SUPREME COURT OF QUEENSLAND

CITATION:	*Donald v Guillesser* [2015] QCA 92
PARTIES:	**ELLEN DONALD** (appellant) **v** **MARGARET GUILLESSER AS ADMINISTRATOR OF THE ESTATE OF THE LATE JOHN DAWSON** (respondent)
FILE NO/S:	Appeal No 9730 of 2014 SC No 4603 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2014] QSC 229
DELIVERED ON:	22 May 2015
DELIVERED AT:	Brisbane
HEARING DATE:	29 April 2015
JUDGES:	Gotterson and Morrison and Philippides JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Patrick Arnold Joseph Guillesser be appointed administrator of the estate of the late John Dawson made on 22 April 2004.** **2. The appeal is dismissed.** **3. The respondent's costs of and incidental to the application made on 29 April 2015, and the appeal, assessed on the indemnity basis, be paid out of the estate.** **4. No order for costs in respect of the appellant.**
CATCHWORDS:	SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – STATUTORY RULES OF CONSTRUCTION – LAPSE WHERE BENEFICIARY DOES NOT SURVIVE TESTATOR BY SPECIFIED PERIOD – where Mr and Mrs Dawson died together in an aeroplane accident – where Mrs Guillesser applied for a grant of letters of administration – where Mr Dawson's mother, Mrs Donald, claimed to be entitled to the entire estate – where this claim was based upon the fact that the gifts failed under the application of s 33B and s 65 of the *Succession Act* 1981 (Qld) – where if the gifts were deemed to fail Mr Dawson died with the estate to be distributed as on intestacy – where the construction and

application of s 33B and s 65 of the *Succession Act* 1981 (Qld) and the proper construction of clause 5 of the will were to be considered – where shortly before the appeal was heard Mrs Guillesser died – where her husband Mr Guillesser was appointed the administrator for the purpose of the appeal – whether the estate should be administered on the basis of clause 5 of the will or as on intestacy – whether Mr Guillesser should administer the estate pending the outcome of the appeal

Succession Act 1981 (Qld), s 33B, s 65

Desmarchelier v Stone [2005] 2 Qd R 243; [2004] QSC 458, distinguished
Fell v Fell (1922) 31 CLR 268; [1922] HCA 55, considered
Guillesser v Dawson & Anor [2014] QSC 229, related
McPherson v Byrne [2013] 2 Qd R 516; [2012] QSC 394, considered

COUNSEL: M F Wilson for the appellant
D B Fraser QC, with S M Gerber, for the respondent

SOLICITORS: Porta Lawyers for the appellant
Slater & Gordon for the respondent

[1] **GOTTERSON JA**: I agree with the orders proposed by Morrison JA and with the reasons given by his Honour.

[2] **MORRISON JA:** On 1 October 2012 Mr John Dawson and his wife, Carol, were killed in an aeroplane crash. Each died on the day of the crash but it could not be established which of them died first.

[3] Mr Dawson left a will.[1] In broad terms, by clause 5 of the will he gifted everything to Mrs Dawson, but if she died first, then everything was to be split: 50 per cent to his sister-in-law, Mrs Guillesser; 25 per cent his brother;[2] and 25 per cent split between three named nieces and nephews.

[4] Mrs Guillesser applied for a grant of letters of administration. Mr Dawson's mother, Mrs Donald, claimed to be entitled to the entire estate. She said this was because s 33B and s 65 of the *Succession Act* 1981 (Qld) have the effect that the gifts failed, and therefore the estate falls to be distributed as on intestacy.

[5] Mr Dawson was six months older than his wife. The learned primary judge found that the effect of s 65 of the *Succession Act* is that she is therefore deemed to have survived him "for a period of 1 day".[3] There is no challenge to this finding.

[6] There were no facts in dispute. The learned trial judge found that the estate should be administered by Mrs Guillesser on the basis of the gifts in clause 5, and not as on intestacy. Ms Donald seeks to challenge that finding.

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1 AB 42.
2 Mr Condon.
3 *Guillesser v Dawson* & *Anor* [2014] QSC 229 at [8].

[7] Shortly prior to the appeal being heard Mrs Guillesser died. Orders were made (unopposed) that Mr Guillesser act as administrator until further order. If the appeal succeeds his administration will end; if it fails then orders will need to be made as to the administration of the estate thereafter.

[8] The issues raised by the appeal are:

(1) the construction of s 33B of the *Succession Act*;

(2) the application of s 33B to the will; and

(3) the proper construction of clause 5 of the will.

Construction of s 33B of the *Succession Act*

[9] As always the task of construction of a statute must begin and end with the text, but that must be considered in its context, which includes the legislative history and extrinsic materials.[4]

[10] Section 33B is found in Div 5 of Part 2 of the Act, which contains a suite of provisions dealing with the interpretation of wills. The various provisions govern a wide range of issues such as: the use of evidence to interpret a will,[5] when a will takes effect,[6] the effect of a failure of a disposition,[7] what general dispositions include,[8] that dispositions are not to fail because issue die before the testator,[9] and the effect of references to a valuation in a will.[10]

[11] Division 5 supplements and modifies the longstanding principles applicable to the construction of wills,[11] which were summarised by Isaacs J in *Fell v Fell*.[12]

[12] Section 33B provides:

> "(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."

[13] Relevantly, two conditions must be met before s 33B applies. First, there must be a disposition of property in the will, to a person. Secondly, the person must die within 30 days after the testator. If they are met then s 33B directs that the will takes effect as if the person died before the testator.

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4 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[71]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47]; *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, at [39].

5 Section 33C.

6 Section 33E.

7 Section 33G.

8 Sections 33I and J.

9 Section 33N.

10 Section 33S.

11 *McPherson v Byrne* [2012] QSC 394, at [15]. (***McPherson***)

12 (1922) 31 CLR 268, at 273-276.

[14] The purpose behind s 33B is the avoidance of multiple administrations where gifts lapse. As was pointed out in *Desmarchelier v Stone*,[13] in respect of s 32, the predecessor of s 33B:

> "Prior to the enactment of s. 32 if a beneficiary died before the testator the gift lapsed. The purpose of the 30 day survivorship rule is to avoid the multiplicity of administration of the same property through several estates which might otherwise occur without unduly delaying the distribution to beneficiaries; see *Report of the Law Reform Commission on the Law Relating to Succession Q.L.R.C.* 22, 24 February 1978, p. 20, para. 32, *The Law of Succession* (Butterworths) 1027."

[15] The context in which s 33B is found includes that it is part of the provisions which deal with the way in which wills are to be interpreted. As appears from the text, s 33B affects a will by imposing a rule of construction, namely that even though the person has died within 30 days **after** the testator's death, the will takes effect as though they had died **before** the testator.

[16] Prior to the 2006 amendment s 32 of the Act, which then appeared in Div 4 of Part 1 dealing with construction and rectification of wills, provided:

> "(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.
>
> (2) A general requirement or condition that a beneficiary survive the testator is not a contrary intention for the purpose of this section."

[17] The amendment in 2006 altered the wording to the current form in s 33B(1), so that instead of saying "the disposition shall be treated as if that person had died before the testator and, subject to this Act, shall lapse", it now says "the will takes effect as if the person had died immediately before the testator".

[18] Some observations may be made about the change in text from s 32 to s 33B(1). Section 32 was directed to the particular disposition made to the particular beneficiary, whereas s 33B, at least on its face, is not. It specifies how "the will takes effect" in the event that a beneficiary dies with 30 days of the testator. Nor does the text of s 33B specify that the disposition lapses. Finally s 32 was directed to beneficial dispositions whereas s 33B is not so limited.

[19] It was submitted by counsel for Mr Guillesser that the differences in wording meant that s 33B has a wider scope of operation than s 32 did, and that it should no longer be regarded as merely a lapse provision. It was said that it serves that purpose in respect of the disposition to the beneficiary, because that beneficiary predeceases the testator, but that it serves a wider purpose as well.

[20] The amendment was made as a result of the report by the National Committee for Uniform Succession Laws in December 1997. The committee was chaired by the

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[13] [2005] 2 Qd R 243, per Moynihan J at [8] (***Desmarchelier***). Section 32(1) was replaced by s 33B in the *Succession Amendment Act* 2006.

Queensland Law Reform Commission (**QLRC**). It proposed a model bill based on the draft Victorian *Wills Act 1994*, which in turn drew on the Queensland *Succession Act*, and contained clause 26, in much the same terms as s 33B.[14]

[21] The report by the QLRC to the National Committee[15] referred to the effect of the proposed section in this way:

> "This provision extends the operation of the doctrine of lapse, a doctrine which has not been subject to criticism, by a month from the date of death of the testator."[16]

[22] In December 1997 the QLRC issued Report No 52[17], which assessed the extent to which the model legislation represented a change in existing law under the *Succession Act*. The QLRC referred to the change from s 32 to s 33B in these terms: "Section 32 of the *Succession Act 1981* (Qld) is in **very similar terms to** clause 26 of the draft *Wills Act 1994* (Vic)."[18] The only matter the subject of report on this aspect was whether 30 days was too long. The QLRC recommended the adoption of the Victorian draft.[19]

[23] That report was the foundation for the changes made in the *Succession Amendment Bill* 2005. In his second reading speech on the Bill the Attorney-General referred to Report No 52, saying the Bill was "to implement the national committee's recommendations regarding the law of wills", and:[20]

> "The bill implements the model legislation with several modifications recommended by the commission's report. The bill does this by replacing part 2 and other miscellaneous provisions of the Succession Act which deal with the making, revocation, formal validity, interpretation of wills and powers of personal representatives."

[24] Thereafter the Attorney-General listed "some of the key changes".[21] None of them included the proposed s 33B. The Attorney-General also said:

> "The amendments are largely consistent with the principles contained in the model wills legislation that accompanied the national committee's 1997 recommendations. The model legislation has been adapted to meet Queensland's legislative standards and to accommodate Queensland's drafting style."[22]

and, after again listing "key changes" which did not mention s 33B, added:

> "The bill reforms and modernises the laws of wills in Queensland..".[23]

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14 The only difference was that clause 26 said 'the will is to take effect" instead of 'the will takes effect".

15 Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills, **QLRC MP29**.

16 QLRC MP29 at page 75.

17 The Law of Wills **QLRC R 52**.

18 QLRC R 52, Vol 2, page 97. Emphasis added.

19 QLRC R 52, Vol 2, pages 97-98.

20 Second reading speech on the *Succession Amendment Bill*, Hansard 23 August 2005, pages 2586-2587.

21 Second reading speech page 2587-2589.

22 Hansard 14 February 2006, page 77.

23 Hansard 14 February 2006, page 78.

[25] The legislature's explanatory notes to the amendment Bill stated:

> "*New section 33B* replaces and **essentially restates**[24] section 32 of the Act. It operates, subject to a contrary intention expressed in the will, so that where a beneficiary under a will fails to survive the testator for a period of 30 days, his or her benefit fails….".[25]

[26] Nothing in the extrinsic material suggests that the legislature intended to do more than to replace s 32 with a more modern version that achieved the same result. The material reveals that a wider change was not recommended by the National Committee, nor the QLRC. Had it been intended that a substantial change was to be wrought, impacting on testamentary intention beyond the particular disposition to the particular beneficiary, one might have expected something quite different to have been said.

[27] Further, such a wider ambit of operation runs beyond the purpose behind the section and its predecessor, namely to avoid multiple administrations.

[28] An example will suffice to demonstrate the potential impact of the wider approach:

- a will makes a disposition of property to X;
- it separately provides that if X dies before the testator then a different piece of property should go to Y;
- but there is no suggestion of a disposition of the second piece of property to X;
- as events transpire X dies within 30 days of the testator;
- under s 32 the only thing affected is the disposition to X;
- under 33B, because the will takes effect as if X died first, the disposition of the second piece of property is enlivened;
- thus even though the fact is that X died after the testator, s 33B operates to impose the legal fiction of X's predeceasing on a disposition that was never intended for X or related to the disposition to X.

[29] Taking those matters into account, the question to be determined is the meaning of the phrase "the will takes effect". Does it mean takes effect for all purposes and affecting all references to the beneficiary, or does it mean takes effect in relation to the disposition referred to in the opening words of the section?

[30] In my view it means "the will takes effect in relation to the disposition referred to as if the person had died immediately before the testator". The outcome identified in the example in paragraph [28] above cannot have been what the legislature intended as a consequence of the amendment.

[31] In my view s 33B does no more than impose the simple rule of construction, that in the particular circumstance of a disposition to a beneficiary who dies within 30 days after the testator, the will is to be construed, in relation to the disposition, as if the beneficiary had died before the testator. It will yield if the will expresses a contrary

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24 Emphasis added.

25 Explanatory Notes to the *Succession Amendment Bill* 2005: page 15-16.

intention to the rule imposed, but s 33B does not have any wider impact on how to construe the provisions of the will.[26]

Application of s 33B

[32] Mr Dawson's will was in a pre-prepared form in which clause 4 was meant for special gifts and clause 5 for the residue. Gifts were provided to Mrs Dawson in both clauses, each of which needs to be considered.

[33] Clause 4 is in these terms:

> "I leave the following special gifts free of all duties and charges to:
>
> Carol A. Dawson of 19 Emcona St Tingalpa my entire estate – wife."

[34] Then clause 5 provides:

> "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 Guillesser my nephew …) between
>
> Michelle Guillesser niece) 3. "

[35] The parties are agreed that the will takes effect, by reason of s 33B(1), as if Mrs Dawson had died immediately before Mr Dawson.[27]

[36] Clause 4 can be dealt with in short terms. Because Mrs Dawson is taken to have died immediately before Mr Dawson, the gift in clause 4 must fail. That is accepted by the parties, whose contentions below, and in this Court, focussed only on the impact of s 33B(1) on clause 5.[28] In oral submissions counsel for Mrs Donald reaffirmed that position.

[37] The difference between the parties as to clause 5 was:

- Mr Guillesser urged that clause 5 should be read as containing two gifts, the first of the residue to Mrs Dawson, which lapsed because of s 33B(1); and the second to the specified family, in their respective proportions, which did not lapse;
- Mrs Donald urged that clause 5 contained one disposition only, the gift of residue to Mrs Dawson and the entitlements under the pre-decease clause, and that whole disposition failed because of s 33B(1); and

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26 *Desmarchelier* at [12]-[14].
27 [2014] QSC 229 at [10].
28 Mrs Donald's outline, paragraph 11.

- Mrs Donald urged that the second sentence of clause 5 should be read as if it said "actually predecease", in the sense that the date of Mr Dawson death was actually before that of Mr Dawson.

[38] In mounting the challenge to the finding of the learned primary judge, Mrs Donald advanced these principal contentions:

- Section 33B is a lapse provision, and its purpose is to lapse gifts to persons who do not survive the testator by 30 days; therefore clause 5 should not be construed as if there was a subsidiary gift to the family;[29]

- Section 33B does not displace s 65, which determined, as a fact, that Mrs Dawson died after and not before Mr Dawson;[30] the gift to the family in clause 5 could only apply if Mrs Dawson died in the lifetime of Mr Dawson, and she did not; s 65 applied to deem her death to have occurred after Mr Dawson;[31]

- Clause 5 should be read as if the second sentence said "actually predecease"; by reason of s 65 the actual date of Mrs Dawson's death was after Mr Dawson's death, so that the gift failed;

- the reasoning in *Desmarchelier* was applicable to clause 5.[32]

Construction of clause 5 of the will.

[39] The first step to construing the will is to construe the plain meaning of the words of clause 5, in the context of the will as a whole.[33] That context includes the terms of clause 4, even though that gift failed in the events which followed.

[40] Clause 5 uses the phrase "I give the residue of my estate" in two different separate sentences. The first sentence creates a disposition, by way of a gift, of the residue to Mrs Dawson alone. The second sentence creates a substituted disposition to the first, signified by the words "**But** if … she predecease me then…".[34]

[41] In my view the plain words of the second sentence of clause 5 creates a gift distinct from that in the first sentence. However the second gift is dependent on the first. The use of the word "But" signifies that the second gift is substituted for the first, if the first fails because Mrs Dawson predeceases Mr Dawson. Mr Dawson evidently desired to cater for each eventuality. In this respect I respectfully agree with the conclusion reached by the learned primary judge.[35]

[42] I do not consider that s 33B(1) has any effect on reaching that construction. It does not depend on whether Mrs Dawson died before or after Mr Dawson. Section 33B(1) only applies to the next stage of the construction exercise, namely whether any, and which, part of clause 5 has been triggered.

[43] The gift in the first sentence would fail if Mrs Dawson predeceased Mr Dawson. Section 33B(1) has that effect and the parties agree it applies. Therefore the failure of that gift would follow for the same reason as the gift in clause 4 failed.

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29 Outline paragraphs 8, 13, relying on *Desmarchelier*.
30 Outline paragraphs 14, 33-36.
31 Outline paragraph 7.
32 Outline paragraphs 19-20.
33 *Fell*, at 273-274.
34 Emphasis added.
35 [2014] QSC 229 at [17].

Mrs Donald contends that s 33B applies to the first sentence of clause 5 but does not apply to the second sentence.

[44] One of her contentions is that s 65 cannot be displaced by s 33B, insofar as it deems Mrs Dawson to have survived Mr Dawson by one day. Thus, it is said: s 65 means that "for all purposes affecting title to property" Mrs Dawson survived Mr Dawson; that is a fact established by s 65 and cannot be displaced by anything in the operation of s 33B.

[45] For several reasons I cannot accept that contention.

[46] First, the extension of that approach would permit s 33B no scope for operation at all, and deny the purpose of the provision, namely to avoid multiple administrations of the same property.[36] Section 65 is a general provision, which has the effect that where the order of deaths is uncertain, the deaths are deemed to have occurred elder downwards, and the younger is deemed to have survived. However that person is only deemed to have survived for one day longer. The application of s 65 is not confined to dispositions under wills, as it applies "for all purposes affecting title to property". Further, s 65 commences with the words "Subject to this Act". Therefore the deemed survivorship is only the case subject to other provisions of the Act.

[47] Section 33B(1) makes specific provision for the position under a will, where a beneficiary dies within 30 days after the testator's death. In that case, for the purpose of avoiding multiplicity of administrations, the will operates as though the beneficiary had died "immediately before the testator". Under s 65 the deemed survivor is, by virtue of surviving for one day longer than the testator, a person who has died within 30 days after the testator's death. There is no warrant to think that such a person is not caught by s 33B(1).[37] The questions of title to property affected by s 65 will not necessarily be completely coincident with the question of dispositions under a will. It just happens to be so in this case. Thus s 65 is not displaced by s 33B(1), but operates in conjunction with it.

[48] Secondly, if it were so, then the gift in clause 4 would not have failed. Mrs Dawson, having survived Mr Dawson by one day, would be entitled to the entire estate under clause 4. Yet Mrs Donald accepts that the gift in clause 4 failed, and by reason of the operation of s 33B(1).

[49] Thirdly, if that were so then the gift in the first sentence of clause 5 would not fail either, because Mrs Dawson would have survived Mr Dawson's death and take the entirety of the residue. However that would not mean the estate would be administered as on intestacy, which is the position for which Mrs Donald contends.

[50] The second contention as to clause 5 is that the second sentence should be read as if it said "actually predecease". In other words it should be read as if it referred to Mrs Dawson's real date of death, not her presumed date of death under s 33B(1). Thus, it was said, s 65 established that, as a matter of fact, the date of Mrs Dawson's death was after Mr Dawson's death. Since she did not predecease in fact, the gift failed.

[51] In my view there are several reasons why that contention cannot succeed. First, it would read into the will words which are not there. There is nothing in the will that suggests that the second sentence should not be read in accordance with its plain words.

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36 *Desmarchelier* at [8].

37 Indeed, the parties accept that s 33B(1) applies in that situation.

That is, if Mrs Dawson does not take under the first sentence because she predeceased Mr Dawson, then the residue is gifted to the others. For that purpose it does not matter if she predeceases because of the effect of s 33B of the Act. After all, both at the time the will was executed, and when it took effect, there was a statutory regime in place which had that effect if the beneficiary died within 30 days of the testator.

[52] Secondly, if correct it would mean that the clause indicated a contrary intention for the purposes of s 33B(2), so that s 33B(1) did not apply. That is directly contrary to the written submissions in this court,[38] and below.[39] Thirdly, if correct it is difficult to see why that contrary intention would not have been reflected in clauses 4 and the first sentence of clause 5. If s 33B(1) does not apply the gift in clause 4, or in the first sentence of clause 5, would not fail. That is an outcome for which Mrs Donald does not contend.

[53] Fourthly, the evident intention of Mr Dawson was that Mrs Dawson should receive the whole estate, unless she died first or is taken to have died first, in which case the estate would be split as in the second sentence of clause 5.

[54] In my view clause 5 of the will works in a simple way, taking into account s 65 and s 33B:

- it is a deemed fact under s 65 that Mrs Dawson died after Mr Dawson;
- however, because of s 33B(1) the will takes effect, for the purposes of the disposition in the first sentence of clause 5, as though she died first;
- therefore the gift to her in the first sentence of clause 5 fails;
- the second sentence gifts the residue to the others if Mr Dawson predeceases, whether in fact or by statutory presumption;
- that gift in the second sentence is enlivened because of s 33B(1) and does not fail.

Applicability of *Desmarchelier*

[55] I do not consider that the reasoning in *Desmarchelier* governs the outcome here. That case concerned a clause in a will which relevantly provided:

> "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."[40]

[56] One brother died within 30 days after the testator. Moynihan J held that the effect of s 32(1), the predecessor to s 33B(1), was that his gift lapsed and did not pass to his children. The will was quite different to that in the present case. The only thing that might pass to the children was the brother's "respective share", and because he pre-deceased the testator the gift lapsed. In other words, the brother's interest in his

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38 Outline paragraphs 37-39.
39 Outline paragraph 37, footnote 20.
40 *Desmarchelier* at [2].

share was never enlivened. Moynihan J held that s 32(1) only had a limited purpose, namely providing that the brother pre-deceased the testator only in respect of the disposition to him.[41] Because it was only his share that could pass to the children, and it lapsed, there was nothing to pass to the children.

[57] The will here is quite different. There are two distinct gifts of the residue, one in substitution for the other.

[58] The contention was advanced that the first sentence of clause 5 created an interest in the residue on the part of Mrs Dawson, and that the second sentence should be construed as giving only Mrs Dawson's interest, in the same way as occurred in *Desmarchelier*. That does not accord with the plain words of clause 5. The first part gave the entirety of an item of property (the residue) to Mrs Dawson. The second part simply provided that if she died first, that item of property went to others. It was not Mrs Dawson's particular interest that was being gifted, it was the residue.

[59] For the reasons expressed above I would dismiss the appeal.

[60] In light of that, the order appointing Mr Guillesser as administrator should be made final.

Costs

[61] The application to substitute Mr Guillesser as administrator was necessary but for no reason to do with Mrs Donald. Mr Guillesser should have his costs of the application, assessed on the indemnity basis, paid out of the estate. There should be no order as to the costs of Mrs Donald in respect of the application.

[62] As to the costs of the appeal I see no reason that the orders should not mirror those below. That is, Mr Guillesser should have his costs of the appeal, assessed on the indemnity basis, and paid out of the estate. As the appeal failed there should be no order as to the costs of Mrs Donald.

Conclusion

[63] I would propose the following orders:

1. Patrick Arnold Joseph Guillesser be appointed administrator of the estate of the late John Dawson made on 22 April 2004.
2. The appeal is dismissed.
3. The respondent's costs of and incidental to the application made on 29 April 2015, and the appeal, assessed on the indemnity basis, be paid out of the estate.
4. No order for costs in respect of the appellant.

[64] **PHILIPPIDES JA:** I agree with the reasons of Morrison JA and with the orders proposed.

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41 *Desmarchelier* at [12].