SUPREME COURT OF QUEENSLAND

CITATION:	*Guillesser v Dawson & Anor* [2014] QSC 229
PARTIES:	**MARGARET GUILLESSER AS ADMINISTRATOR OF THE ESTATE OF THE LATE JOHN DAWSON** (plaintiff) **v** **IAN DAWSON** (first defendant) and **ELLEN DONALD** (second defendant)
FILE NO/S:	BS 4603 of 2013
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	17 September 2014
DELIVERED AT:	Brisbane
HEARING DATE:	17 June 2014
JUDGE:	Philip McMurdo J
ORDER:	**Grant to the plaintiff letters of administration with the will of John Dawson made on 22 April 2004.**
CATCHWORDS:	SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – TESTAMENTARY DISPOSITIONS GENERALLY – LAPSE – where the testator husband and his wife were killed in a plane crash – where the testator left his entire estate to his wife – in the event that the wife predeceased the testator, the estate was left to the plaintiff among others – whether the wife's entitlement under the will "lapsed" by the operation of s 33B of the *Succession Act* 1981 (Qld) – whether the testator died intestate. *Succession Act* 1981 (Qld), s 33B, s 65 *Desmarchelier v Stone* [2005] 2 Qd R 243, distinguished.
COUNSEL:	D B Fraser QC for the plaintiff M Wilson for the defendants

SOLICITORS: Biddle Lawyers for the plaintiff

Porta Lawyers for the defendants

[1] On 1 October 2012, John Dawson and his wife Carol Dawson were killed when the plane in which they were passengers crashed south of Gympie. The question in this case is what should happen to Mr Dawson's estate. The plaintiff, Ms Guillesser, is a sister of the late Carol Dawson. She and others claim to be entitled, in various shares, to John Dawson's estate.

[2] The second defendant is the mother of John Dawson, who claims to be entitled to the entirety of the estate on the basis that any gift under his will has lapsed, so that his property is to be distributed as on intestacy. The first defendant does not contest the plaintiff's claim.

[3] There are no contested facts. The outcome turns on the terms of John Dawson's will and the impact of ss 33B and 65 of the *Succession Act* 1981 (Qld).

[4] John Dawson's will was made on 22 April 2004 when he was aged 55 years. There is no suggestion that the will is invalid. The only question is its effect.

[5] The will was in a printed standard form which called for the insertion of the details including the gift or gifts. Clause 4 provided for the insertion of details relevant to "special gifts". Under the words "I leave the following special gifts free of all duties and charges to", Mr Dawson wrote:

> "Carol A. Dawson of 19 Emcona St Tingalpa
> my entire estate - wife".

Clause 5 provided for a gift of the residue of the estate. As completed by Mr Dawson, it began as follows:

> "I give the residue of my estate to Carol A. Dawson my wife
> Born 04/08/1949 after payments of all my just debts, funeral and testamentary expenses.
> But if he/she predecease me then I give the residue of my estate in parts to:
> a) Margaret Guillesser my sister in law … the part of 50% …
> b) Warren Condon my brother … the part of 25% …
> c) Melissa McLeod my niece …) 25% share,
> d) Peter Guillessar my nephew …) between
> Michelle Guillesser Niece) 3"

[6] This will did not appoint an executor. The plaintiff, Ms Guilleser, applies for a grant of letters of administration with the will, upon the basis of her claimed 50 per cent interest in the estate. It is conceded that if that interest exists, she should have the grant which she seeks.

[7] A coroner inquired as to the deaths of Mr and Mrs Dawson and others in this crash. Mr and Mrs Dawson were able to be identified by DNA samples taken from the crash scene. Clearly, each died on the day of the crash. Death certificates were not issued but in November 2012, a judge of this court permitted the plaintiff to swear to the deaths of Mr and Mrs Dawson as having occurred on or about 1 October 2012 and subsequently death certificates were issued specifying that as the date of death.

[8] In these circumstances, it was factually uncertain which of Mr and Mrs Dawson survived the other. As the respective submissions here agreed, s 65 of the *Succession Act* applies to this case. Section 65 is as follows:

> "65 Presumption of survivorship
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> Subject to this Act, where 2 or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder for a period of 1 day."

John Dawson was born six months earlier than Carol Dawson. Therefore, by s 65 Carol Dawson is deemed to have survived John Dawson for a period of one day "for all purposes affecting the title to property". It is common ground that this includes the operation of John Dawson's will.

[9] It is also common ground that s 33B of the *Succession Act* applies to this will. The argument is as to the effect of that provision. Section 33B is as follows:

> "33B Beneficiaries must survive testator for 30 days
>
> (1) If a disposition of property is made to a person who dies within 30 days after the testator's death, the will takes effect as if the person had died immediately before the testator.
>
> (2) Subsection (1) does not apply if a contrary intention appears in the will.
>
> (3) A general requirement or condition that a beneficiary survive the testator is not a contrary intention."

[10] By s 65, Carol Dawson is taken to be a person who died one day after John Dawson and therefore within 30 days after his death. The parties agree that in consequence of s 33B(1), his will takes effect as if Carol Dawson had died immediately before him.

[11] It is at this point that the arguments part company. The plaintiff's argument is that the will anticipated that Carol Dawson would predecease John Dawson, by giving the estate to the plaintiff and others in that event. The doctrine of lapse would put paid to the gift to Carol Dawson but the will contains a disposition in substitution for that gift in the event of its lapse.

[12] The defendant's argument is that there was a lapse of *any* gift which was within cl 5 of the will. The written submissions for the defendant suggested that as a result of s 33B, "the predecease clause [within clause 5], as part of the gift of the residue, also lapses".

[13] The defendant's argument heavily relied upon a judgment in this court in *Desmarchelier v Stone*.[1] That case was decided by reference to the then s 32 of the

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1 [2005] 2 Qd R 243.

Succession Act, which was in similar but not identical terms to the present s 33B which was substituted for it in 2006.[2] The then s 32 relevantly provided as follows:

> "(1) Unless a contrary intention appears by the will, where any beneficial disposition of property is made to a person who does not survive the testator for a period of 30 days the disposition shall be treated as if that person had died before the testator and, subject to this Act, shall lapse."

[14] In that case, the will relevantly provided as follows:

> "I give Devise and Bequeath in equal shares to my brothers, James Burston Webster and Alison Brand Webster, my property at Tamborine known as 'Blue Anchor' … together with all improvements thereon for their sole use and benefit absolutely. If one or more of my brothers precedes me in death then their respective shares be passed to their respective children in equal shares.
>
> If 'Blue Anchor' is to be sold, I give first option of purchase to Bruce Kingsley Webster where the purchase price for the property or assets shall be the true market value thereof as at the date of the exercise of such option. Such true market value is to be determined by an approved valuer to be appointed by my executors.
>
> I give the rest and residue of my estate … to all my eleven nieces and nephews …"

[15] One of the brothers the subject of that clause of the will, who was known as "Brand", died some 17 days after the testator, meaning that he died within the 30 day period provided for by s 32. Moynihan J held that the effect of s 32(1) was that the gift to Brand lapsed and fell to be dealt with as part of the residue of the estate. He held that there was no contrary intention which was expressed in the will. He said that:

> "[12] Section 32, given its express terms, cannot be construed to the effect that Brand predeceased his brother, save for the limited purpose of s 32. It cannot therefore be said that there is a subsidiary provision in favour of his children.
>
> [13] The will is not apt to give Brand's children an interest in 'Blue Anchor' in the event of his not having survived the testator for the 30 days provided for by s 32. He is therefore treated as having died before the testator and the gift has lapsed. Section 32, in my view, does not allow for any other outcome."

[16] In my view, this case is distinguishable, not because of the difference between the then s 32 and the present s 33B, but because of a critical difference between the two wills. In that case, all which could pass to the children of one of the brothers, to whom "Blue Anchor" was given, was the "respective share" of that brother. All which could pass to Brand's children could be his "respective share". But

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2 *Succession Amendment Act* 2006 (Qld), s 6.

according to that judgment the gift to him lapsed by the operation of s 32, so that there was no share which could pass to his children.

[17] In the present case, it was not Carol Dawson's interest which was then to pass to the plaintiff and others. This will contained a distinct disposition in favour of the plaintiff and others, to take effect in the event of the lapse of the disposition in favour of Carol Dawson. Therefore, the lapse of the disposition in her favour did not put paid to the substitutional disposition in favour of the plaintiff and others: instead the lapse gave effect to it.

[18] Therefore the plaintiff's argument should be accepted. She and the others named in cl 5 are entitled to the estate in the shares as specified. It follows that there should be a grant of letters of administration of the will in her favour.

[19] The case became before the court in the form of cross-applications for summary judgment. But counsel agreed that the hearing should constitute the trial of the case and that if the plaintiff's argument was upheld, there should be a grant in her favour. I will hear the parties as to any further orders.