SUPREME COURT OF QUEENSLAND

CITATION:	*Foley v Gleeson and Ors* [2013] QSC 234
PARTIES:	**HEATHER JEAN FOLEY** (applicant) **v** **MICHAEL BRUCE GLEESON** (first respondent) **IAN CAMPBELL GUNN** (second respondent) **PAUL JAMES EMMERSON** (third respondent)
FILE NO:	SC No 232 of 2013
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	5 September 2013
DELIVERED AT:	Cairns
HEARING DATE:	18 July 2013
JUDGE:	Henry J
ORDERS:	**1. It is declared that the meaning and effect of clauses 3(c)(1) and 3(c)(26)(i) of the will is to confer a discretion upon the second respondent and the third respondent, as trustees, with respect to the manner of distribution and disposition of the funds, the subject of those clauses, as between the applicant and the named secondary beneficiaries.** **2. The application is otherwise dismissed.** **3. I will hear the parties as to costs.**
CATCHWORDS:	SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – PARTICULAR TESTAMENTARY DISPOSITIONS – DESCRIPTION OF BENEFICIARIES OR PERSONS – GENERALLY – where the deceased through his will bequeathed funds to trustees in two trusts in which the applicant was named a primary

beneficiary and other relatives named secondary beneficiaries – where the applicant contends she is unconditionally entitled to be paid all funds held in each trust – where the applicant contends the trustees do not have a discretion in relation to the distribution of the funds between the primary beneficiary and the secondary beneficiaries – whether the applicant is unconditionally entitled to be paid the funds held in each trust

SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – PARTICULAR TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – ADMISSIBILITY AND USE OF EXTRINSIC EVIDENCE IN AID OF CONSTRUCTION – TO IDENTIFY PERSON OR OBJECT OF DISPOSITION – where the respondent contends the applicant is not unconditionally entitled to be paid the funds in the two trusts – where the respondent relies upon extrinsic evidence to show the deceased did not trust the applicant's guardians – whether recourse to extrinsic evidence is necessary to determine the application

Trusts Act 1973 (Qld) s 8
Succession Act 1981 (Qld) ss 33C, 52

Beattie v Sainsbury (2003) NSWUSC 499, considered
Charter v Charter (1874) LR 7 HL 364, considered
Karger v Paul (1984) VR 161, cited
Ritchie v Magree (1964) 114 CLR 173, cited
Saunders v Vautier 41 ER 482, cited

COUNSEL: MA Jonsson for the applicant
CJ Crawford for the respondents

SOLICITORS: Williams Graham Carman Solicitors on behalf of the applicant
G.J. Buckley & Associates Solicitors on behalf of the respondents

[1] The last will of Alexander Donald Gunn ("the deceased") bequeathed some of his property to trustees in two trusts in which his sister, the applicant, was named as a primary beneficiary and certain other relatives were named as secondary beneficiaries.

[2] The applicant, who has dementia and is represented by her guardians, contends through the present application that she is unconditionally entitled to and ought forthwith be paid the funds held in each trust. That is, she asserts the trustees do not have a discretion with respect to the distribution of the trust property as between the primary beneficiary and the secondary beneficiaries and should now simply distribute the entirety to the primary beneficiary.

Background

[3] The applicant has had dementia since at least 17 January 2008 when her niece, Jennifer, nephew, William, and sister-in-law, Lorna,[1] were appointed as her guardians by the Guardianship and Administration Tribunal.

[4] The deceased knew of his sister's dementia by the time he executed his last will on 25 June 2010, three days before his death.

[5] Under the will the first respondent, Bruce Gleeson, and the second respondent, Ian Gunn, were appointed as executors and trustees of the will. The terms of the will bequeathed the whole of the deceased's estate to the executors upon trust to give or pay variously identified property including amounts of money directly to some persons for their sole use and benefit and to others as trustees to hold on trust for named beneficiaries. Those trustees, relevantly, were Ian Campbell Gunn, the second respondent, and Paul James Emmerson, the third respondent. The deceased chose not to name his ailing sister, the applicant, as a direct beneficiary under the will and rather named her as a beneficiary under trusts created by the will.

[6] The deceased died on 28 June 2010. Probate issued on 18 October 2010. The estate has since been fully administered. The funds the subject of the two trusts with which this application is concerned were banked into term deposits in November 2011, over 20 months ago. None of those funds have been distributed to any beneficiary.

Communications culminating in the present application

[7] Mr Hooper of C.W. Hooper & Hooper Solicitors acting for the applicant's administrators contacted the third respondent, Mr Emmerson, in or about early November 2011 explaining the applicant had been admitted to a home under acute care and enquiring how much was held in trust for her. Mr Emmerson declined to provide that information without the consent of the second respondent Mr Ian Gunn. Mr Emmerson deposes he also asked Mr Hooper to provide information to the trustees for their consideration about the applicant's needs and details of her existing resources which could be used to meet those needs. Mr Emmerson deposes he did not receive that information.[2]

[8] It appears that about a year later some further communication must have been directed by C.W. Hooper & Hooper Solicitors to at least one of the trustees, for an email sent by Mr Ian Gunn on 22 November 2012 referred to a recent email request by an employee of C. W. Hooper & Hooper Solicitors for a meeting with their client. Mr Gunn's email explained he had contacted Mr Emmerson to ascertain his opinion "on the best way to proceed from this point" and indicated he was awaiting his reply. Mr Emmerson deposes he has no recollection of this communication.

[9] In a letter dated 13 February 2013, solicitors acting for the applicant wrote to Mr Emmerson's firm noting it was critical that funds be made available to the applicant and requesting an interview with the trustees "with a view to seeking a release of

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1 The appointment was for all personal matters. That appointment was revoked on 13 May 2013 at which time Lorna was removed as an administrator and Jennifer and William were jointly appointed as administrators for the applicant for all financial matters.

2 Ex to Affidavit of Dr Jennifer Ann Gunn p15.

some of the capital to which [the applicant] was entitled for her ongoing welfare and maintenance".[3] The applicant sent a further letter to Mr Emmerson on 18 February 2013 requesting completion of a Centrelink form styled "MOD PT" designed to provide information about involvement in a private trust.[4]

[10] By letter dated 27 February 2013, Mr Emmerson informed the applicant's solicitors the MOD PT document had been completed on the basis the trust was a discretionary trust and the applicant had "no absolute entitlement to any of the invested funds". The letter invited the applicant's solicitors to make a written submission for the exercise of the trustees' discretion to make a distribution to the applicant.[5]

[11] On 4 March 2013, the applicant's solicitors sought an extension of time in which to provide the information sought by the trustees to 6 March 2013.[6] Mr Emmerson granted an extension until Friday 8 March 2013.[7] By a letter dated 6 March 2013 to the trustees, Dr Jennifer Gunn, one of the applicant's administrators, provided an array of information about the applicant's financial circumstances[8] but Mr Emmerson deposes that he did not receive "that document at that time".[9]

[12] In the wake of this remarkable lack of progress the applicant's new solicitors wrote to Mr Emmerson by letter dated 3 April 2013,[10] saying inter alia:

> "As we understand our instructions, in the purported discharge of your responsibilities, you and your co-trustee have declined numerous requests for distribution from the estate to benefit Ms Foley, contending that she has no absolute entitlement out of the estate and that you have instead a discretion, as trustees, with respect to the manner of disposition of the funds, the subject of the clauses just referred to.
>
> It seems to us that your interpretation is at odds with the language of the Will, and particularly of clauses 3(c)(1) and 3(c)(26)(i). On the true construction of those clauses, it is plain that Ms Foley has an immediate and unqualified beneficial interest in and entitlement to the funds the subject of those clauses. And we also mention that Ms Foley's personal financial circumstances involve a genuine and pressing need for the funds earmarked for her by her late brother.
>
> If we are correct as to the true meaning and effect of the clauses just mentioned, your failure or refusal to apply the relevant funds to Ms Foley's benefit is in direct breach of your joint responsibilities as trustees."

[13] The letter went on to foreshadow the present application, failing an acceptable response.

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3 Ex to Affidavit of Paul James Emmerson p86.
4 Ex to Affidavit of Paul James Emmerson p88.
5 Ex to Affidavit of Dr Jennifer Ann Gunn p16; Ex to Affidavit of Paul James Emmerson p89.
6 Ex to Affidavit of Paul James Emmerson p90.
7 Ex to Affidavit of Paul James Emmerson p91.
8 Ex to Affidavit of Dr Jennifer Ann Gunn p18.
9 Affidavit Paul James Emmerson [41].
10 Ex to Affidavit of Dr Jennifer Ann Gunn p20.

[14] Mr Emmerson responded by letter dated 18 April 2013, indicating in light of Mr Ian Gunn's absence the trustees would not be able to provide a response until a later date. The letter continued:

> "In the meantime, subject to the co-Trustee's instructions, we refute the assertion contained in your letter and advise that we were specifically instructed when preparing the Will of Alexander Donald Gunn that none of Heather's family were to have anything to do with the administration or distribution of the Trust to which Heather is one of the beneficiaries.
>
> We enclose a copy of our letter to CW Hooper & Hooper requesting that they provide a financial plan and summary of her needs. As you now act for the guardians we would be pleased if you could respond to that letter so that your response can be considered by the co-Trustee on his return."[11]

[15] By letter dated 22 April 2013 the applicant's new solicitors also asked Mr Emmerson to advise the sum of money held by the trustees pursuant to clause 3(c)(26)(i) along with up to date financial statements of the fund and copies of all tax returns lodged on behalf of the fund since its commencement.[12]

[16] On 24 April 2013,[13] the applicant's former solicitors wrote to Mr Emmerson enclosing a copy of Dr Gunn's letter to the trustees and three spreadsheets submitted in support of the claim for assistance. The copy of the letter of Dr Gunn was presumably the letter by Dr Gunn to the trustees of 6 March 2013 and the three spreadsheets were presumably the annual summaries of expenses of 2010, 2011, 2012 which were purportedly enclosed with Dr Gunn's letter of 6 March 2013.

[17] Mr Emmerson responded on 26 April 2013 indicating the correspondence from Dr Gunn had not previously been received and that the correspondence did not include a summary of assets and liabilities.[14] Mr Emmerson's letter also noted that a title search revealed the applicant owned "significant land which should be included in the Assets and which would be available to meet her needs."[15]

[18] By letter to Mr Emmerson dated 14 May 2013 the applicant's new solicitors noted they were still awaiting details as to the funds held in trust and copies of the financials relating to those funds since the inception of the fund.[16]

[19] A variety of the ensuing correspondence between the parties has been exhibited. None of that correspondence refers to any provision by the trustees to the applicant of the financial documents relating to funds held in trust or to the amount of those funds. Nor does it refer to the applicant's solicitor providing any additional materials in respect of the financial circumstances of the applicant.

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11 Ex to Affidavit of Dr Jennifer Ann Gunn p21.
12 Ex to Affidavit of Dr Jennifer Ann Gunn p23.
13 Ex to Affidavit of Dr Jennifer Ann Gunn p24.
14 Ex to Affidavit of Dr Jennifer Ann Gunn p25.
15 Ex to Affidavit of Dr Jennifer Ann Gunn p25.
16 Ex to Affidavit of Dr Jennifer Ann Gunn p26.

The application

[20] The applicant applies for the following:

1. A review, pursuant to s 8 of the *Trust Act* 1973 (Qld) or otherwise of the decision of the trustees that the meaning and effect of clauses 3(c)(1) and 3(c)(26)(i) of the will is to confer a discretion upon the second and third respondents as trustees with respect to the manner of distribution and disposition of the funds the subject of those clauses as between the applicant and the named secondary beneficiaries.
2. A declaration that on the true construction of those clauses the applicant has an unqualified and unconditional interest in, and entitlement to, the funds the subject of those clauses.
3. An order whether pursuant to s 52(2) of the *Succession Act* 1981 (Qld) or otherwise requiring the first and second respondents to collect and get in the real and personal estate of the deceased and to administer the estate of the deceased according to law.
4. An order that the second and third respondents forthwith pay to the applicant her entitlement in and to the funds the subject of clauses 3(c)(1) and 3(c)(26)(i) of the will.

[21] The third limb of the application, seeking an order requiring the executors to collect and get in the real and personal estate of the deceased and to administer the estate according to law, is no longer relevant. The materials show the executors have administered the estate. To the extent there is any issue about the estate being administered according to law, it goes to the trusts established by it not to the administration of the estate.

The clauses in issue

[22] Clause 3 of the will bequeathed the whole of the deceased's estate to the executors upon trust to take the actions stipulated in sub paragraphs (a), (b) and (c) of clause 3. Clause 3(a) required the executors to pay the deceased's debts, expenses and duties. Clause 3(b) required the executors to give the deceased's residence at Laidley to his friend, Evelyn Ziebell, but included an alternative arrangement in the event Ms Zeibell died first, which she did not. Clause 3(c) required the trustees to stand possessed of the rest and residue of the estate and to provide the same as stipulated in the clauses thereafter.

[23] Clause 3(c)(1) requires the executors:

> "To give the sum of TEN THOUSAND DOLLARS ($10,000.00) to IAN CAMPBELL GUNN and PAUL JAMES EMMERSON as Trustees to hold UPON TRUST for my Sister HEATHER JEAN FOLEY as Primary Beneficiary and my Sister MURIEL MARION JAMIESON, my Nephews ALAN KENNETH GUNN and IAN CAMPBELL GUNN and my Niece FIONA FAY GUNN as Secondary Beneficiaries as my Trustees shall in their absolute discretion determine or in default of such determination then upon the death of the said HEATHER JEAN FOLEY equally between the said Secondary Beneficiaries or the survivors of them and if more than one as tenants in common in equal shares."

[24] Clause 3(c)(2)-(25) inclusive require the executors to give various other sums.

[25] Clause 3(c)(26) requires the executors to divide the rest and residue into three equal parts. As to the first part, clause 3(c)(26)(i) requires the executors:

> "To give the first such part to IAN CAMPBELL GUNN and PAUL JAMES EMMERSON as Trustees to hold UPON TRUST for my Sister HEATHER JEAN FOLEY as Primary Beneficiary for her sole use and benefit absolutely and my Nephews ALAN KENNETH GUNN and IAN CAMPBELL GUNN and my Niece FIONA FAY GUNN as Secondary Beneficiaries as my Trustee shall in their absolute discretion determine or in default of such determination then upon the death of the said HEATHER JEAN FOLEY equally between the said Secondary Beneficiaries of the survivors of them and if more than one as tenants in common in equal shares. …"

[26] A possibly noteworthy variation between the two clauses in issue is the presence in clause 3(c)(26)(i) of the words "for her sole use and benefit absolutely" after the reference to the applicant as the primary beneficiary. Those words are not present in clause 3(c)(1).

Discussion

[27] While this application has been prompted by the conduct of the trustees to date, its focus is on the proper construction of the meaning and effect of clauses 3(c)(1) and 3(c)(26)(i).

[28] Each party takes an extreme position about the true meaning and effect of those clauses.

The respondents' stance

[29] The stance of the respondent appears by implication to be that the clauses should be interpreted so as to deprive the applicant of any distribution under either clause because the deceased did not trust the applicant's guardians. The clauses contain no words implying such a meaning.

[30] Further no such meaning arises from using the broader content of the will as a contextual guide to the meaning of the clauses. The respondent relied upon clause 6(c) of the will to emphasise that the trustees have an absolute discretion as to whether to apply any money in the applicant's favour. Clause 6 of the will relevantly provides:

> "6. IN ADDITION to the powers hereinbefore or by "The Trusts Act of 1973" or any amending or other Act or by law conferred upon my Executors and Trustees I HEREBY GRANT THE FOLLOWING POWERS TO MY EXECUTORS AND TRUSTEES:- …
> (c) TO ADVANCE. I empower my Trustees in their absolute discretion to apply the whole or any part of the income and capital of the expectant contingent or vested share of any child or person suffering from incapacity in or towards the maintenance education or advancement or otherwise for the benefit in life of such child or person under incapacity and for

> such purpose to pay the same to the guardian or guardians for the time being of such child or person under incapacity without being bound to see to the application hereof. …"

[31] It is arguable whether the trustees referred to in clause 6 are the trustees of the will as distinct from the trustees of trusts established under the will. However, clause 6(c) is in any event at odds with a testamentary intention that a distribution, which should be made, ought not be made on account of who a beneficiary's guardian happens to be. That clause conveys a permissive intention that payments to beneficiaries suffering from incapacity be made to their guardians without the trustee being bound to see to the application of such payments.

[32] The respondent urges reliance upon extrinsic evidence and the application of the so called "armchair rule", under which the court may ascertain the facts known to the testator at the time he made his will and thereby place itself in the testator's position.[17] As will become apparent, recourse to extrinsic evidence is unnecessary in the circumstances of this case because the language under consideration is not meaningless or ambiguous on the face of the will or in the light of surrounding circumstances.[18] However, the extrinsic evidence relied upon would not in any event assist in interpreting those aspects of the clauses that are in issue.

[33] The extrinsic evidence is said by the respondent to show that the deceased believed Dr Gunn and her sister Helen had effectively defrauded Mrs Foley out of her real property and that they, along with William and Lorna, had conned the deceased into signing documents to be used by Jennifer, William and Lorna for the purpose of them being appointed as the applicant's guardians. It is suggested that the deceased perceived Jennifer, William and Lorna would use Mrs Foley's assets for their own purposes and not for hers. The respondent submits:

> "[The deceased] obviously not only wanted to establish a trust but a trust that afforded Jennifer, William, Helen and Lorna no opportunity to get their hands on any of his money that could be applied in Ms Foley's favour. A discretionary trust with secondary beneficiaries would obviously achieve that purpose."[19]

[34] It is implicit in that submission that the inclusion of secondary beneficiaries should be taken as connoting an intent to exclude the making of any disposition to the primary beneficiary. Such reasoning fails at the first hurdle. If the deceased had not intended that there be any distribution of funds to the applicant he would hardly have named her as the primary beneficiary.

[35] The extrinsic evidence purportedly relied upon by the respondent may provide some explanation for why the deceased chose to benefit the applicant through the vehicle of a trust rather than a direct bequest, however, it sheds no light upon the interpretation or the meaning of the clauses' provisions regarding the primary beneficiary and the secondary beneficiaries. Extrinsic evidence is plainly unnecessary to explain the meaning of the clauses' references to property being held on trust by trustees. That is a concept well known to the law and an understanding of it does not require recourse to extrinsic evidence.

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17 *Charter v Charter* (1874) LR 7 HL 364.

18 *Succession Act* 1981 (Qld) s 33C.

19 Respondents' outline of submissions [46].

[36] In truth the extrinsic evidence sought to be relied upon by the respondent is of no particular assistance in interpreting that aspect of the meaning of the clauses which is in dispute. Whether it is relevant as a guide to the manner in which the trustees carry out their role does not fall for determination here. However, in the hope of promoting a less extreme and more timely approach to those duties than seems to have occurred to date, two points warrant emphasis.

[37] Firstly, the trustees have a duty to actively engage in the exercise of the discretion conferred upon them by the clauses. It is an inherent requirement of their discretion that it be given real and genuine consideration.[20]

[38] Secondly, it is the words of the trust which guides the trustees' exercise of their discretion. Those words do not convey an intention that the applicant ought receive nothing. To the contrary, the identification of the applicant as a "primary" beneficiary bespeaks an intention that she should, albeit not must, benefit. To refrain from benefitting her because of whom her guardians happen to be is at odds with that intent and with the lawfulness of their appointment as guardians, an appointment specifically directing the guardians to provide a financial management plan to QCAT dealing with the applicant's beneficial entitlements under the will.[21] It is also at odds with the permissive intent of clause 6(c) of the will that the trustees may pay money to the guardian of a beneficiary suffering from incapacity.

Applicant's stance

[39] The applicant submits that on a true construction of the two clauses in issue she has an unqualified and unconditional beneficial interest in the gifts provided for her in those clauses. Thus, it is contended the second and third respondents ought forthwith pay her the funds held in each trust. If it was the deceased's testamentary intention that this should occur the method chosen to implement it was certainly novel. It would have been far simpler to simply bequeath property directly to the applicant, as the deceased's will did do to a number of other persons.

[40] The respondent identifies four features of the language used in the clauses which it contends favours a direct and immediate gift in the applicant's favour.

[41] Firstly, it submits the very making of the choice to differentiate between two categories of beneficiary, namely a primary beneficiary and secondary beneficiaries suggests an intention to differentiate between each category of beneficiary "in terms of the nature of the gift intended for each category of beneficiary".[22] It may be accepted the creation of two categories of beneficiaries reflects an intention to differentiate between beneficiaries. However, it goes too far to infer a distinction as to the nature of the gift intended.

[42] Rather, the distinction between primary and secondary beneficiaries connotes the priority to be given as between beneficiaries in the disposition of the gift. The use of the words primary and secondary to describe the categories of beneficiaries reflects the testator's intention as to the relative importance of those categories vis-à-vis each other. Thus, a consideration informing the exercise of the trustees' discretion about the making of a determination under the trusts is the primary status

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20 *Karger v Paul* (1984) VR 161, 164.

21 Ex to Affidavit of Dr Jennifer Ann Gunn p4.

22 Applicant's outline of submissions [12(a)].

accorded to the applicant as a beneficiary in comparison to the balance of the beneficiaries.

[43] Secondly, the applicant emphasises the presence of a default mechanism in each clause stipulating upon the death of the applicant, that there is to be an equal division of the relevant corpus between the surviving beneficiaries. The applicant submits from this "that the secondary beneficiaries were only intended to take on a gift over in the event of the death of the applicant as primary beneficiary".[23] However, it is clear from both clauses that was not the only circumstance under which the secondary beneficiaries might benefit.

[44] Under the terms of the clauses there can be a distribution to the secondary beneficiaries even while the primary beneficiary is living. Both clauses refer to the trustees holding the property on trust for the primary beneficiary and the secondary beneficiaries as the trustees "shall in their absolute discretion determine". The clauses go on to refer to an equal distribution between the surviving secondary beneficiaries only in the context of arrangements in default of the above-mentioned determination and upon the death of the primary beneficiary. Both clauses certainly contemplate that the secondary beneficiaries could potentially benefit after the primary beneficiary's death, but equally, both clauses contemplate that the trustees might make a determination favourable to the secondary beneficiaries prior to the primary beneficiary's death. In short, the words of the clauses cannot support the conclusion that the only circumstance under which the secondary beneficiaries could benefit would be taking on a gift over in the event of the death of the applicant as the primary beneficiary. This dispenses with the potential application of the rule in *Saunders v Vautier*.[24]

[45] The applicant's third submission builds upon the above-mentioned submission that the discretion held by the trustees regarding the secondary beneficiaries would only become exercisable upon the death of the applicant. The applicant contends that would not qualify the nature of the interest conferred, for example, to limit the extent of the gift as a mere life interest expiring upon her death. Rather, it contends its effect would be merely to direct and control the matter of disposition of the gift in the event that the applicant, as the intended recipient, was to predecease the deceased. The applicant submits this would give full meaning and effect to all of the words of the clauses and avoid the rule that where a legacy is given absolutely and a gift over is superadded in the event of the legatee dying without having disposed of the legacy, the gift over is void and the legacy is absolute.[25] However, for reasons already explained the premise of this third submission, that the discretion held by the trustees to distribute to the secondary beneficiaries would only become exercisable upon the death of the applicant, is incorrect.

[46] The existence of provision in the clauses for a gift over in default is actually a powerful consideration against the interpretation urged by the applicant. It suggests the primary trust power is non-exhaustive in nature because in providing for a gift over in default the settlor was anticipating that the trustees had no duty to exhaust the power.

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23 Applicant's outline of submissions [12(c)].

24 (1841) Cr & Ph 240, 41 ER 482.

25 *Ritchie v Magree* (1964) 114 CLR 173, 176.

[47] Fourthly, the applicant submits particular significance should be given to the words "for her sole use and benefit absolutely", which appear in clause 3(c)(26)(i) (but not clause 3(c)(1)). The applicant submits the requirement that the trustees are to hold the relevant property for the applicant's sole use and benefit and for her absolute benefit indicates, at least so far as clause 39(c)(26)(i) is concerned, the applicant was intended to exclusively benefit and to do so independently of any discretion posed in the trustees.

[48] The applicant submits this delineates a distinction between the primary and secondary categories of beneficiaries. She submits it means that there is provision for a direct and immediate gift in her favour as compared to a mere expectancy, dependent upon a favourable exercise of the discretion reserved to the trustees.

[49] As against this, the respondents submit the words "sole use and benefit absolutely" add no real meaning to the clause. In *Beattie v Sainsbury*[26] Young CJ in Eq explained that, before the *Married Women's Property Act* 1893, the words "sole use and benefit absolutely" were commonly used in wills. This was because at law a married woman's property passed to her husband in accordance with the old common law doctrine that a wife was at one with her husband at law. Use of the words would allow married women to seek a declaration in equity that the husband held the property on trust for the wife thus ensuring, for example, that a married daughter would take property beneficially and it would not go to her husband. Young CJ observed that the words were therefore an otiose expression.[27]

[50] The argument that the words have been included as a relic of past practice rather than with the intention of conveying meaning is bolstered by the repetitive use of the words in other parts of the will, particularly in making specific bequests to specific individuals. In that context the words clearly add no meaning.

[51] However, even if the words are to be read as conveying some meaning, their context within the clause does not support the conclusion that there has been a gift of an absolute interest in the residue in the applicant's favour. The clause uses language such as "trust", "secondary beneficiaries" and "absolute direction" to be exercised by "trustees". The construction contended for by the applicant requires in effect that much of the clause's language be ignored.

[52] The preferable view, considering the words "for her sole use and benefit absolutely" in context is not that they are exclusory of the interest of the secondary beneficiaries but rather those words are intended to emphasise that the applicant is the only primary beneficiary under the trust. Thus, as the sole primary beneficiary the applicant's beneficial interest, whatever it may be determined by the trustees to be, would be "for her sole use and benefit absolutely". Interpreting the words in that way is consistent with the context in which they are used and allows meaning to be given to all the words in the clause.

[53] In the event I am wrong in concluding there should be no reference to extrinsic evidence to interpret the meaning of the clause, the extrinsic evidence does not assist the applicant. If the extrinsic evidence can be regarded as imputing any testamentary intention in respect of the words "for her sole use and benefit

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[26] (2003) NSWUSC 499 [10].
[27] (2003) NSWUSC 499 [18].

absolutely" it would be to emphasise that the funds distributed to the applicant were intended to be for her sole use and benefit, as distinct from the use and benefit of her guardians. Such an interpretation is inconsistent with the contention of the applicant that the clause has the effect of conferring a direct and immediate gift in the applicant's favour.

The proper construction

[54] The extreme stances of both the applicant and respondent as to the proper construction of the sub clauses are unsustainable.

[55] The wording of the clauses does not mean that the applicant has an unqualified and unconditional interest in an entitlement to the funds the subject of those clauses. It follows the applicant is not entitled to the declaration sought or to an order that the second and the third respondent forthwith pay to the applicant her entitlement in and to the funds subject to the clauses.

[56] On the other hand, the wording of the will does not mean its purpose is to solely award the secondary beneficiaries and to make no distribution to the primary beneficiary because of who her guardians are.

[57] The clauses confer a discretion on the trustees to determine if, what and when distributions should be made to the applicant and the secondary beneficiaries. However, the trustees have a duty to exercise that discretion in good faith, upon real and genuine consideration. That consideration must include a real and genuine consideration of the priority accorded to the applicant by the trust's designation of her as the primary beneficiary.

Orders

[58] My orders are:

1. It is declared that the meaning and effect of clauses 3(c)(1) and 3(c)(26)(i) of the will is to confer a discretion upon the second respondent and the third respondent, as trustees, with respect to the manner of distribution and disposition of the funds, the subject of those clauses, as between the applicant and the named secondary beneficiaries.
2. The application is otherwise dismissed.
3. I will hear the parties to costs.