SUPREME COURT OF QUEENSLAND

CITATION:	*Wilson & Anor v Chapman & Ors* [2012] QSC 395
PARTIES:	**WILLIAM RODERICK SELWYN WILSON** (first applicant) and **WAYNE RODERICK LYONS** (second applicant) v **MARGARET CHAPMAN by her litigation guardian CHRISTOPHER JOHN RAWSON-HARRIS** (first respondent) and **MICHAEL WILLIAM FRASER, SIMON MARTIN FRASER, ALEXANDER DUNCAN FRASER and DOUGLAS ROSS FRASER** (second respondents) and **MARTIN ROSS FRASER** (third respondent)
FILE NO/S:	2789 of 2012
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	10 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	10 May 2012
JUDGE:	Daubney J
ORDER:	**1. It is declared that upon the proper construction of clause 6(c) in the will of Marion Dorothea Fraser, deceased, dated 7 January 1959, the words "income and profits" mean net income of and the net realised capital gain made by the assets of the trust established thereby.** **2. It is further declared that for the purposes of clause 6(c) of the said will the third respondent is a "child" of William Martin Fraser.** **3. It is ordered that the indemnity costs of all parties of and incidental to this application be paid out of the trust established by clause 6(c) of the said will.**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – EXPRESS TRUSTS CREATED BY WILL – OTHER MATTERS – where deceased created a trust under a will – where the life tenant was entitled to 'income and profits' under the trust – where the balance of the trust to be transferred to the remainderman on the death of the life tenant – whether phrase 'income and profits' includes realised and unrealised capital gain

Marriage Act 1961 (Cth), s 89

Attorney-General for the State of Victoria v Commonwealth (1961) 107 CLR 529
Clark v Inglis [2010] NSWCA 144
Evans v Brunskill [unreported, Supreme Court of New South Wales, 19 February 1988]
Fell v Fell (1922) 31 CLR 268
Graham v Trust Company Australia [unreported, Supreme Court of Queensland, 5 March 2009]
Harris v Ashdown (1985) 3 NSWCR 193
Orr v Wendt[2005] WASCA 199
Perrin v Morgan (1943) AC 399
Re: Armitage; Amritage v Garnett [1893] 3 Ch 337
Re: Brockbank [1948] 1 Ch 206
Re: Hepworth [1936] CH 750
Re: Spanish Prospecting Co Ltd [1911] 1 Ch 92
Re Taylor [1923] 1 Ch 99

COUNSEL: R T Whiteford for the applicants
G A Thompson (SC) for the first respondent
G R Dickson for the second respondents
D A Skennar for the third respondent

SOLICITORS: Wilson Lawyers for the applicants
De Groots for the first respondent
McCullough Robertson for the second respondents
Slater and Gordon for the third respondent

[1] The applicants have applied for the following declarations:

1. A declaration whether, upon the proper construction of the will of MARION DOROTHEA JANE FRASER, deceased, dated 7 January 1959, the words "income and profits" in clause 6(c) thereof mean:
   (a) The net income of the trust established thereby; alternatively
   (b) The net income of and the net realised capital gain made by that trust; alternatively
   (c) Some other and what amounts.
2. A declaration that the Third Respondent is not a "child" of William Martin Fraser for the purposes of clause 6(c) of the said will.

Background

[2] Marion Fraser ("the testatrix") died on 9 January 1963. She was survived by her three children:

1. William Martin Fraser ("William Fraser");
2. Anne Clarke; and
3. Margaret Chapman (aka Margaret Harris), the first respondent.

[3] William Fraser died on 11 December 1997. He was survived by:

1. four children of his first marriage (the second respondents); and
2. the third respondent.

The second respondents were all born at the time of the testatrix's death. Their mother was William Fraser's first wife. The third respondent was born out of wedlock on 28 May 1964. William Fraser and the third respondent's mother (Beverly Craker) married on 2 November 1970. There was no evidence before me as to whether William Fraser was still married to his first wife at the time of the third respondent's birth.

The Will

[4] The testatrix appointed her son William Fraser and her son-in-law, Alexander Clarke, as her executors and trustees. Probate was granted on 29 June 1965. The will provided for the following distributions:

1. One-third of her residuary estate to her daughter, Anne Clarke, absolutely;
2. One-third of her residuary estate to her son, William Fraser, absolutely; and
3. One-third of her residuary estate to her trustees to be held on, the following trust:-

> 'TO HOLD the remaining equal part or portion either in its present form or in any form of investment that they in their absolute discretion may think fit (including in the investment of shares in any mining company) UPON TRUST for my daughter MARGARET HARRIS and TO PAY TRANSFER AND HAND OVER the income and profits derived therefrom to her until she shall become a bankrupt or shall do or suffer any act or thing whereby the said income and profits or her interest therein or any part thereof would or might but for this provision become charged encumbered or become vested in any other person or persons or a corporation and I direct that my Trustees shall during the residue of the life of the said MARGARET HARRIS pay transfer and hand over the income and profits therefrom to my son WILLIAM MARTIN FRASER but so that my trustees shall not be responsible for paying the said income and profits derived therefrom to the said MARGARET HARRIS after the happening of any such act or thing as aforesaid unless and until they have received express notice thereof and as from her death TRANSFER AND HAND OVER such equal part or portion UNTO and TO my son the said WILLIAM MARTIN FRASER for his sole use and benefit absolutely PROVIDED HOWEVER that should he have predeceased my said daughter then to PAY TRANSFER AND HAND OVER the same UNTO and TO such one or more of his children as shall survive him and if more than one in equal shares as tenants in common for their sole use and benefit absolutely.'

[5] Over the years, the trustees of the trust have changed. The applicants, Mr Wilson and Mr Lyons, are the current trustees and have been the trustees since 2 July 2008 and 19 February 2009 respectively.

[6] The applicants have been unable to ascertain details of the assets of the trust as at its inception. Their enquiries reveal that, from approximately 1981, the trust property consisted of cash investments, shares and debentures. It appears that only share dividends and interest generated by cash investments have been paid to the first respondent.

Issue one: the meaning of 'income and profits'

[7] A dispute has arisen between the parties as to whether the 'income and profits' to which the first respondent is entitled under the terms of the trust include capital gains and, if so, whether it includes both realised and unrealised capital gains.

[8] The first respondent contends that 'income and profits' includes all increases in the value of the trust's capital since inception, whether realised or not. The second respondents initially contended that 'income and profits' includes only net income from investments or capital gain made on assets acquired using income.

[9] The applicants took up the middle ground, submitting that 'income and profits' means not only net income generated by the trust's assets, but also realised capital growth in the value of those assets, howsoever acquired.

[10] It is axiomatic that, when construing a will, the task of the Court is to discover the testator's intention from the words used.[1] In the absence of evidence indicating that a testator attributed a special meaning to a particular word, words will be given their ordinary meaning.[2]

[11] Particular words ought not be read in isolation, and must be looked at in the context of the whole document. Importantly "the Court cannot ignore any word within the document… no language in a will should be treated as 'otiose, as wanting in meaning and effect' and disregarded unless the general purpose is violated by its effect or the language is 'altogether impracticable of application'."[3]

[12] This will appears to have been professionally drawn. Words in a professionally drawn will are rarely regarded as otiose.[4]

[13] The first question, clearly enough, is whether, for the purposes of this will, the word "profits" is synonymous with the word "income", or whether the addition of the words "and profits" connotes an intention on the part of the testatrix that the beneficiary was to received more than just income derived by the trust, i.e. whether the word "profits" has a more diverse meaning then "income".

[14] The meaning of the word 'profits' in a corporations context was considered in *Re Spanish Prospecting Co Ltd*. Moulton LJ observed[5]:

---

[1] *Fell v Fell* (1922) 31 CLR 268 at 273-274, per Isaacs J
[2] Construction of Wills in Australia, Haines, para 2.26
[3] Construction of Wills in Australia, Haines, para 2.32
[4] *Re Taylor* [1923] 1 Ch 99 at [105]; *Perrin v Morgan* (1943) AC 399, at [407]
[5] [1911] 1 Ch 92, at [98]

> The word 'profits' has in my opinion a well-defined legal meaning, and this meaning coincides with the fundamental conception of profits in general parlance, although in mercantile phraseology the word may at times bear meanings indicated by the special context which deviate in some respects from this fundamental signification. **"Profits" implies a comparison between the state of business at two specific dates usually separated by an interval of a year. The fundamental meaning is the amount of gain made by the business during the year. This can only be ascertained by a comparison of the assets of the business at the two dates.**
>
> **…**
>
> **The truth is, that the meaning of "profits" is not rigid and absolute; it is flexible and relative – relative to each company; and in ascertaining the meaning of the word in any context, we must consider the whole context."** (Emphasis added)

[15] I do not accept the submission that there may be no distinction between the meanings of the words "income" and "profit" in this case. Ordinarily, a life tenant is entitled to net income, with increases in the value of capital, less the life tenant's net income, being reserved for the remainderman[6]. It seems to me that the inclusion of the words 'and profits' in this professionally drawn will should be read as deliberate. The clause should be construed to mean that the testatrix intended the first respondent to receive something more than just 'income'.

[16] The next question is whether the term "income and profits" includes either or both of realised capital gains and unrealised capitals gains.

Realised capital gain as 'income'

[17] It is uncontroversial that the first respondent has been paid income over the years in the form of share dividends and interest generated on cash investments.

[18] Counsel for the applicant submitted that there was scope for realised capital gain to be income, or at the very least, it would come under the banner of profit.

[19] I was referred to *Orr v Wendt*[7], in which it was held that capital gain realised by the sale of shares in a portfolio acquired by a trustee for the purpose of share trading to maximise an income stream to a life tenant was 'income' within the meaning of the will. In that case, the trustees were permitted to determine whether 'receipts or outgoings' were capital or income or partly income or capital'[8]. The court drew a distinction between 'profit' and 'capital' and found that the capital gain was 'income'. I note that the trustees in the present case have no such right of determination.

[20] A somewhat different view of the distinction between income and profit had been taken in *Re: Armitage; Amritage v Garnett*[9]. The will in that case left the deceased's residuary estate to his trustees 'to stand possessed of one equal third share…to

---

[6] Laws of Australia, at [15.14.111 & 15.14.118]
[7] [2005] WASCA 199
[8] Ibid, at [8]
[9] [1893] 3 Ch 337

invest it and pay the income to his daughter.. for her life.. and after her death for the benefit of her children.' Part of the residuary estate consisted of shares. The shares were re-issued at a paid-up value greater than their paid-up value at the date of the deceased's death. The trustee then sold the shares. It was held the difference between the two values was 'profit'. Lindley LJ said:

> Now, there has been a great discussion about the nature of this £1 5s. 6 ½d. I should say it is profit. When a person gets out of a concern more then he puts into it, the difference is profit… in that sense of the word, this £1 5s. 6 ½d is profit, being the excess money produced by the sale of the investment over the money invested. But is it income to which the tenant for life is entitled? That is a totally different matter, and I should say that it is clearly not…"

[21] The authorities support the notion that capital gain realised by the sale of shares has the potential to fall within the meaning of 'income' and is, at the very least, captured within the meaning of 'profit'.

[22] I can see nothing specific to the current trust which would point to a different conclusion. It is unnecessary for me to determine whether share profits realised under the present trust arrangement fall into the category of income or profits. On the authorities to which I have referred, I am satisfied that realised capital gains come within the meaning of "profits", at the very least.

[23] Accordingly, I find that the first respondent should be entitled to realised capital gains. The receipt of these gains should not, however, be at the expense of the trust. It is clearly appropriate for there to be an accounting of the costs associated with the realisation of these gains. In other words, the first respondent should receive the net realised capital gains. Similarly, payment to the first respondent of income should not be at the expense of the trust. She is entitled to net income.

[24] Further, I consider this approach is harmonious with the over-all scheme of the will. The repetition of the words 'equal part or portion' in the will suggests an intention on the part of the testatrix to distribute her estate evenly to each of her three children. William Fraser and Anne Clark, received their part or portion absolutely, and were free to enjoy any realised capital gains made on the invested capital. To distribute realised capital gains to the first respondent, rather than preserving them for the residuary beneficiaries, is consistent with the over-all scheme of the will.

Unrealised capital gain as 'income'

[25] Much of the hearing was concerned with the issue of unrealised capital gain, and whether that ought be treated as 'income' for the benefit of the first respondent.

[26] In particular, I was referred to *Clark v Inglis*[10]. The Trust Deed in that case provided that the trustee:

> "…shall stand possessed of the Trust Fund UPON TRUST…to…apply so much of the income (if any) thereof in any year as the Trustee shall think fit for the maintenance, education, benefit or advancement in life of all or such

[10] [2010] NSWCA 144

> one or more to the exclusion of the others … of the Eligible Beneficiaries … as the Trustees shall … before the end of that year determine …"

[27] The trust asset in that case was a share portfolio. From the inception of the trust in 1982 to 1998, the share portfolio was valued at the lower of cost and net realisable value. In 1999, a new accountant took over responsibility for the accounts. At the trustee's request, he prepared the trust accounts on the basis of valuing the share portfolio to market, that is, revaluing it to market and taking the net movement up or down to the profit and loss account as income or expense, respectively. For each financial year ended 30 June 1999, 2000, 2001, 2002, 2004, 2005 and 2006, there was an increase in the value of the investments. For the year end June 30 2003, there was a small decrease.[11]

[28] In these years (other than 2003), the income referable to these increases in value of investments (though unrealised) was distributed to the beneficiaries. No sale of assets took place; there was no distribution or movement of cash, but the accounts recorded such transactions.

[29] Conflicting evidence was given as to whether the accounting practices adopted from 1999 were proper. Allsop P (McColl JA and MacFarlan J agreeing) held the unrealised capital gain was 'income', stating:

> '[38] … The issue is whether unrealised accretions in value of such shares can fall within the concept of income. This is a question to which no legal standard exists… No case or legal principle or statute was cited that such increase in value could not be characterised as income referable to shares. That income is conceptually different from profit can be accepted; it does not follow from that that income cannot be represented by unrealised gain, or, that if it be form of capital it cannot pursuant to the terms of the trust deed be determined to be income."
>
> [39] Crucial to the question is the view of business people and accountants, given the commercial and accounting character of the question.

[30] The accounting evidence at the trial of *Clark v Inglis* was clear. Evidence by an expert to the effect that accounting standards, principles and practice permitted the practice was preferred by the primary judge and this finding was not disturbed on appeal. The expert opinion was that the concept of 'income' encompassed both revenue and gain and that 'gains' need not be realised if they represented increases in economic benefit.

[31] *Clark v Inglis* demonstrates that there is scope for unrealised increases in the value of investments to be treated as income. The next step is to enquire whether unrealised gains in the present case were intended to be transferred to the first respondent.

[32] Counsel for the applicants and second respondents drew my attention to a number of differences between the circumstances in *Clark v Inglis* and the trust created by the testatrix. I will deal with each of them in turn.

---

[11] Ibid, at [6]

[33] **Accounting evidence**
Clark v Inglis was determined on expert evidence about accounting standards and practices applicable to that particular trust. No such evidence was adduced in the present case.

[34] Although unrealised capital gain was held to be income, Allsop P (McColl JA and MacFarlan JA agreeing) stressed the following:

> 'Crucial to the question is the view of business people and accountants, given the commercial and accounting character of the question. The question being of a business and accounting character in usage and concept, the court should pay heed to principles, practice and approach of commercial accountancy.'

[35] Whilst it is true that such evidence does not appear in the present case, this need not necessarily be an insuperable barrier to the first respondent receiving unrealised capital gain, if she is entitled to it. On the other hand, in *Clark v Inglis*, accounting practices had been adopted over a number of years and evidence was lead as to whether these accounting practices were permitted. Clear records had been kept. Under the current trust there are no relevant accounting practices to be examined, because the first respondent has not been paid for unrealised gains.

[36] **Power to distribute capital**
The Deed of Trust in *Clark v Inglis* gave the trustee an express power to determine whether any property or moneys held by the trustee was 'capital' or 'income'. There was no such clause in the testatrix's will.

[37] This, however, is not fatal to the first respondent's claim. The first respondent is not seeking to distribute capital. What constitutes the capital in the fund has changed over time. The Trustees have the power:

> TO HOLD the remaining equal part or portion either in its present form or in any form of investment that they in their absolute discretion may think fit (including in the investment of shares in any mining company)

[38] The power to transfer unrealised capital gain, which is not capital, is not necessarily impeded under the terms of the will. But under the wording of the will, the power to alter the form of the trust property is at the absolute discretion of the trustees. Beneficiaries have no power to direct a trustee in the exercise of their discretionary powers.[12] The first respondent has no power under the will to direct the trustees to reconstitute trust property.

[39] **Time periods for calculating and distributing capital gains**
The Deed of Trust in *Clark v Inglis* directed the trustee to undertake calculations annually. In contrast, there is no provision in the current will to specify when or how often the 'income or profits' are to be paid to the first respondent. The applicant's counsel expanded on this at the hearing of the application:

> '…when in practice is the profit to be determined; I'm not trying to be flippant but does one sit – would the first respondent sit there with the share prices and one day it spikes, so she immediately phones and says,

[12] *Re Brockbank* [1948] 1 Ch 206

> "Right, pay me"? Now, what happens if the share price falls between the date of the trustees giving the instruction and the date of them actually being able to liquidate the shares?
> …
>
> How are losses to be dealt with? Let us assume there was a huge spike in the share price at some particular point in time. Let us assume the 30th of June 2009 or 2008 so the direction comes in – "Sell".
>
> …
>
> Presumably the only way you can actually find the money is to sell, realise the capital gain upon the first respondent's direction and pay the money over. That returns the trust portfolio to a certain level. What if we then have a GFC; what if for the balance of the first respondent's life the price never returns to the price they were at the 30th of June 2008; that inures permanently to the detriment of the remainder and it is submitted that injustices such as that make it unlikely that the deceased intended the words in her Will to mean that which is contended by the first respondent.'

[40] Many of the issues raised here by counsel pertain to difficulties related to the distribution of unrealised gain. Realised capital gain could be distributed at the discretion of the trustees either at the time the gain became realised or at the end of each financial year, as "income and profits" under the will.

[41] In the context of unrealised gain, the lack of specific wording makes it difficult, if not impossible, to administer any benefit derived from unrealised gain to the first respondent. In relation to timing, as mentioned above, any distribution or reconstitution of trust assets would happen at the discretion of the trustees and not the first respondent. In short, even if the first respondent were held entitled to unrealised capital gains, there is no power for her to demand that they be ascertained at any particular point in time.

[42] The issue of how losses would be dealt with is also of concern. A life tenant who is only entitled to income is neither entitled to unrealised gains nor are they accountable for direct capital loses. In the event of a financial crisis, such a life tenant would receive a diminished income stream, but they would not need to account to the residuary beneficiaries for a decrease in the overall value of the capital assets.

[43] If a life tenant is entitled to diminish the trust corpus by taking unrealised capital gains, the capital assets of the trust will become more vulnerable to capital loss, because the life tenant will be continuingly removing the capital gain buffer. It is not sensible to allow the life tenant to continually draw down on unrealised gains, when the life tenant is not accountable for capital loses. There must be a balance, which would be achieved by allowing the unrealised capital gain to inure for the benefit of all beneficiaries under the trust. The appreciation of a trust asset will favourably affect both the life tenant and the residual beneficiaries - the life tenant will stand to receive a greater amount of income and the residual beneficiaries will receive more valuable residuary assets.

[44] **'Apply' vs. 'pay transfer and hand over'**
In *Clark v Inglis*, the Trust Deed only required the Trustee to 'apply' the income. This was done by crediting the beneficiaries' account, although no money in fact was realised. The present situation is quiet different. The Trustees are required to 'PAY TRANSFER AND HANDOVER' the income and profits to the life tenant. It is difficult to imagine how this could be achieved without actual realisation and payment of the money. In practical terms, such a hand-over could only take place once the profits are realised. The power to hold the capital assets in their present form, or in any form of investment, lies with the trustees. While the trustees may choose to realise a gain and thus make it available to the first respondent, the first respondent does not have any power under the will to demand or require that an unrealised capital gain become realised. Therefore, so long as the gain remains in an unrealised state, the first respondent has no access to the benefit.

[45] In *Graham v Trust Company Australia*[13], Byrne SJA considered the terms of a will similar to the relevant clause in this case. The clause in that case provided for the residuary estate (a dwelling and a share portfolio) to be held on the following terms:

> 'TO RETAIN and/or invest the rest and residue … AND TO PERMIT my daughter … to have the net profits and income therefrom and/or the net use and benefit thereof during her lifetime for use and benefit absolutely PROVIDED ALWAYS that should my trustees be of the opinion that such net profit and income in any year are insufficient for the maintenance and comfort of my said daughter in such year I EMPOWER my trustees to pay to her from the capital of the rest and residue of my estate such monies as they may from time to time in their absolute discretion elect towards her maintenance and comfort or otherwise howeverso for the benefit of my said daughter and I declare that the decision of my trustees on all matters arising under this sub-clause of this my Will shall be final and binding on all beneficiaries under this my Will and on the death of my said daughter or on my death should she predecease me to stand possessed of as well the capital as the income of the rest and residue of my estate or such part thereof as shall then remain upon trust.'

[46] Byrne SJA considered whether the term 'net profits' included 'net capital profits' and whether net capital profits extended to both 'realised' and 'unrealised' gains:

> 'Whatever view may be taken about the operation of the clause in respect of realised capital gains, it cannot be applied to unrealised capital gains. **Such an outcome would involve consequences so inconvenient that a construction of the will producing them should not be adopted unless compelled by clear words**, and there are no such words here. [Emphasis added]
>
> The expression 'net profits and income' falls to be construed in context.
>
> What is granted is a life estate – a concept which ordinarily involves that the whole of the capital sum, in whatever form it may exist from time to time, eventually passes to the remainderman. And so, typically, increases in capital can be expected to inure to the advantage not only of the life tenant

[13] Unreported, Supreme Court of Queensland, 5 March 2009

> but also the remainderman. And so, typically, increases in capital can be expected to insure to the advantage not only of the life tenant but also the remainderman. Cf *Re Armitage; Armitage v. Garnett* [1893] 3 Ch 337, particularly at page 347, per Lord Justice Lopes. And that cannot happen here if the gains realised, or especially unrealised, were to vest absolutely in the life tenant.
>
> ….
>
> Next, the expression "net profits" does not stand alone. It functions as part of a composite expression, "net profits and income therefrom and/or the net use and benefit thereof." This choice of words might be thought to indicate an intention not to restrict the benefits the daughter might derive from her use and enjoyment of the assets comprising the life estate to some narrow view of receipts comprehended by income.'

[47] Similarly in the present case, a conclusion that the term "profits" included unrealised capital gains would yield extremely inconvenient consequences. It would provoke uncertainty as to the time at which the quantum of such gains should be ascertained. It would require an accounting (if that were possible) in circumstances where there has in the past apparently been no such accounting records kept. It would also yield a result which is not consistent with the over-all scheme of the will. Accordingly, I am not inclined to adopt such a construction of the word "profits".

Conclusion on the first issue

[48] The inclusion of the words "and profit" after the word "income" shows an intention on the part of the testatrix for the first respondent to receive more than just income. I am satisfied that the testatrix intended that the first respondent receive realised capital gain made by the trust. The income and realised capital gains payable to the first respondent should be net of the costs associated with accounting for the income and realisation of the gains respectively.

[49] The phrase 'income and profits' does not extend to unrealised capital gains. As Byrne SJA observed in *Graham v Trust Company Australia*, to extend the meaning of 'profits' to include unrealised captain gain 'would involve consequences so inconvenient that a construction of the will producing them should not be adopted unless compelled by clear words.' There are no such clear words here. Any unrealised capital gain, provided it remains in this form, should be preserved for the residuary beneficiaries.

[50] It is therefore appropriate to declare that upon the proper construction of clause 6(c) of the will of Marion Dorothea Jane Fraser, deceased, dated 7 January 1959 the words "income and profits" mean the net income of, and the net realised capital gain made by, the assets of the trust established thereby.

Issue two: the third respondent

[51] The further question argued before me concerns the entitlement of the third respondent to receive a share of the trust assets upon its dissolution. It will be

recalled that the terms of the testamentary trust provide that on the death of the first respondent the corpus of the trust is to be paid as follows:

> "TO my son the said WILLIAM MARTIN FRASER for his sole use and benefit absolutely PROVIDED HOWEVER that should he have predeceased my said daughter then TO PAY TRANSFER AND HAND OVER the same UNTO and TO such one or more of his children as shall survive him and if more than one in equal shares in tenants in common for their sole use and benefit absolutely."

[52] The contention put against the third respondent is that, because the third respondent, who is undoubtedly a son of William Fraser, was born out of wedlock, he is not a "child" of William Fraser for the purposes of the will, and is therefore not entitled to take.

[53] The following chronology is relevant:

7 January 1959	Testatrix makes her will
9 July 1963	Testatrix dies
28 May 1964	Third respondent born
29 October 1965	Probate of the will granted
2 November 1970	Third respondent's parents marry
11 February 1997	William Fraser dies

[54] Section 89 of the *Marriage Act* 1961 (Cth) (which commenced on 1 September 1963) provides:

> "**Legitimation by virtue of marriage of parents**
>
> (1) A child (whether born before or after the commencement of this Act) whose parents were not married to each other at the time of his or her birth but have subsequently married each other (whether before or after the commencement of this Act) is, by virtue of the marriage, for all purposes the legitimate child of his or her parents as from his or her birth or the commencement of this Act, whichever was the later.
>
> (2) Subsection (1) applies in relation to a child whether or not there was a legal impediment to the marriage of his or her parents at the time of his or her birth and whether or not the child was still living at the time of the marriage or, in the case of a child born before the commencement of this Act, at the commencement of this Act.
>
> (3) Subsection (1) does not apply in relation to a child unless:
>
> (a) at the time of the marriage of the child's parents:
>
> (i) where that marriage took place before the commencement of section 24 of the *Marriage Amendment Act 1985* – the child's father was domiciled in Australia; or

(ii) in any other case – one of the child's parents was domiciled in Australia; or

(b) the marriage of the child's parents took place in Australia, or outside Australia under Part V of this Act or under the *Marriage (Overseas) Act 1955*.

(4) Nothing in this section renders ineffective any legitimation that took place before the commencement of the Act by or under a law of a State or Territory or shall be taken to exclude the continued operation of such a law in relation to such a legitimation.

(5) This section does not apply in relation to a child so as to affect any estate, right or interest in real or personal property to which a person has become, or may become, entitled, either mediately or immediately, in possession or expectancy, by virtue of a disposition that took effect, or by devolution by law on the death of a person who died, before the marriage of the parents of the child or the commencement of this Act, whichever was the later."

[55] It is said that the received common law rule of construction is that "a gift to children means legitimate children only, unless it appears from the context or from circumstances that illegitimate children must have been intended".[14] The operation of this common law rule is relevantly diminished by the effect of s 89, which is "directed to legitimating children whose parents were not married to one another when they were born but intermarried subsequently: they are legitimated whether or not when they were born their parents might lawfully married each other".[15] Of particular relevance for present purposes, however, is s 89(5). The argument put against the third respondent is, in effect, that the relevant disposition under the will took effect before his parents married, that by operation of s 89(5) his status as a child was not legitimated when the gift took effect, and accordingly he is not a "child" of William Fraser for the purposes of the will.

[56] The purpose of s 89(5) was described by Dixon CJ in *Attorney-General for the State of Victoria v Commonwealth*[16] as follows:

> "On the other side the savings of subsection (5) bring out what is indeed obvious enough, that the chief operation or effect of legitimation is to place the child in the same category as legitimate children for the purpose of inheritance, of sharing his next of kin, of filling descriptions found in wills, settlements and other assurances of property when the description depends on, or implies, blood relationship at some point and generally in affecting the operation or application of legal instruments or legal categories governing rights, duties, liabilities, privileges or immunities."

---

14 Hawkins & Ryder, *On the Construction of Wills* at p 131.

15 *Attorney-General for the State of Victoria v Commonwealth* (1961) 107 CLR 529, per Dixon CJ at 540.

16 Supra at 541.

[57] Central to the argument against the third respondent was the contention that the interest which the third respondent would otherwise have under the estate arose "by virtue of a disposition that took effect" before his parents married in 1970. Reliance was placed on the judgment in *Re Hepworth*.[17] In that case, the will devised the residuary estate to the deceased's children for life and on the death of each child to their children. The deceased died in 1922. One of his sons had a daughter who was legitimated in 1927, by operation of the relevant legislation. That son died in 1928. The question was whether the daughter was entitled to take her father's share. The relevant provision of the legislation in that case provided that the Act did not "affect the operation or construction of any disposition **coming into operation** before the commencement of this Act" (emphasis added). The legislation further defined "disposition" to mean an "assurance of any interest in property by any instrument whether *inter vivos* or by will". In rejecting an argument that, insofar as the daughter was concerned, there was no "disposition" until her father died, Farwell J said:[18]

> "In my judgment the disposition in this case is the will of the testator. It cannot have been intended by the Act that the date of the disposition should depend upon the time at which some benefit given to a beneficiary becomes payable, or ceased to be contingent and becomes vested."

[58] The legislation considered in *Re Hepworth* was, however, different to the wording of the *Marriage Act*. Relevant for the purposes of s 89(5) is determination of when a relevant disposition "took effect". In my view, the relevant disposition i.e. to the "children" of William Fraser, albeit contained in a trust which had become operative on the death of the testatrix, did not "take effect" until the death of William Fraser. To apply s 89(5) in the manner contended for by the applicant to the terms of this will would result in a construction of the will under which the only children of William Fraser who could take under the terms of the trust were those who were his legitimate children as at the date of death of the testatrix. That is clearly not what was intended by the disposition. It is obvious that what was intended was that, in the event that William Fraser predeceased his sister, the gift would be to such of William Fraser's children, as at the date of his death, who are alive at the date of the sister's death. It is completely consistent with the obvious intent of the disposition to construe the will as meaning that the gift to Williams Fraser's children takes effect on his death.

[59] William Fraser married the third respondent's mother in 1970. By operation of s 89, the third respondent thereupon became the legitimate child of his parents. He was William Fraser's legitimate child when William Fraser died. If he is still alive when the first respondent dies, he will be one of William Fraser's children to whom the trust will be distributed. Accordingly, it is appropriate to declare that the third respondent is a "child" of William Martin Fraser for the purposes of construction of clause 6(c) of the will.

[60] In light of my conclusion based on the application of s 89 of the *Marriage Act*, it is not necessary for me to canvas arguments which were advanced in relation to the

---

17 [1936] CH 750.

18 At 754.

Legitimation Acts 1899-1936 (Qld), the *Legitimation Act* 1902 (NSW), and the *Status of Children Act* 1978 (Qld).

[61] Whilst it is now unnecessary to decide the point, I should nevertheless say something about the so-called common law rule, to which reference was made in argument, which is said in the texts to be to the effect that references to children in wills are to be taken as references to legitimate children unless a contrary intention be shown. Whether such a principle in fact properly stated the common law position has been doubted – in *Evans v Brunskill*[19], Bryson J said:

> "A yet further source of doubt is the applicability of principles established by case law to the effect that references to children are to be taken prima facie as references to legitimate children. Very emphatic decisions and accompanying speeches in the House of Lords in *Hill v Crooks* (1873) LR 6 HL 265 and in *Dorin v Dorin* LR 7 HL 568, followed on a number of occasions, places a significant obstacle in the path of resort to facts external to the very words in the Will for the ascertainment of any other intention. On the other hand it had by 1937 been recognised, as must, I think, be fairly plain, that there were elements of overstatement in speeches in the House of Lords in those cases; recognition of this is to my mind apparent in the judgment of Long Innes CJ in Eq. in this Court in *Walker v Langenberger* 37 SR 201 at 212, 213. It is necessary to consider whether those speeches are capable of being regarded as stating the law having regard to the principle, expressed in *Perrin v Morgan* [1943] AC 339 at 406 per Viscount Simon LC as the fundamental rule that one is to 'put on the words used the meaning which, having regard to the terms of the Will, the testator intended.' Indeed to my mind there are marks of internal inconsistency in those speeches themselves between recognition of this fundamental task and the promotion of what then appeared to be a prima facie meaning of references to a child or to children into a legal rule attributing a fixed legal meaning as the term of art to such references when used by a testator in his will. I was given an extensive citation of authority since 1873. The application of the principles of 1873 to wills made in modern times, including wills made in 1937 must now be regarded as doubtful; see *Harris v Ashdown* (1985) 3 NSWLR 193."

[62] Practical issues concerning the legitimation of children now arise rarely, as a consequence of the relative longevity of the respective legitimation statutes. But this case could have been one of the rare occasions when it would have been necessary to have recourse to the common law. If I had taken a different view of the application of s 89 of the *Marriage Act* 1961 and of the effect of the will, it is most likely I would have needed to determine the case on common law principles. Had that been necessary, I would certainly have had regard to the following observations by Kirby P in *Harris v Ashdown* (1985) 3 NSWCR 193 at 199-200:

> "I cannot leave this examination of the authorities without saying that, in my view, the observations of Lord Cairns in 1873 must, even as providing a judicial dictionary, be regarded as of doubtful

---

19 Unreported, Supreme Court of New South Wales, 19 February 1988.

> applicability to the task of deriving the testator's intention, at least in the case of a will drawn today. Attitudes to personal relationships and the provisions of the law on matters such as illegitimacy and adoption, have change so significantly in the past hundred years, that it is no longer safe to adopt, even as a rule of thumb, the principle that by the use of the word 'child' in his will, a testator must be taken to mean only a legitimate child. Quite apart form the provisions of legislation on adoption and the status of illegitimacy, social attitudes to such children have so changed since the 19th century, as to make the rule laid down by Lord Cairns inapplicable to modern conditions. In 1873, adoption (other than by Act of Parliament in the case of Royal adoptions) was virtually unknown as a legal status. It was not known in the law of this Statute under 1923. Attitudes to illegitimacy were quite different to those which exist nowadays, and are now reinforced by legislation. In 1873, if a testator referred to a 'child' or 'children' in a will, he did so against the background of legal provisions and social attitudes and prejudices which existed at that time. A testator writing a will today does so against a quite different background of legal provisions and social attitudes. Reference has been made in recent decisions of the Court to the changing attitudes to de facto marriage relationships and their significance for legal principles laid down in earlier times: see *Baumgartner v Baumgartner* (1985) 2 NSWLR 406; *A A Tegel Pty Ltd v Madden* (1985) 2 NSWLR 591. The application to a modern will of the approach proposed by Lord Cairns in 1873 would, in the changing circumstances of personal relationships today, run the very real risk of frustrating the testator's intention.
>
> Accordingly, in my view it is no longer safe to approach the construction of words such as 'child' and 'children' from the starting point of Lord Cairns' dictum. Nowadays, it would be much safer to include in the expression 'child', as used in a will, legitimate and ex-nuptial, adopted and step-children, unless, from the language of the will itself, or from admissible surrounding circumstances, it is shown that a narrower meaning was intended by the testator. Such an approach acknowledges at once the changing nature of personal obligations in today's society and the demise of earlier prejudices against illegitimacy which help to explain the starting point taken by Lord Cairns and, consequently, those who have since followed his dictum. That starting point may well have been appropriate in the social circumstances in which wills were written in 1873. It is scarcely appropriate in modern Australia."

It is, however, not necessary to venture further on this topic for the purpose of determining the present dispute.

Disposition of this application

[63] Accordingly, it will be declared that:

(a) upon the proper construction of clause 6(c) in the will of Marion Dorothea Jane Fraser, deceased, dated January 1959, the words

"income and profits" mean net income of, and the net realised capital gain made by, the assets of the trust established thereby, and

(b) for the purposes of clause 6(c) of the said will, the third respondent is a "child" of William Martin Fraser.

[64] Given the nature of the matters argued, it is clearly appropriate to order that the indemnity costs of all parties of and incidental to this application be paid out of the trust established by clause 6(c) of the said will.