SUPREME COURT OF QUEENSLAND

CITATION:	*Public Trustee of Queensland (as litigation guardian of Ethel May Brigg, also known as Lucy Brigg) v Stibbe as executor of the Will of the late Winifred Deidre Butler & Anor* [2012] QSC 357
PARTIES:	**In the matter of THE WILL OF THE LATE WINIFRED DEIDRE BUTLER** **DEAN BRADLEY STIBBE as Executor of the Will of the late WINIFRED DEIDRE BUTLER** (applicant)
FILE NO/S:	BS No. 2683 of 2012
PARTIES:	**PUBLIC TRUSTEE OF QUEENSLAND (as litigation guardian of ETHEL MAY BRIGG, also known as LUCY BRIGG)** (Applicant) **v** **DEAN BRADLEY STIBBE as Executor of the Will of the late WINIFRED DEIDRE BUTLER** (First Respondent) **AUSTRALIAN RED CROSS SOCIETY** (Second Respondent)
FILE NO/S:	BS No. 8632 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 November 2012
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2012
JUDGE:	Ann Lyons J
ORDER:	**In BS No. 2683 of 2012:** **1. That upon the proper construction of the Will of Winifred Deidre Butler deceased dated 4 March 2002 the gift to Lucy Brigg (also known as Ethel May Brigg) in clause 3.4.2 thereof was adeemed by the sale during the deceased's lifetime of the property described in clause 3.4.2 of that will, being the deceased's house at 29 Allamanda Drive, Bongaree, Bribie Island.**

2. That upon the proper construction of the said Will and in the events which have occurred monies held or invested in the Public Trustee of Queensland on behalf of the deceased at the date of her death form part of her residuary estate.

3. That:

(a) The items in Schedule A to the Amended Originating Application filed on 14 August 2012 comprise the items of jewellery referred to in clause 3.3 of the Will of the said deceased and are to be distributed to Lucy Brigg;

(b) The items in Schedule B to the aforesaid Originating Application are not 'jewellery' within the meaning of clause 3.3 of the sale Will and form part of the deceased's residuary estate.

4. Orders that the costs of an incidental to these proceedings be paid from the estate of Winifred Deidre Butler on the indemnity basis.

In BS No. 8632 of 2012:

1. This Application be heard and determined notwithstanding that it was instituted more than nine months after the death of Winifred Deidre Butler deceased.

2. Pursuant to s 60 *Guardianship and Administration Act* 2000 (Qld) that the First Respondent pay:

(a) All remaining estate liabilities;

(b) Compensation to Lucy Brigg in the sum of $190,000 rateably out of the estate of Winifred Deidre Butler deceased for the loss of benefit of the gift under clause 3.4.2 of the will of the said deceased dated 4 March 2002 provided that there are sufficient funds remaining in the Estate after payment of all remaining estate

liabilities. In the event that the amount remaining in the Estate after payment of all remaining liabilities is less than $190,000, then the First Respondent shall pay that lesser sum to Lucy Brigg.

3. **The First Respondent pay the aforesaid compensation to the Public Trustee as the financial administration of Lucy Brigg, and his receipt shall be a sufficient discharge.**

4. **The costs of all parties of and incidental to this Application be paid out of the estate of Winifred Deidre Butler deceased on the indemnity basis.**

CATCHWORDS: **SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND THE EFFECT OF TESTAMENTARY DISPOSITIONS – GENERALLY** – where testatrix in her Will directed that the net proceeds from the sale of her house be divided between her husband and her friend and, in the event that either predeceased her, the share to which they were otherwise entitled be given to the Australian Red Cross Society – where testatrix's husband predeceased her – where Public Trustee was appointed the testatrix's administrator and sold testatrix's home and part of the sale proceeds were paid as a nursing home bond – whether the gift of the house was adeemed

SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND THE EFFECT OF TESTAMENTARY DISPOSITIONS – GENERALLY – GENERAL PRINCIPLES OF CONSTRUCTION – ORDINARY AND GRAMMATICAL MEANING OF WORDS – where testatrix in her Will directed that "any cash I have in my bank accounts at the time of my death" be given to her friend – where Public trustee managed the testatrix's money via its Common Fund and deposited and withdrew funds into its Term Investment Fund and its Conservative Trust Fund – whether money in Public Trustee's Cash Account and Term Investment Account belongs to the Public Trustee or to the testatrix's estate – whether money in Public Trustee's Conservative Trust Fund can be considered "cash in my bank account"

SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND THE EFFECT OF TESTAMENTARY DISPOSITIONS – GENERALLY – GENERAL PRINCIPLES OF CONSTRUCTION – ORDINARY AND

GRAMMATICAL MEANING OF WORDS – where testatrix in her Will directed that "all of my jewellery" be given to her friend – where testatrix left items including watches, necklaces, bangles, rings, earrings, pendants, chains, powder compacts, gem stones, jewellery boxes, war medals, dog tags, badges, name tags, bowling badges, a coin and note collection and Australian Mint items – whether war medals, dog tags, badges, name tags, bowling badges, a coin and note collection and Australian Mint items constitute 'jewellery'

Commonwealth Financial Sector Reform (Amendments and Transitional Provisions) Act 1998
Guardianship and Administration Act 2000, s 60
Public Trustee Act 1978, s 19, s19A
Public Trustee Regulation 2001
Succession Act 1981, s 33C

Johnston v Maclarn [2002] NSWSC 97
Kruize v Cheung [2008] QSC 156
Moylan v Rickard [2010] QSC 327
Parnell v Hinkley[2007] WASC 102
Re Thomson & Anor (as trustees of the trusts established pursuant to the will of Shine (deceased) [2010] QSC 167
Re Viertel [1997] 1 Qd R 110
RL v New South Wales Trustee and Guardian [2012] NSWCA 39
Roman v Ladewig [2003] QCA 530
The Trust Company Limited & Anor v Zdilar & Ors [2011] QSC 5
The Trust Company Ltd v Gibson and Anor [2012] QSC 183

Hardingham I J, Neave M A and Ford H A J *The Law of Wills* The Law Book Company Limited, Sydney, 1977
Martyn J R and Caddick N (eds.) *Williams, Mortimer and Sunnocks on Executors, Administrators and Probate* (19th ed) Sweet and Maxwell, London, 2008
Roper R S D *A treatise on the law of legacies* (4th ed) William Benning & Co, London, 1847

COUNSEL: R T Whiteford for the Applicant/Respondent
D A Skennar for the First Respondent/Applicant

SOLICITORS: Official Solicitor for the Public Trustee for the Applicant/Respondent
Files Stibbe & Associates for the First Respondent/Applicant

ANN LYONS J:

Background

[2] There are two applications before the Court in two interrelated proceedings.

[3] The first application, originally filed on 22 March 2012 and amended on 14 August 2012, is in proceeding BS No. 2683 of 2012 and is an application by the executor in relation to the interpretation of the Will of the late Winifred Deidre Butler.

[4] The second application filed on 18 September 2012, is in proceeding BS No. 8632 of 2012 and is for compensation pursuant to s 60 of the *Guardianship and Administration Act* 2000 (Qld) ("GAA") by the Public Trustee of Queensland as administrator for one of the beneficiaries named in the Will of Winifred Deidre Butler.

The application in BS No. 2683 of 2012

[5] The Applicant in BS No. 2683 of 2012 is a solicitor and the executor of the Will of the late Mrs Butler. Mrs Butler died on 1 November 2010 aged 92 and the executor obtained probate of the deceased's last Will, dated 4 March 2002, on 10 December 2010.

[6] The assets and liabilities of the estate indicate that the assets essentially comprise funds received from the Public Trustee, a refund of a nursing home bond, a small amount of money held in a Credit Union Australia Account, jewellery and personal effects.

[7] One of the beneficiaries named in Mrs Butler's Will, Lucy Brigg, was unable to be located by the executor. Accordingly the executor filed an originating application to obtain orders as to the advertising in relation to her. On 11 April 2012, Martin J made an order for the placement of the advertisements in accordance with the application. The advertising required by the order was effected on 12 and 13 April 2012.

[8] As a result of that advertising the executor ascertained that Lucy Brigg's affairs were being managed by the Public Trustee of Queensland.

[9] The executor now seeks orders from the Court as to the construction of the last Will of the late Winifred Deidre Butler and as to the administration of the estate.

The Terms of the Will

[10] The Testatrix appointed, as executor, a solicitor with the firm Files Stibbe & Associates and pursuant to clause 3 she directed that her executor hold her estate on trust. Clauses 3.3 to 3.6 of the Will provided:

> "*3.3* ***TO GIVE*** *all of my jewellery and any cash I have in my bank accounts at the time of my death to my Friend* ***LUCY BRIGG*** *of Foley Street, Bribie Island in the State of Queensland;*
>
> *3.4* ***TO SELL*** *my house and* ***TO DIVIDE*** *the net proceeds of sale as follows:*
>
> *3.4.1* ***TO GIVE*** *fifty percent (50%) to my Husband* ***ALEXANDER WILLIAM BUTLER****;*

3.4.2 ***TO GIVE*** *fifty percent (50%) to my said Friend* ***LUCY BRIGG***

3.5 ***SHOULD*** *any of the persons referred to in Clause 3.4 have predeceased me then* ***TO GIVE*** *the share to which they were otherwise entitled to the* ***AUSTRALIAN RED CROSS SOCIETY****, Queensland Division of GPO Box 917, Brisbane in the State of Queensland;*

3.6 ***TO GIVE*** *the rest and residue of my Estate to the* ***AUSTRALIAN RED CROSS SOCIETY****, Queensland Division of GPO Box 917, Brisbane in the State of Queensland.*"

Events subsequent to the appointment of the Public Trustee of Queensland

[11] Prior to Mrs Butler's death the Public Trustee was appointed her administrator pursuant to an order of the Guardianship and Administration Tribunal dated 30 April 2002 when she lost capacity to manage her own financial affairs.

[12] At the time of the appointment of the Public Trustee Mrs Butler owned a home at Allamanda Drive, Bribie Island and she had a Term Deposit with Credit Union Australia in an amount of $16,934.89, which was transferred to the Public Trustee on 17 May 2002.

[13] The house was sold by the Public Trustee for $200,000 with the sale settling on 12 November 2002. The net proceeds of sale of $194,310.82 were deposited into the Public Trustee's Common Fund.

[14] On 26 November 2002 the sum of $109,347.62 from the sale proceeds was paid to Burpengary Gardens as a nursing home bond. The deceased later moved to the Churches of Christ Retirement Village on Bribie Island and the nursing home bond was $101,970.86.

[15] Mrs Butler's husband Alexander Butler died on 17 January 2005.

[16] Pursuant to this application the executor seeks orders from the Court which essentially requires answers to the following questions:

(a) Was the gift to Ms Briggs pursuant to clause 3.4.2 a gift which has been adeemed?

(b) Are the funds held by the Public Trustee in accounts on behalf of the deceased "cash I have in my bank accounts at the time of my death" in accordance with paragraph 3.3 of the Will?

(c) If not, are the amounts held for the deceased by the Public Trustee to fall into the residuary estate?

(d) What personal items constitute 'jewellery' pursuant to clause 3.3 of the Will.

Was the gift to Ms Briggs adeemed?

[17] It is clear that pursuant to clause 3.4 of the Will Mrs Butler instructed her executor "To sell my house and to divide the net proceeds of sale" as between 50 per cent to Mrs Butler's husband Alexander William Butler and 50 per cent to Lucy Brigg. Mr Butler predeceased Mrs Butler and pursuant to clause 3.5 his share was to go the Australian Red Cross Society.

[18] I am satisfied that the reference in the Will to "my house" could not be said to include her rights to reside at the nursing home pursuant the bond paid to the nursing home. Justice Margaret Wilson in *The Trust Company Limited & Anor v Zdilar & Ors*[1] held that the reference in that case by the testatrix to "my house property" could not be held to cover her rights in relation to the unit in a retirement village. Her Honour said:

> "[40] The testatrix referred to the property at 18 Esma Street as "my house property". The use of the possessive pronoun "my" bespeaks ownership in the sense of "belonging to me" or "over which I have full control". In that context, her reference to "any substitute house property which I shall own" was, in my view, a reference to any property fitting the description of "house" in relation to which she had similar rights. Her rights in relation to the unit in the retirement village were very different from her rights as the owner of the fee simple in the property at 18 Esma Street."

[19] It is clear that Mrs Butler's house was sold in November 2002. The question is whether the gift of 50 per cent of the sale proceeds of that house to Ms Briggs has been adeemed. The general principles in relation to ademption are outlined in Williams, Mortimer and Sunnucks' text *Executors, Administrators and Probate*,[2] in the following terms:

> "The general rule is that, in order to complete the right of a specific legatee to receive his legacy, the thing bequeathed must, at the testator's death, remain itself as described in the will: otherwise the legacy is adeemed. For instance, if the legacy is of a specific chattel in possession, as of a gold chain, or a bale of wool, or a piece of cloth, the legacy is adeemed, no only by the testator's selling or otherwise disposing of the subject in his lifetime, but also if he changes its for so as to alter the specification of it. Thus, if he converts the gold chain into a cup, or the wool into cloth, or makes the piece of cloth into a garment, the legacy is adeemed. The law is that where you find a change in the thing bequeathed ademption will follow, unless it can be shown that the thing is change in name or form only and remains substantially the same."

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1 [2011] QSC 5.

2 Martyn J R and Caddick N (eds.) *Williams, Mortimer and Sunnocks on Executors, Administrators and Probate* (19th ed) Sweet and Maxwell, London, 2008 at 68-03.

[20] In the text *The Law of Wills*[3] the learned authors discuss the distinction between specific gifts which are subject to the rules of ademption and other gifts which are not, as follows:

> "Like general legacies demonstrative legacies are not subject to ademption. Where the words of the will indicate that a gift is to be made primarily out of a particular fund, or from the proceeds of the sale of particular property, but the gift is not to fail if the fund goes out of existence or proves inadequate, the legacy is demonstrative. In contrast, *if the will indicates that the gift can only be satisfied from a particular fund, the gift is specific and ademption will occur if the fund is not in existence at the testator's death*." (my emphasis)

[21] I consider that the gift to Ms Brigg in clause 3.4.2 was a specific gift and therefore subject to the rules of ademption. It was a specific gift of a percentage of the proceeds of sale of her house. Significantly, McPherson JA in *Romano & Anor v Ladewig & Anor*[4] held that if the gift in the will "were of the land itself or alternatively the proceeds of its sale, it would be a specific bequest of that land or those proceeds." The specific gift in the present case is to be contrasted with the gift in *Moylan v Rickard*,[5] where the will in question intended that there be a gift of a sum of money but that the sum of money was to be calculated in reference to a property described as the deceased's principal place of residence at the date of her death. In those circumstances, it was held by Peter Lyons J that the principle of ademption did not apply as follows:

> "[39] It will be obvious that the principle applies where a gift in a will is a gift of specific property. The rationale for the principle is that the property not forming part of deceased's estate, effect cannot be given to a gift of it.
>
> [40] The gift to the applicant in cl 4(c) of the will is not a gift of specific property. It is a gift of a sum of money. In my view, that gift cannot fail by reason of the doctrine of ademption.
>
> [41] Mr Peterson of Counsel, who appeared for the respondents, made reference to *Re Culbertson.* That case discussed the difference between general legacies, demonstrative legacies and specific legacies. A specific legacy was identified as "a gift by will of a particular thing forming part of the testator's estate or of a specified legal or equitable interest, such being described in a sufficiently explicit manner in the will as to enable it to be identified as separated from the mass of the testator's estate inclusive of other things of the same kind, if any, and which is satisfied by the executor by delivery of the particular thing or by appropriate transfer of such interest to the legatee."

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3 Hardingham I J, Neave M A and Ford H A J *The Law of Wills* The Law Book Company Limited, Sydney, 1977 at 156-157.

4 [2003] QCA 530 at [18].

5 [2010] QSC 327 (references omitted).

> [42] A demonstrative legacy was described as "an unconditional gift of a specified amount accompanied by a reference to a particular fund or source for payment thereof". A general legacy is a legacy which is neither specific nor demonstrative.
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> [43] As I have indicated, the gift made to the applicant in cl 4(c) is not a specific legacy. It bears some analogy with a demonstrative legacy, for, if the property were sold within three months of the deceased's death, then the sale price provides a measure for the amount of the gift; and it seems likely that it would constitute the source of funds for that gift. However, the gift is intended to take effect even if a sale of the property does not occur within three months of the death. In that case, the source of the funds is not specified in the will, whether directly or indirectly.
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> [44] A demonstrative legacy is not adeemed by the total or partial failure at the testator's death of the fund out of which it was to be paid.
>
> [45] The gift to the applicant found in cl 4(c) of the will is clearly not a specific gift or legacy. Indeed, its connexion to the property referred to in that clause as a source of funds for the gift is not as close as the connexion between a demonstrative legacy, and the property which provides the source of funds for such a legacy.
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> [46] I am therefore of the view that the gift referred to in cl 4(c) the will is not adeemed, because it is not a gift of specific property; rather it is a gift of money, the amount of which is to be determined by reference to a property."

[22] By contrast in the present case it is clear that there was a specific legacy as there was a gift by the Will of a percentage of the particular house property which was previously owned by Mrs Butler.

[23] I am also satisfied that I should not follow the decision of *Re Viertel*,[6] which was for over a decade accepted as authority for the proposition that a specific gift was not adeemed if the property was disposed of by a third party without the knowledge of the deceased. In the recent decision of *RL v New South Wales Trustee and Guardian*,[7] the New South Wales Court of Appeal held that *Re Viertel* was wrongly decided. The Court held that the sale during the deceased's lifetime of a 'lock up garage', which was specifically gifted under a will, resulted in an ademption of a specific gift of that asset even though it was sold in accordance with a court order after the testatrix lost capacity. The Court held that the real question is "whether the testator possessed the property in the specific gift at the time of his death. If he did not, the legacy is adeemed by annihilation of the subject."[8]

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6 [1997] 1 Qd R 110.
7 [2012] NSWCA 39.
8 Ibid at 175.

[24] In *RL*, Campbell JA analysed the law of ademption in Appendix B to the judgment in great detail. His Honour stated that if some specific item of property is given by the will and immediately before the death of the testator, if he or she does not own property of that description, then there is no subject matter to which the gift in the will can attach. The Court specifically held that *Re Viertel* came to an incorrect view of the law and that the correct analysis of the law was set out by Young CJ In Equity in *Johnston v Maclarn*.[9] Campbell JA also referred to Roper on Legacies,[10] which indicated that the word 'ademption' when applied to specific legacies of stock or of money must be considered as synonymous with the word 'extinction' and that the testator's intention is irrelevant. The only thing to be ascertained is whether the testator possessed the property in the specific gift at the time of his death. If he did not, the legacy is adeemed by annihilation of the subject.

[25] It was held that unless there are dishonest dealings, a principal is bound by the acts of his attorney within the scope of the authority conferred, even if the principal has no intention to carry out the specific act that the attorney has carried out. It was held that it was no different to the way in which an incapable person is bound by acts, performed with proper legal authority, of whoever is administering his or her affairs, whether that administration is occurring under a court or Guardianship Tribunal management order or an enduring power of attorney. Campbell JA continued:

> "When one is considering whether the disposition of an asset of an incapable person has adeemed a specific gift made by that person's will, there is no legitimate basis of principle on which a disposition effected pursuant to an enduring power of attorney should operate in any different way to a disposition effected pursuant to the authority of the court, or of the NSW Trustee. *Re Viertel* did not consider the whole of the well-established line of English cases that show that the disposition of an asset of an incapable person in accordance with the court order results in an ademption of a specific gift of that asset. Insofar as it considered *Jenkins v Jones* and *In Re Larking* from that line of cases, it did not appreciate the basis upon which they had been decided."[11]

[26] The *RL* decision was recently followed by Mullins J in *The Trust Company Ltd v Gibson and Anor*:[12]

> "[22] When the application was heard, the parties' submissions proceeded on the basis that *Viertel* was authoritative in recognising an exception to ademption in a case where the real property of the testatrix who had become mentally incapacitated was lawfully sold and the proceeds of sale preserved during her lifetime by her attorneys who had no knowledge of the terms of her will. The devise of the property in *Viertel* to those attorneys was held not to be adeemed. After I had reserved my decision, the parties'

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9 [2002] NSWSC 97.

10 Roper R S D *A treatise on the law of legacies* (4th ed) William Benning & Co, London, 1847 at p 329.

11 Above n 7 at 186.

12 [2012] QSC 183.

> counsel drew my attention to *RL v NSW Trustee and Guardian* [2012] NSWCA 39. In *obiter dicta* Campbell JA who gave the leading judgment (with which Young JA and Sackville AJA agreed) concluded that *Viertel* and cases which applied it (including *Ensor v Frisby* [2010] 1 Qd R 146 and *Public Trustee of Qld v Lee* [2011] QSC 409) were wrongly decided. The parties agreed that, if I were to follow *RL*, the conclusion would follow that the gift to the respondents under clause 3(b)(i) of the will was adeemed and the sale proceeds held on account of the deceased would properly fall into residue.
>
> [23] *RL* was concerned with the manner in which the manager of the estate of an incapable protected person was obliged to invest the net proceeds of sale of an asset that was the subject of a specific legacy in the last will that the protected person made before becoming incapable. Although *RL* was not directly concerned with the question of ademption that arose in *Viertel*, arguments had been addressed to the court based on *Viertel.* Campbell JA dealt in detail with those arguments and set out in Appendix B to his reasons at [148]-[187] why *Viertel* and cases following it were wrongly decided. It is a comprehensive and convincing analysis."

[27] Accordingly it would seem clear that the sale by the Public Trustee of Mrs Butler's house in November 2002 adeemed the gift to Lucy Brigg in clause 3.4.2 of the Will. There is now nothing in the estate which fits the words of the gift to Lucy Brigg in the Will. I am accordingly satisfied that the gift is adeemed as the house property has indeed been 'annihilated'.

[28] The funds from the sale of the property were paid to the Public Trustee and placed initially in the Common Fund.

Are the funds held by the Public Trustee funds which could be considered to be "cash I have in my bank accounts at the time of my death"?

[29] There is a small amount currently held in a Credit Union account which Counsel agree fits the description of cash held in a bank account. The bulk of Mrs Butler's funds however was held in various accounts by the Public Trustee. Counsel for the Public Trustee has provided a very helpful flowchart which sets out the ways in which the moneys received from the sale of the house have been invested since November 2002 until her death in November 2010.[13]

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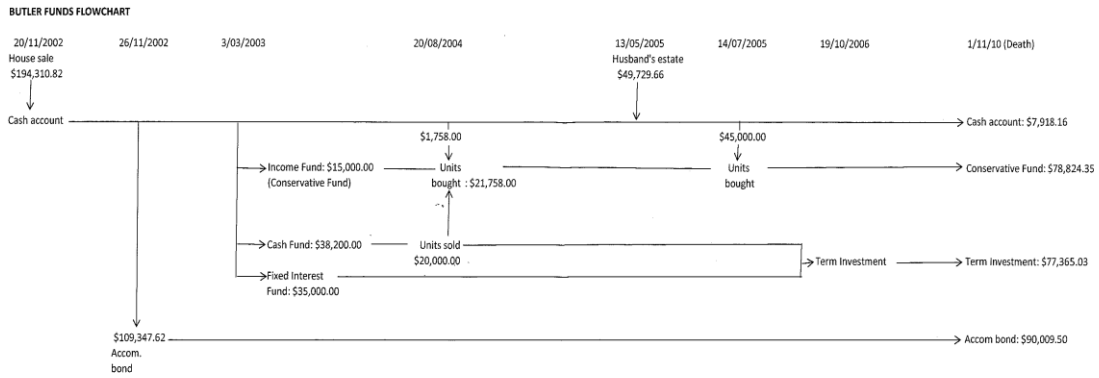
13 Exhibit 1.



[30] It is clear from that flowchart that the Public Trustee, pursuant to its usual practice, initially managed Mrs Butler's money via the Common Fund. Whilst the amount of $194,310.82 was initially paid into the Common Fund it is clear that there were numerous deposits into and withdrawals from the Common Fund over the years. The funds were ultimately managed by the Public Trustee in a number of different ways for Mrs Butler as follows:

1. On 26 November 2002, $194,310.82 was deposited into the Public Trustee's Common Fund.

2. On 26 November 2002, $109,347.62 was withdrawn to pay the accommodation bond.

3. On 3 March 2003, the PTQ withdrew $88,200 and invested it in a Unit Trust managed by the Public Trustee.

4. On 19 October 2006, two of those trusts were liquidated and the proceeds paid back into the Common Fund and used to create a term investment account within the Common Fund for Mrs Butler. The investment in a third unit trust however "the Conservative Fund" was maintained.

[31] On 1 November 2010, when Mrs Butler died a widow, her estate consisted of funds held by the Public Trustee totally an amount of approximately $164,000 as well as an entitlement to accommodation bond refund valued at $99,009.50, as well as items of jewellery and other personal effects.

[32] The relevant principles when construing a will were summarised by Atkinson J in *Re Thomson & Anor (as trustees of the trusts established pursuant to the will of Shine (deceased))*.[14] It is clear that the task of the Court is to discover the testator's intention by an examination of the words used in the will. The general principle is that the court interprets the words of the will in the context in which they appear in accordance with their usual meaning. The only exception is that where the usual meaning rule is insufficient to resolve the construction of the clause in the will, a court can consider extrinsic evidence.

[33] Accordingly, it is manifestly clear that the court should start with the words of the Will and, as Atkinson J indicated, if their usual meaning in the context of the will is clear then that meaning is given. If not, then resort can be had to such extrinsic

14 [2010] QSC 167.

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 (Qld).

[34] It is clear from the affidavit of Clinton Miles,[15] the Director of Disability Services for the Public Trustee, that at the time of the deceased's death her funds totally some $164,000 were held by the Public Trustee in three different types of investments. The amounts actually held by the Public Trustee in those three different accounts were as follows:

(a) $7,918.16 in a "Public Trustee – Cash Account";

(b) $77,365.03 in a "Term Investment Account"; and

(c) $78,824.35 which represented units in the Public Trustee of Queensland – Conservative Fund.

[35] Whilst there may be an argument that the money in the Public Trustee Cash Account and the Public Trustee Investment Account might be considered to be 'cash', there is no doubt that those funds were not within Mrs Butler's own bank accounts. The provisions of the *Public Trustee Act* 1978 (Qld) require that funds held by the Public Trustee be held in a certain way. Section 19 of that Act provides that all money received by the Public Trustee must initially be paid into the Public Trustee's own bank account, that is, the 'Common Fund'.

[36] The affidavit of Clinton Miles outlines the process adopted by the Public Trustee in relation to moneys held in the Common Fund, which is that the money in the Common Fund is attributed to the Public Trustee's clients by the accounting measure of individual ledgers. Consequently any money which may be needed by an individual client immediately is allotted to the Public Trustee's cash account within the Common Fund by an accounting entry. Any money not immediately needed is then by accounting entry allotted to the Public Trustee's Term Investment Account within the Common Fund. Under the *Public Trustee Regulation* 2001 (Qld), the Public Trustee is required from its own funds to credit the client's ledger with the interest prescribed for those accounts.

[37] Accordingly those accounts clearly belongs to the Public Trustee and not to the estates under administration from which the money comes. Accordingly, the money held was not held in Mrs Butler's bank accounts. It is also clear the interest generated by that account belongs to the Public Trustee pursuant to ss 19 and 19A of the *Public Trustee Act*.

[38] I am satisfied therefore that the Public Trustee's Cash Account and Public Trustee's Term Investment Account cannot be considered to be cash which Mrs Butler had in her bank accounts at the time of her death and, accordingly, they fall into residue and pass to the Red Cross. The executor accepts that these moneys held by the Public Trustee were part of the Common Fund and were not held on the deceased's behalf.

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15 Affidavit of C J Miles sworn 26 October 2012 (Doc 4 on BS No. 8632 of 2012).

[39] In relation to the Conservative Fund, however, it is argued by the Public Trustee that those funds may well fulfil the requirements of the Will and might be considered to be "cash in my bank account".

[40] The evidence indicates that on 3 March 2003 the Public Trustee withdrew $88,200 and invested it in Unit Trusts. Two of those trusts were liquidated in October 2006 and paid back into the Common Fund and used to create a term investment. However the investment in the third unit trust, the Conservative Fund, was maintained. This is currently an amount in excess of $78,000.

[41] The Public Trustee argues that this is a unit trust established by Deed dated 10 July 2006 whereby the Public Trustee is the trustee of the trust. Pursuant to that Deed the Public Trustee holds on trust for clients the units bought with money debited to that client's ledger. The units confer beneficial interest in the trust fund though not to any particular part of it. The units are redeemable on oral or written notice.

[42] Counsel for the Public Trustee argues that the Conservative Fund is within the meaning of the words "any cash in my bank account at the time of my death" because

> "as is well known, a customer does not have 'cash' in a bank account. Rather, the customer has a chose in action, since the bank is merely indebted to the customer for the amount deposited. Accordingly, there is a limit to the extent to which a technical meaning should be given to the phrase 'cash in the bank'."

[43] Counsel for the Public Trustee argues that, pursuant to the decision of *Parnell v Hinkley*,[16] it is proper to read clause 3.3 of the Will as if it was a gift of 'money' in my bank accounts rather than 'cash'. In that decision it was held that "in modern parlance "cash" and "money" are commonly used 'synonymically'.[17] Counsel also relies on the decision of Cullinane J in *Kruize v Cheung*,[18] where the words "any money that I may have including any bank accounts that I may hold at the time of my death" were held to include not only a savings account but a wealth management account which was a unit trust, namely the ANZ Conservative Trust.

[44] Counsel argues that on the basis of the reasoning in *Kruize v Cheung* that the Public Trustee banked Mrs Butler's money on her behalf when he became her financial administrator and that the Conservative Fund is one of the types of investments developed by the Public Trustee to offer to customers.

[45] It is argued that unlike the money in the Common Fund, which belongs to the Public Trustee, the Public Trustee held the units in the Conservative Fund on trust for Mrs Butler. Accordingly, it is argued that if Mrs Butler had turned her mind to it, she would have included her interest in that trust, since it was acquired as an investment of her money as being money in her bank accounts. Accordingly the Public Trustee argues that the money in the Conservative Fund passes to Lucy Brigg.

[46] In my view, however, whilst it is possible that the units in the Public Trustee of Queensland Conservative Fund may be considered to be money and as such is

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16 [2007] WASC 102.

17 Ibid at [23] per Master Newnes.

18 [2008] QSC 156.

consistent with cash, it is necessary to read clause 3.3 of the Will as a whole. I am not convinced that the reference by the deceased to cash in her bank account is synonymous with a unit held in this Public Trustee investment fund particularly when one considers the definitions in clause 1.2 of the Trust Deed as follows:

> "1.2 The following words and phrases have these meanings and are used in relation to all Trusts.
>
> …
>
> '**Assets'** in respect of a Trust includes:
>
> (a) Cash on hand or at a bank;
> (b) Authorised Investments;
> (c) amounts owing to the Trust by debtors (excluding bad or doubtful debts);
> (d) income accrued from Authorised Investments to the extent not included in the preceding paragraphs of this definition;
> (e) any prepayment of expenditure; and
> (f) any Tax credit, deduction or rebate which has not already been taken into account in the calculation of Liabilities and which the Trustee considers can be utilised within the next two Financial Years.
>
> …
>
> '**Trust Fund**' means in relation to a Trust all of the Assets for the time being of the Trust but subject to the Liabilities at the time of the Trust.
>
> …
>
> '**Unit'** means, subject to the provisions of the Schedule relating to a Trust, an undivided part or share in the beneficial interest in a Trust Fund as described in clauses 3 and 4."

[47] In any event I am not satisfied that the amounts held by the Public Trustee could be considered to be held by a 'bank'. It is clear that subsequent to the commencement of the *Commonwealth Financial Sector Reform (Amendments and Transitional Provisions) Act* 1998, a body corporate may only carry on banking business in Australia if it has been granted an authority to carry on a banking business in Australia by the Australian Prudential Regulation Authority (**APRA**).

[48] In his affidavit, the executor Mr Stibbe, sets out the list of businesses which have APRA authority. The Public Trustee of Queensland is not a business which has the relevant APRA authority.

[49] Accordingly, I am satisfied that the money held in the Conservative Fund could not be considered to be 'cash' held in a 'bank' account. Accordingly the funds in the Public Trustee Fund do not pass to Lucy Brigg pursuant to cl 3.3 of the Will but, rather, fall into the residuary estate.

What items constitute 'jewellery'?

[50] Clause 3.3 provided that Ms Brigg was to receive Mrs Butler's jewellery as at the date of her death.

[51] It is clear that Mrs Butler left some jewellery as well as some coins, war medals, badges and other personal effects at her death. Pursuant to paragraphs 3E and 3F of the amended application filed by the executor on 14 August 2012, the executor seeks clarification as to what items comprise 'jewellery' and what items do not.

[52] Schedule A of the application lists three-and-a-half pages of items which include watches, necklaces, bangles, rings, earrings, pendants, chains, powder compacts, gem stones and jewellery boxes. Schedule B lists four pages of items comprising war medals, RAAF dog tags and badges, name tags, bowling badges, an extensive coin and note collection, as well as numerous items from the Australian Mint.

[53] The word 'jewellery' is defined by the Macquarie Dictionary as "jewels; articles made of gold, silver, precious stones, etc for personal adornment." I am satisfied that the items in Schedule A all appear to be items of jewellery. Whilst there could be an argument that gem stones which have not been set into a piece of jewellery might not be considered to be an item of personal adornment, the decision of *Re Whitby, Public Trustee v Whitby*[19] held that cut, unmounted diamonds were classified as jewellery. I will accordingly apply the same logic to the unmounted gem stones.

[54] I am similarly satisfied that the coins, war medal and badges in Schedule B do not fall within the ordinary meaning of the word 'jewellery'. The 1856 decision of *Sudbury v Brown*[20] specifically held that coins did not constitute jewellery.

[55] I am satisfied that the items set out in Schedule A comprise the items of jewellery referred to in cl 3.3 of the Will.

Should there be an Order for Compensation pursuant to s 60 of the GAA?

[56] Pursuant to an application filed on 18 September 2012, the Public Trustee seeks orders that the application be heard notwithstanding that it was instituted nine months after the death of Winifred Butler and that the executor pay to the Public Trustee as administrator for Lucy Brigg compensation for the loss of the benefit of the gift in the Will.

[57] I am satisfied that the extension should be granted. The relevant principles are well known and were set out in the decision of *Moylan v Rickard.*[21] The Court needs to be satisfied that the delay has been adequately explained, that there is no prejudice to the beneficiaries and that there has not been any unconscionable conduct by the applicant.

[58] The affidavit of Clinton Miles indicates that Ms Brigg suffers from dementia and is a high care resident of Sinnamon Village. The Public Trustee was appointed to administer her affairs pursuant to an order of the Guardianship and Administration Tribunal on 5 October 2009.

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19 [1944]Ch 210.
20 (1856) 27 LTOS 260.
21 Above n 5.

[59] I am satisfied that Ms Brigg was unable to be located in the nine month period, given her placement in a high secure dementia facility, until after the advertising occurred in April 2012. Since that date the matter has proceeded relatively expeditiously. As the only beneficiary is the Red Cross I am not satisfied that it has been prejudiced by the delay and there is no evidence to that effect.

[60] In terms of whether compensation should be ordered, s 60 of the GAA provides:

> "**60 Power to apply to court for compensation for loss of benefit in estate**
>
> (1) This section applies if a person's benefit in an adult's estate under the adult's will, on intestacy, or by another disposition taking effect on the adult's death, is lost because of a sale or other dealing with the adult's property by an administrator of the adult.
>
> (2) This section applies even if the person whose benefit is lost is the administrator by whose dealing the benefit is lost.
>
> (3) The person, or the person's personal representative, may apply to the court for compensation out of the adult's estate.
>
> *Editor's note—*
> *Court* means the Supreme Court—see schedule 4 (Dictionary).
>
> (4) The court may order that the person, or the person's estate, be compensated out of the adult's estate as the court considers appropriate, but the compensation must not be more than the value of the lost benefit.
>
> (5) The *Succession Act 1981*, sections 41(2) to (8), (10) and (11) and 44 apply to an application and an order made on it as if the application were an application under part 4 of that Act by a person entitled to make an application. The section provides that the amount of compensation is the amount "the court considers appropriate" but that the amount is not to be more than the 'value of the benefit lost'."

[61] The Bribie Island house sold for $200,000 in November 2002 and $194,310.82 was deposited with the Public Trustee after the sale costs were deducted. I consider that the approach to be adopted is the approach of Peter Lyons J in *Moylan v Rickard*,[22] which is to increase the November 2002 sale price for the Bribie Island house by the percentage the median price of similar houses increased in the relevant period. The evidence establishes that median sale price of houses on Bribie Island in fact roughly doubled in the relevant period from $205,000 to $405,000. That submission is not contested by the Counsel for the executor. Accordingly the current sale price of the house would be approximately $400,000.

[62] I am therefore satisfied that the gross value of the benefit lost by the ademption of the gift should be an amount calculated by reference to the current sale price. From that gross figure however I need to deduct the current sale costs as Ms Briggs was gifted 50 per cent of the net sale proceeds. The amount banked after the sale costs were taken out in 2002 was $194,310.82, which was almost $6000. Section 60, however, requires that the value of the compensation awarded must not be more than the value of the lost benefit. It is clear that those sale costs would have

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22 Ibid at [102].

increased in the last decade. There is, however, no evidence as to what the increased legal fees would be although the current Queensland Real Estate Commission Table indicates that the commission on $400,000 inclusive of GST is a figure of $11,495. To ensure that the compensation awarded is 'not more' than the benefit lost I need to factor in all possible costs that could be deducted from the sale proceeds. I consider therefore that if I take deduct a figure of $20,000 from the current sale price of $400,000 that would ensure that the compensation awarded for the loss of 50 per cent of the net proceeds of sale is 'not more' than the value of the lost benefit. That would reduce the figure payable to Ms Briggs to $190,000. I consider that a reduction to that extent ensures that the requirements of s 60 are complied with.

[63] I am satisfied that the compensation should be paid rateably by the estate even if that means a greater proportion will be paid by the Red Cross as residuary beneficiary because the Red Cross has received an amount of $16,934 from the Credit Union account paid to the Public Trustee in May 2002 which was originally intended for Lucy Brigg. It is also clear that Mrs Butler only intended that the Red Cross receive fifty per cent of the house proceeds originally.

ORDERS

[64] I order that:

In BS No. 2683 of 2012:

1. **That upon the proper construction of the Will of Winifred Deidre Butler deceased dated 4 March 2002 the gift to Lucy Brigg (also known as Ethel May Brigg) in clause 3.4.2 thereof was adeemed by the sale during the deceased's lifetime of the property described in clause 3.4.2 of that will, being the deceased's house at 29 Allamanda Drive, Bongaree, Bribie Island.**

2. **That upon the proper construction of the said Will and in the events which have occurred monies held or invested in the Public Trustee of Queensland on behalf of the deceased at the date of her death form part of her residuary estate.**

3. **That:**

   (a) **The items in Schedule A to the Amended Originating Application filed on 14 August 2012 comprise the items of jewellery referred to in clause 3.3 of the Will of the said deceased and are to be distributed to Lucy Brigg;**

   (b) **The items in Schedule B to the aforesaid Originating Application are not 'jewellery' within the meaning of clause 3.3 of the sale Will and form part of the deceased's residuary estate.**

4. **Orders that the costs of an incidental to these proceedings be paid from the estate of Winifred Deidre Butler on the indemnity basis.**

In BS No. 8632 of 2012:

1. This Application be heard and determined notwithstanding that it was instituted more than nine months after the death of Winifred Deidre Butler deceased.

2. Pursuant to s 60 *Guardianship and Administration Act* 2000 (Qld) that the First Respondent pay:

(a) All remaining estate liabilities;

(b) Compensation to Lucy Brigg in the sum of $190,000 rateably out of the estate of Winifred Deidre Butler deceased for the loss of benefit of the gift under clause 3.4.2 of the will of the said deceased dated 4 March 2002 provided that there are sufficient funds remaining in the Estate after payment of all remaining estate liabilities. In the event that the amount remaining in the Estate after payment of all remaining liabilities is less than $190,000, then the First Respondent shall pay that lesser sum to Lucy Brigg.

3. The First Respondent pay the aforesaid compensation to the Public Trustee as the financial administration of Lucy Brigg, and his receipt shall be a sufficient discharge.

4. The costs of all parties of and incidental to this Application be paid out of the estate of Winifred Deidre Butler deceased on the indemnity basis.