SUPREME COURT OF QUEENSLAND

CITATION:	*The Public Trustee of Queensland as a Corporation Sole* [2012] QSC 178
PARTIES:	**RE: THE PUBLIC TRUSTEE OF QUEENSLAND AS A CORPORATION SOLE** (applicant)
FILE NO/S:	4065 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	22 June 2012
DELIVERED AT:	Brisbane
HEARING DATE:	17 May 2012
JUDGE:	Daubney J
ORDER:	**Pursuant to s 134 of the Public Trustee Act 1978 ("the Act"), the Court advises that in circumstances where a person holds a will as bailee for a testator, s 63(3) of the Act, on its proper construction, does not authorize the Public Trustee to accept that will from that person for safe custody without the consent or direction of the testator.**
CATCHWORDS:	INTERPREATION – GENERAL RULES OF CONSTRUCTION OF INSTRUMENTS – GENERAL MATTERS – where the Public Trustee of Queensland seeks the opinion of the Court pursuant s 134 of the *Public Trustee Act* 1978 (Qld) – where the Public Trustee of Queensland seeks a direction that he may accept wills for safe custody from persons or sources other than testators pursuant to s 63 *Public Trustee Act* 1978 (Qld) – whether a proper construction of s 63 allows the Public Trustee to receive and hold wills in this manner *Acts Interpretation Act* 1954 (QLD), ss 14A and 14B *Public Trustee Act* 1978 (QLD), ss 63 and 134 *Project Blue Sky Inc v Australian Broadcasting Authority* 194 CLR 355 *Public Trustee of Queensland v MacPherson* [2011] QSC 169 *R v Young* (1999) 46 NSWLR 681

COUNSEL: R T Whiteford for the applicant

SOLICITORS: The official solicitor for the Public Trustee of Queensland for the applicant

[1] The Public Trustee seeks the opinion of the court pursuant to s 134 of the *Public Trustee Act* 1978 as to whether he may accept wills for safe custody from persons or sources other than testators. He has sought an order in the following terms:

PURSUANT TO SECTION 134 PUBLIC TRUSTEE ACT 1978, THE COURT ADVISES AND DIRECTS THE PUBLIC TRUSTEE THAT:

1. Upon the proper construction of section 63 of the **Public Trustee Act** 1978:
   (a) the Public Trustee may receive and hold a will deposited with him by a person or persons other than the testator;
   (b) the Public Trustee is a sub-bailee of such a will;
   (c) the Public Trustee's liability in respect of such a will is that prescribed in s.63(4) of the **Public Trustee Act 1978.**

[2] Section 134 for the *Public Trustee Act* 1978 relevantly provides:

Public trustee may take opinion of court on question arising in course of duties

(1) The public trustee may, without instituting formal proceedings, take the opinion or obtain the direction of the court upon any question, whether of law or of fact, arising under this Act or in the course of the public trustee's duties.

(2) Any such question shall be submitted to a judge of the court in such manner and at such time as the public trustee may direct, and shall be accompanied by such statement of facts, affidavits, documents, and other information as the public trustee may require and the public trustee or anyone authorised by the public trustee shall, if the judge so desires, attend upon the judge at such time and place as the public trustee may appoint.

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(5) The judge shall give the judge's opinion or direction to the public trustee and, subject to any order of the court in other proceedings formally instituted, the public trustee, acting in accordance with such opinion or direction, shall be fully indemnified."

[3] In *Public Trustee of Queensland v MacPherson*, McMeekin J considered the purpose of s 134[2]:

"In *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of*

[2] [2011] QSC 169, at [19] – [20]

Australia and New Zealand (2008) 237 CLR 66; [2008] HCA 42 the High Court considered the New South Wales analogue of this section. The plurality made several general points about the provision. For present purposes the one of significance is the emphasis that the provision "operates as 'an exception to the Court's ordinary function of deciding disputes between competing litigants'; it affords a facility for giving 'private advice'. It is private advice because its function is to give personal protection to the trustee."[3]

Thus I am not balancing the two competing arguments of litigating parties."

[4] The Public Trustee identified three instances where bailees of wills have asked to deposit these wills with the Public Trustee for safe custody:

"(a) the executor of an estate of a former solicitor has requested that she deposit wills that the solicitor had in safe custody facility while practicing;

(b) a solicitors firm, Anderssens, say that it no longer maintains a safe custody facility, and wishes to deposit a number of "unclaimed" wills with the Public Trustee. This is taken to mean Anderssens are unable to contact the testators;

(c) the Queensland Law Society has about 16 000 wills in its possession obtained from legal practices to which receivers had been appointed under the **Legal Profession Act 2007** and has asked to deposit them with the Public Trustee."

Common to all these requests is that the testators delivered their wills to the solicitors as bailees for safekeeping, but it is now the bailee (or a sub-bailee thereof) and not the testator who asks to deposit the wills with Public Trustee.

[5] There is no suggestion that any of the affected testators have consented to, or given a direction for, their wills to be deposited with the Public Trustee.

The relevant provisions under the *Public Trustee Act* 1978

[6] Section 63 provides:

"**Wills, deeds and documents may be deposited**

(1) Any person may deposit any trust instrument in the Public Trust Office for safe custody.

(2) Any testator may deposit the testator's will in the Public Trust Office for safe custody, and, after the death of the testator, the public trustee shall deliver the will to such person as the testator may have directed in writing, or, in the absence of such direction, to such person as the public trustee thinks proper.

(3) The public trustee may accept for safe custody debentures or other interest-bearing securities for money, and other documents.

(4) The public trustee's liability in respect of any document or security deposited pursuant to this section shall, where a charge is made, be that of bailee for reward, and, where no charge is made, be that if a gratuitous bailee."

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1 At [19] – [20]

[7] The depositing of a will for safe custody under s 63(2) is limited by the identity of the person requesting the safe custody, i.e. the testator. The provision also prescribes the manner in which the will is to be dealt with upon the death of the testator. The legislation does not expressly cover the situation where the safe custody of the will by the Public Trustee is requested by someone other than the testator and without his/her consent.

[8] Provisions relating to the depositing of wills for safe keeping with the Public Trustee can be found in each of the Australian jurisdictions. The relevant provisions in Victoria[4] and New South Wales[5] permit "any person" to deposit a will; the legislation in Western Australia[6], like Queensland, is framed to permit a "testator" to deposit a will, while the provisions in South Australia[7], the Northern Territory[8] and the Australian Capital Territory[9], only permit the acceptance of a will where the Public Trustee is named as executor. Each of the respective provisions provides its own instruction on the manner in which the will is to be placed and held in safe custody.

Another way?

[9] Counsel for the Public Trustee submitted that s 63(3), through the inclusion of the words "other documents", was wide enough to cover other wills, not deposited by the testator. Counsel for the Public Trustee advanced the following reasons for this interpretation:

> " (a) it provides the Public Trustee "may accept for safe custody debentures or other interest-bearing securities for money, and other documents". Its operation is not limited by the identity of the person requesting the safe custody;
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> (b) "document" is not defined in the Public Trustee Act. The Acts Interpretation Act 1954 defines "document" to include: "any paper or other material on which there is writing". This is wide enough to include a will. "Other documents" in s.63(3) should not be narrowly construed, e.g. by limiting it *ejusdem generis* to "debentures or other interest-bearing securities for money". If parliament had intended the subsection to have that narrow construction, it could have said "debentures and other interest-bearing securities for money, and other *similar* documents". It is difficult to see what meaning could be given to "other documents" if limited to the type of documents previously referred to in the sub-section, as "debentures or other interest-bearing securities for money" seems to cover all documents of that type. The section heading refers to deeds, but they are not specifically referred to in the body of the section. "Deeds" clearly is wider than the "trust instruments" referred to in s.63(1), e.g. Deeds of Gift, Deeds of Forgiveness of Debt. And what of other valuable documents such as

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4 *Administration and Probate Act* 1958 (VIC), s 5A
5 *Succession Act 2006* (NSW), s51
6 *Public Trustee Act* 1941 (WA), s 54
7 *Public Trustee Act* 1995 (SA), s 52
8 *Public Trustee Act* 1979 (NT), s 89
9 *Public Trustee Act* 1985 (ACT), s 22

Certificates of Title? Unless "other documents" is construed widely, such important documents do not appear to be caught by the section;

(c) Construing s.63(3) in a wide fashion is in accordance with the overall purpose of s.63 which is to facilitate the safe keeping of important documents. The need for safe keeping can arise just as much, if not more, when a bailee has the document, as when its maker/owner has it;

(d) Section 63(1) allows "any person", not just the maker to deposit a "trust instrument" with the Public Trustee. There is no good reason why a similar facility should be available for wills;

(e) ss.364 and 392 of the Residential Tenancies and Rooming Accommodation Act 2008 oblige landlord to deliver to the Public Trustee "personal documents" left on the premises when the former tenant cannot be found. This includes wills made by the tenant or otherwise. It makes no sense to restrict the Public Trustee's power to receive wills from other than the testator to instances specifically authorised by legislation like this. As has occurred in the present case, solicitors are far more likely to call on the public trustee to take safe custody of "unclaimed wills", yet there is no statutory provision specifically referring to the situation;

(f) the Public Trustee may become administrator of "unclaimed property" pursuant to Part 8 of the Public Trustee Act. Those provisions are inappropriate for documents such as private wills. They are concerned with property that has market value, as the Public Trustee is required to advertise and/or apply for a Court Order appointing him administrator of the unclaimed property depending on its value. Also s108 Public Trustee Act provides that the Public Trustee is the trustee of unclaimed property, whereas it is more appropriate for him to be bailee (or sub-bailee) of documents he holds in his safe custody.

The proper construction of the phrase "other documents"

[10] This application turns on the proper construction of the words "other documents" in s 63 (3).

[11] Acknowledging the purposive approach to statutory interpretation[10] , it is appropriate in this case, in the absence of previous authority on this point, to have regard to extrinsic material as an aid to interpretation[11]. The *Public Trustee Bill* was introduced to Parliament to "change the name and style of the Public Curator of Queensland to that of The Public Trustee of Queensland and to consolidate and amend the law relating to him and his office"[12]. The only mention in the Parliamentary debate, about the safe keeping of documents, was acknowledgement of the important role of the Curator (as the Public Trustee was then described) in

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10 *Acts Interpretation Act* 1954 (QLD), s 14A (1); *Project Blue Sky Inc v Australian Broadcasting Authority* 194 CLR 355

11 *Acts Interpretation Act* 1954 (QLD), s 14B (1)(c)

12 Queensland, *Parliamentary Debates*, Legislative Assembly, 13 March 1979, 42 – 1 (Hon. J. E. H. Houghon)

holding "in safe custody for **testators** 306,935 wills" (emphasis added)[13]. The explanatory memorandum did not provide much additional guidance but did state that the Public Trustee's public function would include, "provision for wills, trust instruments and other documents to be placed for safe custody in the Public Trustee Office, if desired."[14] Whilst the explanatory memorandum and second reading speech provided little guidance, they did reinforce that the clear role for the Public Trustee in respect of wills, is to hold them in safe keeping for a **testator.**

[12] Unlike s 63(2), the operation of s 63(3) is not limited by the identity of the person requesting the safe custody and is inherently broader. I agree with the submission that the phrase "other documents" must have a wider meaning than documents of a similar kind to "debentures or other interest-bearing securities for money"; without adopting this interpretation, s 63 would fail to provide for documents such as deeds, which are included in the section heading, but are not expressly referred to in the section. I also agree as a starting point that the word "document", when given its meaning under the *Acts Interpretation Act,* is wide enough to cover a will.

[13] However, just as a full reading of the subsection necessitates an expansion of the meaning of the phrase "other documents" beyond documents of a kind similar to "debentures or other interest-bearing securities for money", it also operates to limit the meaning of the phrase. Read in isolation the word "document" is certainly wide enough to include a will. But in the context of the preceding subsection, which specifically deals with wills, I do not consider that "other documents", in this context, should be read to include all other wills not captured by the express wording of s 63 (2). Even if I were to adopt a liberal interpretation of subsection 63(3), and construe the phrase "other documents" to include wills deposited by bailees in situations such as those described at paragraph [4], the problem would still remain as to how these wills would be appropriately managed. Section 62(2) makes express provision for the way in which, after the death of the testator, the Public Trustee is to deal with a will which had been deposited under that subsection. No such provision is made under s 62(3).

[14] There is a further consideration. A solicitor to whom a testator entrusts a will for safekeeping holds that will as bailee. The existence of the bailment gives rise to a range of obligations on the bailee (not the least of which is not to part with possession of the bailed property other than in accordance with the bailer's instructions) and a range of rights in the bailer. A receiver of the solicitor's practice, into whose possession the bailed property passed, would also be impressed with the bailment[15]. The wide construction of s 63(3) contended for by counsel for the Public Trustee would clearly have an impact on the rights and obligations under such bailment. I do not consider that's s 63(3), in its present form, is apt to abrogate or ameliorate those common law rights and obligations.

[15] Rather than the depositing of a will by a bailee or sub-bailee being expressly forbidden by the legislation, it seems more likely that this is an event which was not within the contemplation of the Legislature when the legislation was passed. The explanatory memorandum to the Bill included commentary that provision for documents to be placed for safe custody in the Public Trustee Office should be

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13 Ibid

14 Explanatory memorandum, Public Trustee Bill 1978 (Qld)

15 Whether that be by sub-bailment or extended bailment is not a question for present consideration

accommodated, "if desired"[16]. Whilst I see the sense in the application made by the Public Trustee, and see also the practical desirability of the Public Trustee's Office being regarded as the appropriate body to store the wills deposited in these circumstances, I consider that the legislation, as it is currently framed, is not wide enough to cover these situations. To direct that any wills could be deposited under the banner of "other documents" without provision for how the wills are to be handled would be a messy solution that only solves part of the problem.

[16] This may be a case in which the problem identified by Spigelman CJ in *R v Young* raises its head, that is, - "what, if anything, should the courts do when it appears parliament has failed, apparently by inadvertence, to deal with an eventuality required to be dealt with if the purpose of the statue is to be achieved."[17] If there is a lacuna in the legislation, as it appear to me there is, clear guidance from Parliament is required. It should be left to Parliament to remedy the deficiency.

[17] Pursuant to s 134 of the *Public Trustee Act* 1978 ("the Act"), the Court advises that in circumstances where a person holds a will as bailee for a testator, s 63(3) of the Act, on its proper construction, does not authorize the Public Trustee to accept that will from that person for safe custody without the consent or direction of the testator.

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[16] Ibid
[17] (1999) 46 NSWLR 681.