SUPREME COURT OF QUEENSLAND

CITATION:	*Simpson v Simpson & Ors* [2011] QSC 196
PARTIES:	**NEIL ROBERT SIMPSON, AS EXECUTOR OF THE ESTATE OF MIRIAM GRACE SIMPSON, DECEASED** (applicant) **v** **STEPHEN MICHAEL SIMPSON** (first respondent) **ANNETTE JOAN BORCHARDT** (second respondent) **TIMOTHY CLIFTON WHITNEY, A LITIGATION GUARDIAN FOR TAYLOR JAMES SIMPSON KEENE, A MINOR** (third respondent)
FILE NO:	SC No 2877 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	30 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	9 May 2011
JUDGE:	Peter Lyons J
ORDER:	**The Court:** **1. Declares that, upon the proper construction of the will of Miriam Grace Simpson, deceased, dated 1 April 1983, and in the events which have occurred, the First Respondent holds any interest in the estate of the said deceased to which he would have been entitled by reason of Charles Erle Simpson predeceasing the deceased upon constructive trust for the Applicant and the Second Respondent;** **2. Declares that the residuary estate of the said deceased should be paid by the Applicant equally to the Applicant and the Second Respondent;** **3. Orders that the Applicant's, the Second Respondent's and the Third Respondent's costs of this Application be paid from the estate of Miriam Grace Simpson, deceased, on an indemnity basis.**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – GENERALLY – DESCRIPTION OF LEGATEES AND DEVISEES – ISSUE – where the testatrix provided in her will for disposition of the residue of her estate to such of her children who attained the

age of eighteen years – where the testatrix further provided that if one of her children died before his or her interest vested, then the disposition the deceased child would have taken was to pass to such 'issue' of the deceased child who attained the age of eighteen – where a child of the testatrix died at the hand of his son ('the grandchild') – whether a child of the grandchild was entitled to the share of the estate that the grandchild would have taken but for his criminal conduct.

Succession Act 1981 (Qld), s 33L

Matthews v Williams (1941) 65 CLR 639; [1941] HCA 32
Perpetual Trustee Co Ltd v Wright (1987) 9 NSWLR 18

COUNSEL: R T Whiteford for the applicant
R M Treston for the third respondent

SOLICITORS: Finemore Walters & Story for the applicant
McCullough Robertson for the third respondent

[1] Miriam Grace Simpson (*the testatrix*) died on 5 August 2010. She left a will, dividing her estate amongst her three children, with provision for a gift over in the event that any of her children predeceased her. Her son Charles Simpson died on 25 April 2006, at the hand of his son (and the testatrix's grandson) Stephen Simpson. The question in the application is whether Stephen's son Taylor Keene is conditionally entitled to the share of the testatrix's estate which would have passed to Charles, had he survived.

The will

[2] The will first provided for a specific disposition of a motor vehicle to the testatrix's daughter, Annette, who was the second respondent. Clause 3(c) then dealt with the residue of the estate by directing the executor as follows:

> "(c) to stand possessed of the rest and residue of my estate UPON TRUST to divide the same equally between such of my children as shall survive me and attain the age of eighteen years PROVIDED ALWAYS that if any such child should die without having attained a vested interest hereunder leaving issue who shall survive to attain the age of eighteen (18) years such issue shall take and if more than one equally between them the share in my estate which his her or their parent would have taken had such parent survived to attain a vested interest hereunder."

[3] Since Charles did not survive the deceased, the will makes no gift to him. The question in the application arises out of the proviso to clause 3(c) of the will.

The contentions

[4] The applicant is the executor of the estate. The submissions made on his behalf may be summarised very briefly as follows:

(a) The proviso to clause 3(c) of the will operates only to the extent of making provision for a gift over to grandchildren of the testatrix. It makes no provision for a disposition in favour of a great grandchild, such as Taylor;

(b) Alternatively, the proviso operates only in respect of the death of a person who would otherwise be a beneficiary under the will. It does not operate where a person is precluded from receiving a benefit under the will by reason of that person's criminal act. It is not possible, in the present case, to give some extended operation to the will, so that Taylor may take a benefit under it.

[5] The only other active party in the application was the litigation guardian for Taylor. The submissions made on his behalf controverted those made on behalf of the applicant. It was accepted that if the applicant's submissions as to the effect of clause 3(c) of the will were upheld, then the applicant should succeed. It is therefore convenient to commence with a consideration of this clause.

Construction of clause 3(c)

[6] Ms Treston of Counsel who appeared for the third respondent referred to cases and dictionary definitions supporting the proposition that the expression "issue" of a person consists of the person's children and all other lineal descendants. She drew attention to provisions of the *Succession Act* 1981 (Qld) (*Succession Act*) where the word has been used in that sense. She drew attention to the use of the words "children" and "child", in clause 3(c); and the subsequent introduction of the expression "issue", as indicative of an intention to adopt a term of broader import. She also relied on the introduction into law in 1981 of the *Succession Act*, which then included s 30(2). Section 30 of the *Succession Act* was as follows:

> "**30. Construction of documents: 'Die without issue'; mode of distribution amongst issue.**
>
> (1) Any disposition or appointment of property using the words 'die without issue', or 'died without leaving issue', or 'having no issue', or any words which may import either a want or failure of issue of any person his lifetime or at the time of his death, or an indefinite failure of his issue shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person and not an indefinite failure of his issue.
>
> (2) Unless a contrary intention appears by the will, a beneficial disposition of property to the issue of a person shall be distributed to the nearest issue of that person and if there be more than 1 such nearest issue, among them in equal shares and by representation among the remoter issue of that person."

[7] Section 30(2) has since been replaced by s 33L, expressed in somewhat different terms, but of a generally similar effect. It is as follows:

> **"33L How dispositions of property to issue operate**
>
> (1) A disposition of property to a person's issue, without limitation as to remoteness, must be distributed to the person's issue in the same way as the person's estate would be distributed if the person had died intestate leaving only issue surviving.
>
> (2) Subsection (1) does not apply if a contrary intention appears in the will."

[8] The effect of Ms Treston's submission was, therefore, that clause 3(c) was to be read against the background of these provisions, and was intended to extend the

benefit of the testamentary dispositions made by the will beyond the grandchildren of the testatrix.

[9] Mr Whiteford of Counsel, who appeared for the applicant, referred to the following passage from *Jarman on Wills*:[1]

> "Where a will declares that in the event of the deaths of original devisees or legatees before a specified time, their issue shall take the shares which the father or mother of such issue would have taken if living, it is obvious that 'issue' must be construed to mean 'children'.
>
> And a clause substituting issue for their parents, it seems, has the same effect, the word 'parents' so used being considered to denote the original legatees, and not the parents of their issue remoter than children."

[10] Mr Whiteford's submissions also refer to *Perpetual Trustee Co Ltd v Wright* (*Wright*),[2] where Bryson J expressed the view that this passage did not reflect the general rule sometimes referred to as the rule in *Sibley v Perry*.[3] In *Wright*, Bryson J gave extensive consideration to a number of authorities dealing with wills containing somewhat similar expressions. The fundamental proposition which emerges from his Honour's judgment is that it is necessary to determine the intention of the testator from the language of the will as a whole, rather than to apply a rule of construction, when dealing with provisions of a will which refer to a "child" of a testator, "issue" and "parent". His Honour set out passages (referring to the rule in *Sibley v Perry*) from the judgment of the High Court in *Matthews v Williams* (*Matthews*)[4] (a case referred to by Mr Whiteford), parts of which seem to me to be of particular assistance in the present case. They are as follow:

> "The foundation of the rule is the relationship implied by the use of the word 'parent' between a first or earlier taker or person otherwise referred to and a second or subsequent class of takers called 'issue.' It is evident that in applying the rule the first step to take is to identify the earlier taker or takers to whom the word 'parent' is applied. When this is done and it appears, as of course in most instances it naturally does, that ascertained or ascertainable persons are regarded as standing in the relation of parent and child to the issue, an inference arises that by issue the testator meant children.
>
> But, … if there is nothing to show that the person referred to as a parent must of necessity be the ascertained person the foundation of Lord Eldon's decision upon the third clause of the will in *Sibley v Perry*[5] has no application. This point is brought out by Sargant J in *In re Burnham*.[6] He says: 'In *Pruen v Osborne*,[7] *Smith v Horsfall*,[8] and other cases of the kind, the only person expressly mentioned as donees under the original gift, and for whose decease provision is expressly made are the first generation … It is therefore natural to

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1 Raymond Jennings & John Harper (eds), (Sweet & Maxwell, London: 8th ed, 1951) at 1587-1588.
2 (1987) 9 NSWLR 18.
3 (1802) 7 Ves 522; 32 ER 211.
4 (1941) 65 CLR 639 at 656.
5 (1802) 7 Ves 522; 32 ER 211.
6 (1918) 2 Ch at 204.
7 (1840) 11 Sim 132; 59 ER 824.
8 (1858) 25 Beav 628; 53 ER 776.

> limit provisions for representation to the case of this generation, and when this is done, the force of the word 'parent' almost necessarily limits the class of introduced representatives to the next succeeding generation."

[11] In *Matthews*, the High Court had earlier noted that the *prima facie* legal meaning of the word "issue" is descendants or progeny, and is not limited to children.[9]

[12] As has been noted, clause 3(c) commences with a disposition to the children of the testatrix who should survive her. The proviso to clause 3(c) identifies as one condition of its operation, the fact that a child of the testatrix has predeceased her. Provision was made in such a case for a disposition to issue of that child. However, that disposition is the share which the parent would have taken, had the parents survived to attain a vested interest under the will. The only people for whom provision is made for the attaining of a vested interest under the will, conditional on their survival, other than the issue to take in substitution, are the children of the testatrix; and these are referred to as the "parent" of issue who might take in those circumstances. It is therefore clear that the language of the proviso contains a disposition only to issue of children of the deceased, who are themselves children of the deceased's children, and accordingly, grandchildren of the testatrix.

[13] There is no other language in the will to lead to a different conclusion. The intention of the testatrix, as it appears from the language of the will, is to provide for a gift in substitution in the event that a child of the testatrix should predecease her, only to children of that child, and not to remoter issue of the testatrix's deceased child.

Effect of the death of a child of the testatrix, and Stephen's criminal conduct

[14] Because Charles died before the testatrix, he was not entitled to a share of the will. Ordinarily, that would have had the effect that Stephen would have taken the disposition under the will which Charles would have taken, had Charles survived. However, Stephen's criminal conduct prevents this from happening.

[15] Had the will evidenced an intention that a share of the estate would have passed to Taylor had Stephen predeceased the testatrix, there may have been a basis for construing the will as passing that share to Taylor, notwithstanding that the will did not expressly so provide. It would have been necessary to consider how this might occur. Four possibilities were identified by Young CJ in Equity in *Egan v O'Brien.*[10] However, my earlier finding makes it unnecessary to consider these possibilities.

[16] Nor is it necessary to determine whether, in the events which have happened, the share which might have gone to Charles had he survived, passes as on intestacy, or by virtue of the operation of the initial gift found in clause 3(c). In either case that share would be divided equally between Annette and Neil.

Conclusion

[17] The declaration sought by the applicant should be made.

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9 *Matthews v Williams* (1941) 65 CLR 639 at 650-651.

10 [2006] NSWSC 1398 at [7]; see also *Re Keid* [1980] Qd R 610; *Re Rowney* (Unreported , Supreme Court of Queensland, Cooper J (when a member of this Court), 19 March 1992).