SUPREME COURT OF QUEENSLAND

CITATION:	*Hope & Anor v Schneider & Ors* [2016] QSC 44
PARTIES:	**DEBORAH MAREE HOPE and CHRISTINE ANN SOWIK** (applicants) **v** **ESTATE OF MARIE JOSEPHINE SCHNEIDER** (first respondent) **CHRISTOPHER JOHN LAYTON** (second respondent) **SAMANTHA SCHNEIDER** (third respondent)
FILE NO:	SC No 574 of 2016
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	15 February 2016
JUDGE:	Ann Lyons J
ORDER:	**1. It is declared that the will of Marie Josephine Schneider be read and construed as if the first four lines of clause 4 which precede the words <u>PROVIDED HOWEVER</u> are ignored.** **2. I will hear from the parties as to costs.**
CATCHWORDS:	SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – ASCERTAINMENT OF TESTATOR'S INTENTION – GENERALLY – where the testatrix in a clause in her last Will left specific pecuniary bequests to her grandchildren and step-grandchildren and then left the residue to those of her children and stepchildren who were living at the time of her death – where, pursuant to a later inconsistent clause in the Will, the testatrix left the whole of her estate to her children in equal shares and if any one of her children or stepchildren predeceased her then their interest would pass to their issue – what was the intention of the testatrix – whether whole or part of the contradictory clauses should be ignored or omitted

SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – CHANGING, TRANSPOSING, OMITTING OR SUPPLYING WORDS – GENERALLY – where the testatrix in a clause in her last Will left specific pecuniary bequests to her grandchildren and step-grandchildren and then left the residue to those of her children and stepchildren who were living at the time of her death – where, pursuant to a later inconsistent clause in the Will, the testatrix left the whole of her estate to her children in equal shares and if any one of her children or stepchildren predeceased her then their interest would pass to their issue – what was the intention of the testatrix – whether whole or part of the contradictory clauses should be ignored or omitted

SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – WHERE INCONSISTENCY OR REPUGNANCY – where the testatrix in a clause in her last Will left specific pecuniary bequests to her grandchildren and step-grandchildren and then left the residue to those of her children and stepchildren who were living at the time of her death – where, pursuant to a later inconsistent clause in the Will, the testatrix left the whole of her estate to her children in equal shares and if any one of her children or stepchildren predeceased her then their interest would pass to their issue – what was the intention of the testatrix – whether whole or part of the contradictory clauses should be ignored or omitted

Succession Act 1981 (Qld), s 33C, s 33N

Butlin v Butlin (1966) 113 CLR 353; [1966] HCA 4, cited
Fell v Fell (1922) 31 CLR 268; [1922] HCA 55, applied
Public Trustee of Queensland v Jacob [2007] 2 Qd R 165; [2006] QSC 372, cited
Public Trustee of Queensland v Smith [2009] 1 Qd R 26; [2008] QSC 339, cited
Re Potter's Will Trusts [1944] 1 Ch 70, cited

COUNSEL: D J Morgan for the applicants
M Steele for the first respondent
C A Brewer for the third respondent

SOLICITORS: Elliott & Harvey for the applicants
Roberts & Kane for the first respondent
Mehera Saunders for the third respondent

History

[1] Marie Josephine Schneider died on 6 July 2014 at the age of 84. Her last Will is dated 5 August 1999.

[2] Mrs Schneider was married twice. Her first marriage at the age of twenty nine was to Lawrence Oliver Layton. There were two children of that marriage, the second respondent Christopher John Layton and the first applicant Deborah Maree Hope (previously Smith).

[3] At the age of 46 she married Arthur Lawrence Schneider.[1] He predeceased her on 30 January 2011. They had been were married for thirty five years.

[4] Mr Schneider had also been married previously and he had two children from his first marriage, namely the second applicant Christine Ann Sowik (previously Phillips) and a son also called Arthur Lawrence Schneider, who predeceased Mrs Schneider. The third respondent, Samantha Jane Schneider, is the younger Arthur Lawrence Schneider's daughter and therefore Mrs Schneider's step-granddaughter.

[5] There are inconsistent clauses in the Will due to errors on the part of the solicitor who drafted the Will and the staff who prepared it. On one interpretation Ms Samantha Schneider would take the share of her deceased father. On a different interpretation she would not receive a share of the estate.

This application

[6] By this originating application filed on 12 January 2016 the applicants, who are Mrs Schneider's daughter and stepdaughter respectively, seek a declaration as to the proper construction of the Will dated 5 August 1999. The firm of solicitors who acquired the practice of the solicitor who drafted the Will accept that they should pay the costs of the application.

[7] The affidavits filed in this application indicate that there was disharmony between Mrs Schneider's children and stepchildren prior to her death which resulted in proceedings in the Queensland Civil and Administrative Tribunal. There are now caveats in this Court in relation to probate and whether a grant should be made to the current executor. There are ongoing discussions in relation to various disputes and other applications in this Court have been adjourned to a date to be fixed pending the determination of this discrete issue.

The Will

[8] In her Will Mrs Schneider appointed both her son Christopher Layton and her stepson Arthur Schneider "or the survivor of them" as her executors and trustees. Given the death of her stepson, Arthur Schneider, Christopher Layton is now the sole executor.

[9] In clauses 3(a) to 3(e) of the Will, Mrs Schneider made a number of specific gifts of $2,000 each to five named persons: her granddaughters Cassandra England and Amy Smith; her grandson Daniel Hope; and her step-granddaughters Rachel Phillips (daughter of Christine Sowik (Phillips)) and Samantha Schneider (daughter of Arthur Lawrence Schneider) as follows:

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[1] As per the spelling of Lawrence on the death certificate.

> "3. I GIVE the whole of my estate both real and personal whatsoever and wheresoever situate TO my said Trustee UPON THE FOLLOWING TRUSTS:
>
> (a) as to the sum of two thousand dollars ($2,000.00) for my grand-daughter CASSANDRA ENGLAND if she shall be living at the time of my death;
>
> (b) as to the sum of two thousand dollars ($2,000.00) for my grand-daughter AMY SMITH if she shall be living at the time of my death;
>
> (c) as to the sum of two thousand dollars ($2,000.00) for my grand-son DANIEL HOPE if he shall be living at the time of my death;
>
> (d) as to the sum of two thousand dollars ($2,000.00) for RACHEL PHILLIPS (daughter of Christine Ann Phillips) if she shall be living at the time of my death;
>
> (e) as to the sum of two thousand dollars ($2,000.00) for SAMANTHA SCHNEIDER (daughter of Arthur Laurence Schneider) if she shall be living at the time of my death"

[10] All of those gifts were clearly then on the proviso that the named person was living at the time of Mrs Schneider's death.

[11] Clause 3(f) then provided for the residue as follows:

> "(f) as to the rest and residue of my estate for such of them my children CHRISTOPHER JOHN LAYTON and DEBORAH MAREE SMITH and my husband's children the said ARTHUR LAURENCE SCHNEIDER and CHRISTINE ANN PHILLIPS if they shall be living at the time of my death and if more than one as tenants in common in equal shares.

[12] Clause 3 (f) therefore divided her residue equally amongst her children and stepchildren only if they were alive at her death (my emphasis).

[13] Clause 4 however contains an inconsistent provision and leaves the residue to such of her children who survive her for a month in equal shares as tenants in common but then provides that the share of a deceased child or stepchild is to go to their issue, if any, as follows (my emphasis):

> "4. I GIVE the whole of my real and personal estate whatsoever and wheresoever situate TO my Trustee UPON TRUST for such of them my children as shall survive me for the space of one calendar month and if more than one in equal shares as tenants in common PROVIDED HOWEVER that in the event of any of my children or my husband's children predeceasing me or dying before obtaining a vested interest in this my Will leaving issue me surviving then such issue shall take and if more than one equally between

them the share to which his her or their parent would otherwise have been entitled under this my Will."

[14] It is clear that there are obvious mistakes in the Will because in both clauses 3 and 4 there is a gift of "the whole of my estate both real and personal" to the trustees. Furthermore clause 3(f) is in direct contrast to clause 4. In 3(f) she leaves the residue for such of her children and her husband's children who are alive at the time of her death as tenants in common in equal shares but in clause 4 she gives the whole of her estate to the trustee on trust for such of her children who survive her for a month and if more than one in equal shares as tenants in common with the proviso that if any of her children or her husband's children predecease her, then their issue would take the share that their parents would have been entitled to under the Will.

Submissions as to the meaning of the Will

Applicant's submissions

[15] Counsel for the applicants argues that there is insufficient clarity about the solicitor's actual instructions to order rectification pursuant to s 33 of the *Succession Act* 1981(Qld) and relies on Haines text "*Construction of Wills in Australia*"[2] to argue that if statutory rectification is not available then a court of construction has power to declare upon a mistake appearing in a will prepared by non-professional persons. This has become known as the "blundering attorney's clerk or law stationer principle" from the decision of Sir James Bacon VC in *Re Redfern; Redfern v Bryning*[3] where it was held that where it is clear that a person preparing a will has made a mistake and the testator has not completely expressed his or her meaning then the Court can supply words which should have been used.

[16] In this regard counsel for the applicants submits clause 4 is in general terms as it deals with classes of relations. Clause 3, however, by dealing with named individuals, exhibits a specific intent. Accordingly, it is submitted that the Will works perfectly well if clause 4 is deleted as that would keep intact the express intentions to benefit the named grandchildren and give effect to benefit those expressly named.

[17] In this regard counsel for the applicants notes that the reference in clause 4 to both Mrs Schneider's children and her stepchildren shows an intention which is different to the standard anti-lapse provision[4] which would only apply to her issue. Reference is also made to the decision of White J (as her Honour then was) in *Public Trustee of Queensland v Jacob*[5] who held that there was a need to give effect to all the words in a will and that the words used in that case did indicate an intention to exclude the anti-lapse provision and were therefore not just surplusage.

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2 David M Haines QC, *Construction of Wills in Australia* (LexisNexis Butterworths, 2007).
3 (1877) 6 Ch D 133, 138.
4 *Succession Act* 1981 (Qld) s 33N.
5 [2007] 2 Qd R 165.

[18] Reference was also made to High Court decision of *Fell v Fell*[6] and the rules on the correction of errors in the construction of wills and to the rule of despair in *Re Potter's Will Trusts*.[7] The Court held in *Re Potter's Will Trusts* that the rule of despair is a fundamental rule in the interpretation of wills where effect must be given, so far as is possible, to the testator's words but that "apparent inconsistencies must, so far as possible, be reconciled and that it is only when reconciliation is impossible that a recalcitrant provision must be rejected." It was further held that in a case of two irreconcilable provisions "it is the later which prevails".[8]

[19] Counsel for the applicants submits that the Will read on its face is unworkable and that an error has clearly been made which must be remedied by the court of construction rather than the court of probate by way of rectification because actual intention evidence is not available.

[20] Counsel argues that there are three ways to make the Will work:

1. ignoring all of clause 3;

2. ignoring all of clause 4; or

3. ignoring the first three lines of clause 4.

First respondent's submissions

[21] Counsel for the first respondent also argues that there has been a clear clerical error by Mr Denning, the solicitor who drafted the Will. Counsel argues there is no real evidence of Mrs Schneider's intention and that Mr Denning's evidence is actually contradictory. Counsel submits that the deletion of the entirety of clause 4 is consistent with Mr Denning's initial evidence and is the more sensible reading of the entire Will as required by the ordinary rules of construction.

[22] Counsel for the first respondent argues that clause 3 provides for specific gifts to grandchildren and in clause 3(f) for the residue to be divided equally between her surviving children or stepchildren. Furthermore, this is the clause which the solicitor initially stated that he was instructed to include[9] which clearly evidences a contrary intention to s 33N of the *Succession Act* 1981 (Qld). Accordingly if there was a wish to benefit grandchildren then a specific provision was not required given the effect of s 33N. Reliance is also placed on the fact that clause 3(f) refers to named children and stepchildren and it is unlikely that clause 4 was intended to be included as it is in general terms only.

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6 (1922) 31 CLR 268 (Isaacs J).
7 [1944] 1 Ch 70.
8 *Re Potter's Will Trusts* [1944] 1 Ch 70, 77.
9 Affidavit of Graeme Scott Denning sworn 3 November 2014, [4].

Third respondent's submissions

[23] Counsel for the third respondent, however, argues that Mrs Schneider's clear intention was to treat her children and her stepchildren equally and that clauses 3(f) and 4 cannot stand together. The Will therefore should be construed as though the first three lines of clause 4 which precede the words "Provided However" should be deleted.

The instructions for the Will

[24] The draftsman of the Will is a retired solicitor, Graeme Denning. He has sworn two affidavits in this proceeding sworn 3 November 2014 and 25 September 2015 respectively.

[25] In his November 2014 affidavit he states that he initially operated a firm called Graeme Denning & Associates at Upper Mount Gravatt from 1982 until 1997 when his practice merged with Elliott & Harvey. The current firm of Elliott & Harvey has now acquired Mr Denning's practice. Mr Denning states that he recalls Mrs Schneider as a client and he recalls "receiving instructions for paragraph 3". He continues by stating that he can now see that clause 3 and 4 are in "conflict" and then states that paragraph 4 "should not have been included in the Will as what has occurred is that a precedent has been followed which is contradictory to the testators [sic] intent as set out in paragraph three (3) of the said Will". He then states that he supports the application by Elliott & Harvey "to have the said Will rectified by paragraph four (4) at page one (1) being deleted."[10]

[26] In the affidavit sworn on 25 September 2015 Mr Denning states that he had some recollection of Mrs Schneider but that in 50 years of practice as a solicitor he made several wills a week and he "cannot now recall specifically making the Will, or the specifics of her instructions."[11] He continued however to state that since he had sworn his original affidavit he has "had further recollection of the circumstances surrounding the matter":[12]

> "In my previous Affidavit I referred to the use of a precedent. My recollection is that the practice in the office was to use certain precedent clauses and then adapt them to particular cases, and in this case I would have said to use 'the grandchildren' precedent.
>
> In this case that 'grandchildren' precedent is in clause 4.
>
> In hindsight, because I made a slight change from the precedent, namely the inclusion of the words '*or my husband's children*', I believe that the balance of clause 4 from the words '*PROVIDED THAT*' must have been meant to be included.
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> Upon further reflection and considering the slight change from the precedent, I believe the Will should have been adapted by deleting all the

[10] Affidavit of Graeme Scott Denning sworn 3 November 2014, [4]-[6].
[11] Affidavit of Graeme Scott Denning sworn 25 September 2015, [3].
[12] Affidavit of Graeme Scott Denning sworn 25 September 2015, [5]-[8].

> text in the first three lines of clause 4 which precedes the words '*PROVIDED THAT*'."

[27] In an affidavit sworn 11 January 2016 Kara Burgess, the lawyer who took Mr Denning's instructions in relation to his affidavit sworn 25 September 2015, swears that the use of the words "*PROVIDED THAT*" in the affidavit was a typographical error and the words "*PROVIDED HOWEVER*" should have been used in lieu.[13]

[28] I accept that Mr Denning has stated that he cannot remember making the Will or the specifics of Mrs Schneider's instructions other than remembering taking instructions for clause 3, by which I consider he means instructions about the specific gifts to the grandchildren. He has not however referred to any contemporaneous notes he made at the time. Nor has he provided a copy of the precedents he refers to. I accept, however, Mr Denning's evidence that the inconsistency in clauses 3 and 4 has come about by an incorrect use of precedent documents as it seems to me that such a conclusion is manifest when one considers the document.

[29] I also consider that Mr Denning's evidence in relation to the process he adopted at the time should be accepted because it refers to his practice in relation to the use of precedents when he drafted a will. His evidence in essence is that Clause 4 was included because that was to be the operative clause in relation to grandchildren. In other words clause 4 was meant to be inserted and it was to be an operative

The Law of Construction of Wills

[30] The applicants seek orders for the construction of the Will and it would seem that this application is clearly an application to the court of construction. The law in relation to the construction of wills was very clearly summarised by Atkinson J in the 2008 decision *Public Trustee of Queensland v Smith*.[14] In that case her Honour stated that the task of a court of construction was to discover a testator's intention by examining the actual words used in the will and that task involves having regard to the rules of construction and, subject to that, the court is bound to construe the will as trained legal minds would do.[15] As Isaacs J said in *Fell v Fell*,[16] "[a] Court, in my opinion, is not to place itself in the position of a person unaccustomed to the functions of a legal tribunal, and then make the double error of assuming how he would construe the document, and next adopting as a curial interpretation the construction so assumed." The relevant principles which were considered to be incontestable were set out as follows:

> "(1) 'Every will must by law be in writing, and it is a necessary consequence of that law that the meaning must be discovered from the writing itself, aided only by such extrinsic evidence, as is necessary in order to enable us to understand the words which the testator has used' (Lord *Cranworth* in *Abbott v. Middleton*; Lord *Wensleydale* in the same case).

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13 Affidavit of Kara Charmaine Burgess sworn 11 January 2016, [3]-[4].
14 [2009] 1 Qd R 26.
15 *Public Trustee of Queensland v Smith* [2009] 1 Qd R 26, 31 [20].
16 (1922) 31 CLR 268, 273.

(2) ‘The instrument … must receive a construction according to the plain meaning of the words and sentences therein contained. But … you must look *at the whole instrument*, and, inasmuch as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole *in order to give effect, if it be possible to do so, to the intention of the framer of it*’ (Lord *Halsbury* L.C. in *Leader v. Duffey*; *Ward v. Brown*; *Buckley* L.J. in *Kirby-Smith v. Parnell*).

(3) ‘If the will shows that the testator must necessarily have intended an interest to be given *which there are no words in the will* expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has *on the whole will*, sufficiently declared” (*Towns v. Wentworth*; *Hawkins on Wills*, 2nd ed., at p. 6).

(4) An inference cannot be made ‘that did not necessarily result from all the will taken together’ (Sir *R. P. Arden* M.R. in *Upton v. Ferrers*). A necessary inference is one the probability of which is so strong that a contrary intention cannot reasonably be supposed (*James* L.J. in *Crook v. Hill*).

(5) ‘We cannot give effect to any intention which is not expressed or plainly implied in the language of’ the ‘will’ (Lord *Watson* in *Scalé v. Rawlins*). ‘You have no right to fancy or to imply, unless there be something within the four corners of the will which is not only consistent with the implication you make, but *which could hardly stand, if at all*, in the will, without that implication being made. That is what is called necessary implication, and legitimate implication, in contradistinction to gratuitous, groundless, fanciful implication’ (Lord *Brougham* L.C. in *Langston v. Langston*).

(6) ‘If the contents of a will show that a word has been undesignedly omitted or undesignedly inserted, and demonstrate what addition by construction or what rejection by construction will fulfil the intention with which the document was written, the addition or rejection will by construction be made” (*Knight Bruce* L.J. in *Pride v. Fooks*).

(7) ‘When the will is in itself incapable of bearing any meaning unless *some words* are supplied, so that *the only choice is between an intestacy and supplying some words*; but even there, as in every case, the Court can only supply words if it sees on *the face of the will itself clearly and precisely what are the omitted words*, which may then be supplied upon what is called a necessary implication from the terms of the will, and in order to prevent an intestacy’ (*Page Wood* V.C. in *Hope v. Potter*).

(8) ‘There are two modes of reading an instrument: where the one destroys and the other preserves, it is the rule of law, and of equity, following the law in this respect (for it is a rule of common sense …), that you should rather lean towards that construction which preserves, than towards that

> which destroys. *Ut res magis valeat quam pereat* is a rule of common law and common sense; and much the same principle ought surely to be adopted where the question is, not between two rival constructions of the same words appearing in the same instrument, but where the question is on so ready an instrument as that you may either take it verbally and literally, as it is, or with a somewhat larger and more liberal construction, and by *so supplying* words as to read it in the way in which you have every reason to believe that the maker of it intended it should stand; and thus again, according to the rule *ut res magis valeat quam pereat*, to supply, if you can safely and easily do it, that which he *per incuriam* omitted, and that which instead of destroying preserves the instrument; which, *instead of putting an end to the instrument and defeating the intention* of the maker of it, tends rather to *keep alive and continue and give effect to that intention*' (Lord *Brougham* L.C. in *Langston v. Langston*).
>
> (9) If on reading the will you can see some mistake must have happened, 'that is a legitimate ground in construing an instrument, because that is a reason derived not *dehors* the instrument, but one for which you have not to travel from the four corners of the instrument itself' (*Langston v. Langston*).
>
> (10) 'The mind never inclines towards intestacy; it is a *dernier ressort* in the construction of wills' (Lord *Shaw* in *Lightfoot v. Maybery*). 'In ascertaining the intention, I ought to a certain extent—we all know what the expression means—to lean against an intestacy, and not to presume that the testator meant to die intestate if, on a fair construction, *there is reason for saying the contrary*' (*Buckley* L.J. in *Kirby-Smith v. Parnell*)." (footnotes *omitted*)

[31] Those principles have been approved in a series of cases including expressly by Barwick CJ in *Butlin v Butlin*[17]where his Honour stated "[t]he Court is not authorized to supply the gift he might reasonably have made but the gift he has indicated that he did actually intend to make." He continued:[18]

> "To my mind, there is nothing in the will which, applied to the circumstances of the testator, leads me to the necessary inference that a particular gift was certainly intended by the testator."

[32] I also note the provisions of s 33C of the *Succession Act* 1981 (Qld) which is in the following terms:

> "**33C Use of evidence to interpret a will**
>
> (1) In a proceeding to interpret a will, evidence, including evidence of the testator's intention, is admissible to help in the interpretation of the language used in the will if the language makes the will or part of it—
>
> (a) meaningless; or
>
> (b) ambiguous on the face of the will; or

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[17] (1966) 113 CLR 353, 357.

[18] *Butlin v Butlin* (1966) 113 CLR 353, 358.

(c) ambiguous in the light of surrounding circumstances.

(2) However, evidence of the testator's intention is not admissible to establish any of the circumstances mentioned in subsection (1)(c).

(3) This section does not prevent the admission of evidence that would otherwise be admissible in a proceeding to interpret a will."

[33] The obvious starting point are the words of the Will itself and if the usual meaning is clear then the Will is given that construction. It is clear from the words of the Will that Mrs Schneider had 2 children and 2 stepchildren as well as grandchildren and step-grandchildren. It is also clear from the face of the Will that she initially appointed her son and her stepson as her executors and that she left specific and equal gifts to her grandchildren and step-grandchildren.

[34] It would seem to me that clauses 2 and 3 clearly show that she was treating her children and stepchildren equally and her grandchildren and step-grandchildren equally. A very even handed approach is obvious on the face of the Will.

[35] The provisions of clauses 3(a) to (e) are also clear.

[36] It would seem clear to me that Mrs Schneider at clause 3 (f) turned her mind to the residue of her estate and once again she specifically names both her children and her husband's children by name. Three is no doubt that she wants them to all to share the residue if they are alive when she died.

[37] She then had to consider what was to occur if they were not all alive at her death. Were the children of her children or the children of her step children to take their deceased parents share or not?

[38] There is no doubt however that clauses 3(f) and 4 are ambiguous when one considers them together. That fact is readily apparent as the clauses cannot stand together. Accordingly, pursuant to s 33C of the *Succession Act* 1981 (Qld), given that ambiguity, this Court can consider evidence, including evidence of Mrs Schneider's intention, to help in the interpretation of the language used in the Will.

[39] In my view, having considered both the words of the Will and Mr Denning's evidence, Mrs Schneider's intention was that a grandchild or step-grandchild was to take the deceased parent's share. This intention is gleaned from the use of the specific words which are contained in clause 4 after the words "PROVIDED HOWEVER". As Mr Denning states, those words in clause 4 were included because he would have received instructions that the "grandchildren" clause was to be included. Obviously that clause related to the grandchildren getting the share of the parent.

[40] Clause 4 comes directly after clause 3(f) and I accept that, as that clause has been specifically included, there must have been instructions in that regard about that aspect of her estate. In my view, the words in clause 4 after the words "PROVIDED HOWEVER" make it manifestly clear what she wanted to happen. They are the words

which are surely clarifying words which were meant to follow on after the list of her children and stepchildren's names. I accept Mr Denning's evidence that the source of the ambiguity in clauses 3(f) and 4 is due to the use of precedent clauses. The precedent clauses were clearly inserted and not merged into clause 3 nor checked for obvious ambiguity.

[41] I consider that when one considers the Will objectively as a whole, the words continuing after the words "PROVIDED HOWEVER" in clause 4 reflect her actual instructions and are consistent with the other clauses in the Will, in particular the specific gifts in clause 3 and the express naming of her children and stepchildren as to the residue. The words "then such issue shall take and if more than one equally between them the share to which his her or their parent would otherwise be entitled under this my Will" reflect her intention. Furthermore, when one considers that page of the Will, those words appear directly above her signature. When she read through her Will they were the last words she would have read on the first page and they also stood out as they appear after the underlined words "PROVIDED HOWEVER". In my view they are the final and operative command in relation to her residue. Clause 4 was to correct what was contained in clause 3(f) as it follows on and contains, in my view, the testatrix's operative instructions.

[42] In *Fell v Fell*[19] Isaacs J considered that the meaning of a will was to be discovered from the writing itself aided only by such extrinsic evidence which is necessary. That is the approach which I have endeavoured to adopt. I consider that the clear inference from the very words of the Will, aided by aspects of Mr Denning's evidence, is that Mrs Schneider intended to benefit all her children and grandchildren and her husband's children and grandchildren equally. I consider that this is the only inference which necessarily results from "all the will taken together". As Isaacs J held, "[a] necessary inference is one the probability of which is so strong that a contrary intention cannot reasonably be supposed."[20]

[43] I consider that the Will reads perfectly well if the first four lines of clause 4 are ignored. Clause 4 should be read so that it commences with the words "PROVIDED HOWEVER" and the words before those words in clause 4 should be ignored.

[44] Orders:

1. It is declared that the will of Marie Josephine Schneider be read and construed as if the first four lines of clause 4 which precede the words PROVIDED HOWEVER are ignored.

2. I will hear from the parties as to costs.

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[19] (1922) 31 CLR 268.
[20] *Fell v Fell* (1922) 31 CLR 268, 274.