourth part of my real and personal estate to hold the same upon trust for Mary Shine (daughter of my brother James Joseph Shine) and as to the other three-fourth parts thereof to hold the same upon trust to permit and suffer my daughter Agnes Shine to receive all rents, issues, income and profits thereof during her lifetime and upon her death to hold the said three-fourth parts of my estate upon trust for such child or children of my said daughter as shall survive her and attain the age of twenty-one years and if more than one in equal shares –
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> (b) If my said daughter shall died before me or without leaving any children who shall survive her and attain the age of twenty-one years then and in such case I DIRECT my said trustees to hold the said three-fourths of my real and personal estate upon trust for such children of my brother James Joseph Shine and my sisters Agnes Ryan and Ellen Watson as shall survive my said daughter and if more than one in equal shares. - …"

[8] Clause 4 of the will empowered his trustees to make any partnership arrangements with his brother James Joseph Shine with regard to the grazing and farming business with which they were then in partnership. Clause 5 authorised the sale or lease of any of his lands or other property but recorded "It is my earnest hope that the property known as Lucerne Park in the parish of Burnett which is at present

owned by my brother and myself shall be kept in the Shine family and I authorise my said Trustees to make any arrangements regarding any part of it or otherwise as they may deem most advantageous to my estate."

[9] In the circumstances that transpired after the death of Daniel William Shine, his daughter Agnes received the rent, issues, income and profits of three quarters of his estate during her lifetime under clause 3(a) of the will. She died without issue so that part of the estate falls to be distributed, if it be applicable, under clause 3(b) of the will:

> "I direct that my said Trustees to hold the said three fourths of my real and personal estate upon trust for such children of my brother James Joseph Shine and my sisters Agnes Ryan and Ellen Watson as shall survive my said daughter and if more than one in equal shares."

Construction of the will

[10] The task of a court of construction is to discover the testator's intention by examination of the words used in the will.[1] Judicial construction involves having "regard to any rules of construction which have been established by the courts, and subject to that, [such courts] … are bound to construe the will as trained legal minds would do."[2]

[11] The general principle of construction of a will is the "usual meaning rule" which is that the court interprets the words of the will, in the context in which they appear, according to their usual meaning.[3] This rule is taken from the propositions set out in the classic work by Sir James Wigram, *Admission of Extrinsic Evidence in Aid of the Interpretation of Wills* first published in 1831.

[12] Wigram's propositions I and II are:[4]

I. A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless, from the context of the will, it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed.

II. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule

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1 *Perrin v Morgan* [1943] AC 399 at 406 per Viscount Simon; LJ Hardingham, MA Neave, HAJ Ford, *Wills and Intestacy* (2nd ed) at [1101]; DM Haines, *Construction of Wills in Australia* at [5.2]; K Mackie and M Burton, *Outline of Succession* (2nd ed) at [7.4] – [7.6].

2 *Ralph v Carrick* (1879) 11 Ch D 873 at 878 per Cotton LJ, cited with approval by Isaacs, J in *Fell v Fell* (1922) 31 CLR 268 at 273.

3 See LJ Hardingham, MA Neave, HAJ Ford, *Wills and Intestacy* (2nd ed) at [1102].

4 5th ed at 16-18.

> of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered.

[13] It is only where the usual meaning rule is insufficient to resolve the construction of a provision of a will that the court may consider extrinsic evidence. It follows that the court should start with the words of the will. If their usual meaning in the context of the will is clear, then that meaning is given. If not, then resort may be had to such extrinsic evidence as traditionally applied by the courts in construing a will together with the aids of construction set out in s 33C of the *Succession Act* 1981.[5]

[14] The court of construction in ascertaining the usual meaning of the words of the will looks at three questions identified by the learned authors of *Williams on Wills*.[6] They are:

(1) What words has the testator used to express his or her intention?

(2) What is the meaning of such words in relation to the persons and things described, who are the specific persons to be identified as donees and what are the specific things to be identified as the subject of dispositions?

(3) What is the meaning of the words in relation to the disposition of the property among the donees?

[15] In answering the first two questions, which are the relevant questions in this case, the court looks at the words used in the context of the will as a whole[7] and applies a presumption against intestacy. The presumption against intestacy is that the testator did not intend to die either totally or partly intestate, provided that on a fair and reasonable construction there is no ground for a contrary conclusion.[8]

[16] In *Re Harrison, Turner v Hellard*[9] Lord Esher MR described the presumption thus:

> "There is one rule of construction, which to my mind is a golden rule, viz, that when the testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce – that he did not intend to die intestate when he has gone through the

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5 See *The Public Trustee of Queensland v Smith* [2008] QSC 339 at [20]-[26].

6 8th ed at [49.3].

7 *Key v Key* (1853) 4 De GM & G 73 at 84, considered in *Re Dolands Will Trusts, Westminster Bank Ltd v Phillips* [1970] Ch 267, [1969] 3 All ER 713; *Tunaley v Roch* (1857) 3 Drew 720 at 724: *Re James's Wills Trusts, Peard v James* [1962] Ch 226, [1960] 3 All ER 744; *Re Wootton's Will Trusts, Trotter v Duffin* [1968] 2 All ER 618, [1968] 1 WLR 681.

8 *Williams on Wills* at [51.1].

9 (1885) 30 Ch D 390 at 393.

> form a making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy."[10]

[17] That judgment was followed by Higgins J as part of the majority in the High Court in *Fell v Fell*[11] and is part of the more general principle expressed by Isaacs J[12] following Lord Brougham LC in *Langston v Langston*:[13]

> "There are two modes of reading an instrument where the one destroys and the other preserves, it is the rule of law, and of equity, following the law in this respect (for it is a rule of common sense …), that you should rather lean towards that construction which preserves, than towards that which destroys."

[18] The presumption was given effect by Gibbs J in *Re East, Deceased*[14] to save an ambiguous will from intestacy. If on a proper construction of the will, however, an intestacy does arise, the presumption cannot be used to rewrite the will to save the estate from intestacy.

[19] The second relevant rule of construction in this case is that words of the will must be construed as a whole. This rule of construction was also referred to by Isaacs J in *Fell v Fell*[15] where his Honour quoted from Lord Halsbury LC in *Leader v Duffy*:[16]

> "The instrument … must receive a construction according to the plain meaning of the words and sentences therein contained. But … you must look *at the whole instrument* and, in as much as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole *in order to give effect, if it be possible to do so, to the intention of the framer of it*."

[20] Clause 5 of this will shows an intention by the testator to retain his real property within the Shine family rather than being shared with those outside the family as would necessarily happen if the construction of the gift in clause 3(b) did not take effect in the circumstances and there was a partial intestacy.

[21] The first question to be asked, "what words has the testator used to express his intention," readily admits of an answer. He used the words "children of my brother

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10 *Re Johnston* (1982) 138 DLR (3d) 392 at 400; *Re MacDonnell* (1982) 133 DLR (3d) 128; *Edgeworth v Edgeworth* (1869) LR 4 HL 35 at 40; *Re Redfern, Redfern v Bryning* (1877) 6 Ch D 133 at 136; *Kirby-Smith v Parnell* [1903] 1 Ch 483 at 489; *Fell v Fell* (1922) 31 CLR 268; *Re Messenger's Estate, Chaplin v Ruane* [1937] 1 All ER 355; *Re Turner, Carpenter v Staveley* [1949] 2 All ER 935; *Re Lady Monck's Will, Monck v Croker* [1900} 1 IR 56; *Re Biln Estate* (1967) 61 DLR (2d) 535 and *Re Crone* (1969) 5 DLR (3d) 317; *Jankowski v Pelek Estate* (1995) 131 DLR (4th) 717. The text was cited in *Re Gray* (1900) 73 DLR (4th) 161 at 165.

11 At 284.

12 At 275.

13 (1834) 2 Cl & F 194 at 243.

14 [1964] QW 16.

15 At 273-274.

16 (1888) 13 App Cas 294 at 301.

James Joseph Shine and my sisters Agnes Ryan and Ellen Watson" that survived his daughter Agnes. If there was more than one beneficiary within that category, they were to take "in equal shares".

[22] The second question is what is the meaning of the word "children"? Which persons are described by the term "children" in the context of this will and who are the specific persons identified as donees? In answering those questions the court takes into account the rules of construction earlier referred to i.e. that the testator used the words in their ordinary meaning unless from the context of the will he appears to have used them in a different sense, that the testator is presumed not to have intended an intestacy, and that the words of the will are to be construed as a whole.

[23] As the learned authors of *Williams on Wills* observe at [74.1] the description "children" of the named person in its ordinary meaning refers to the first generation only of descendants of a person and does not include any grandchildren or remoter issue. However, that meaning may be extended by the context of the will to other generations of descendants or issue of the named persons. The word "issue" in its legal sense means descendants of every degree.[17] In this case the named persons are the brother and sisters of the testator who themselves had children. If the word "children" is given a narrow meaning to only issue of the first generation of the testator's brother and sisters then a partial intestacy will necessarily follow and the estate will pass to the personal representatives of members of his family to be distributed according to their wills.

[24] Unfortunately, notwithstanding the presumption against intestacy and reading this clause in the context of the will as a whole, the meaning of the word "children" is clear and there is nothing in this will which expands its meaning. The natural and ordinary meaning of the word "children" is issue of the first generation.

[25] The usual construction may yield to a contrary meaning only where no other meaning is available. The phrase often repeated is: "children may mean grandchildren where there can be no other construction, but not otherwise."[18] In *Re Atkinson; Pybus v Boyd*, Younger J[19] referred with approval to the words of Pearson J in *Re Kirk*:[20]

> "The true rule is, that a gift in a will to 'children' must be construed as a gift to children literally, and nothing else, unless from the will

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17 *Williams on Wills* (8th ed) at [76.1]; *Edyvean v Archer, Re Brooke* [1903] AC 379; *Re Burnham, Carrick v Carrick* [1918] 2 Ch 196; *Re Swain, Brett v Ward* [1918] 1 Ch 399; *Re Sutcliffe* [1934] Ch 219; *Re Hipwell, Hipwell v Hewitt* [1945] 2 All ER 476; *Walsh v Johnston* [1899] 1 IR 501; *Re Taylor's Trust, Taylor v Blake* [1912] 1 IR 1; *Turner's Trustees v Turner* (1897) 24 R 619; *Re Harding* [1956] NZLR 482; *Re Patterson Estate* (1958) 66 Man R 416; *Re Matthews* [1960] VLR 3; *Re Green, McKenzie v Stringer* [1963] NZLR 148; *Re Linklater Estate* (1967) 66 DLR (2d) 30; 'It is conceded that in ordinary parlance the word "issue" means children and only children and does not include grandchildren or great-grandchildren, but in the language of lawyers and only in that language it means descendants'; *Ralph v Carrick* (1879) 11 Ch D 873 at 883; *Kernahan v Hanson* (1990) 73 DLR (4th) 286.

18 *Reeves v Brymer* (1799) 4 Ves Jun 692 at 698; 31 ER 358 at 361; *Berry v Berry* 3 Giff 134 at 137; 66 ER 354 at 356; *Re Atkinson; Pybus v Boyd* [1918] 2 Ch 138 at 143.

19 At 144.

20 52 LT 346 at 348.

> itself and the context it appears that the word is intended to have a larger meaning."

Younger J then summarised the construction point as follows:

> "This case shows, one might have hoped finally, that we are here in the presence of no hard and fast rule; that the question is never more than one of construction of the particular instrument; that the word "children" must have its natural signification attributed to it in all cases unless from the will itself and the context it appears that the word is intended to have a larger meaning, or unless, as may be added, by the application of a principle not limited to the word "children," the word is in a proper case carried beyond its ordinary signification from the want of any persons more accurately answering to the description – a course necessary to prevent its being imputed to a testator that he made a gift without having in his mind any actual or possible object or subject of it."

[26] At the time the testator made his will, his brother and two sisters had living children. They were the actual or possible subject of the clause. It was apparently not within his contemplation that his daughter would die without issue and die after the death of all of her cousins from the Shine family. He made no provision for what would happen to that part of his estate should that unhappy eventuality transpire. As a result that disposition lapses. The anti-lapse rule does not apply because his nieces and nephews were not his issue.

[27] As the Queensland Law Reform Commission (QLRC) pointed out in its *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General* Report 65 (2009) Volume 2 at [23.9], all Australian jurisdictions include in their succession legislation a provision which counteracts the doctrine of lapse in certain situations. These provisions create a statutory substitutional disposition that applies where the beneficiary under a will is a child or other issue of the testator. The effect of these provisions is that, if such a beneficiary dies before the testator but leaves other issue who survive the testator, the property does not fall into the residuary estate or fail on intestacy Under the modern form of the anti-lapse rule, the property that was the subject of the original disposition passes to the issue of the deceased issue who survive the testator.

[28] The relevant provision in Queensland is s 33N of the *Succession Act* 1981, which was introduced based on recommendations made by the QLRC in its *Wills Report* (1997) QLRC 84 and its *Supplementary Wills Report* (2006) 10. Section 33N provides:

> "**33N Dispositions not to fail because issue have died before testator**
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> (1) This section applies if –
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> (a) a testator makes a disposition of property to a person, whether as an individual or as a member of a class, who is issue of the testator (an original beneficiary); and

> (b) under the will, the interest of the original beneficiary in the property does not come to an end at or before the original beneficiary's death; and
> (c) the disposition is not a disposition of property to the testator's issue, without limitation as to remoteness; and
> (d) the original beneficiary does not survive the testator for 30 days.
>
> (2) The issue of the original beneficiary who survive the testator for 30 days take the original beneficiary's share of the property in place of the original beneficiary as if the original beneficiary had died intestate leaving only issue surviving.
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> (3) Subsection (2) does not apply if –
> (a) the original beneficiary did not fulfil a condition imposed on the original beneficiary in the will; or
> (b) a contrary intention appears in the will.
>
> (4) A general requirement or condition that issue survive the testator or reach a specified age does not show a contrary intention for subsection (3)(b).
>
> (5) A disposition of property to issue as joint tenants does not, of itself, show a contrary intention for subsection (3)(b)."

[29] The anti-lapse provision cannot save the disposition in clause 3(b) of the will of Daniel William Shine because it was made in favour of the testator's nephews and nieces, who are not his issue which is a class confined to the testator's own direct descendants. The anti-lapse rule applies only where the beneficiary is the issue of the testator.

[30] There was no residuary clause in the will. I am therefore bound to hold that the testator died intestate as to three quarters of his estate. That intestacy occurred at the time of his death.

[31] Ordinarily, as the testator was a widower, his daughter, or her personal representatives, would be entitled to the whole of the estate which was subject to an intestacy. However, they have specifically disclaimed any such entitlement. The benefit of the estate then passes to those next entitled: the personal representatives of the deceased's brothers and sisters living at the date of his death pursuant to s 37(1)(a) of the *Succession Act* 1981.

[32] I direct, therefore, that the property held on trust as to three quarters of the estate be distributed to the personal representatives of Edward Joseph Shine, Ellen Mary Watson, Annie Catherine Shine, James Joseph Shine and Mary Agnes Ryan.

[33] I order that the applicants' costs be paid on an indemnity basis from the estate.