SUPREME COURT OF QUEENSLAND

CITATION:	*Li v Choi & Ors* [2020] QCA 131
PARTIES:	**FANG LI** (appellant) **v** **DORIS CHOI ALSO KNOWN AS NGIE LIK CHOI AS EXECUTOR AND TRUSTEE OF THE ESTATE OF XIN LI, DECEASED** (first respondent) **MANLING LI** (second respondent) **XIAODING ZHOU BY HER LITIGATION GUARDIAN LAN ZHOU** (third respondent) **PING LI** (fourth respondent)
FILE NO/S:	Appeal No 13801 of 2019 SC No 9068 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2019] QSC 269 (Boddice J)
DELIVERED ON:	12 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	28 May 2020
JUDGES:	Fraser and Mullins JJA and Jackson J
ORDERS:	**1. Appeal dismissed.** **2. The administrator's costs of the appeal, to be assessed on the indemnity basis, be paid out of the estate.** **3. All other parties' costs of the appeal be paid by the administrator out of the estate.**
CATCHWORDS:	SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – ASCERTAINMENT OF TESTATOR'S INTENTION – OTHER PARTICULAR CASES – where the appellant appeals against an order of the court revoking the grant of probate, thereby leaving the deceased intestate – where the testator's executed will was intended to be a temporary will pending preparation and execution of an instrument making better provision – where the temporary will provided that the estate be distributed equally between the four beneficiaries as the testator had not yet decided on the

proportions – where the testator had made it clear that he did not want the estate to be distributed equally among the four beneficiaries – where the testator was told that crossing out the word 'equally' in the will would still result in equal distribution between the beneficiaries under Australian law – where the testator subsequently expressed that he did not want equal distribution and initialled a change to the will crossing out the word 'equally' – where the appellant submits that the testator knew and approved of the contents of the will – where the second respondent submits that the will did not express the mind of the testator – whether the primary judge erred in finding, by inference, that the testator executed the will on the footing that the distribution was not to be equal and that he had not made up his mind as to what the proportions would be

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where, although the appeal was dismissed, the case was one at the margin – where the court has an unfettered discretion as to the costs of an appeal – whether all of the parties should have their costs of the appeal paid out of the estate

Civil Proceedings Act 2011 (Qld), s 15
Law of Succession of the People's Republic of China, Article 15
Succession Act 1981 (Qld), s 10, s 18
Uniform Civil Procedure Rules 1999 (Qld), r 681, r 766(1)(d)

Baldwin v Greenland [2006] QCA 424, cited
Bool v Bool [1941] St R Qd 26, cited
Chapman v Wilson [2013] QCA 282, cited
Costa v Public Trustee (NSW) (2008) 1 ASTLR 56; [2008] NSWCA 223, cited
Currie v Glen (1935) 54 CLR 445; [1936] HCA 1, cited
Forsyth v Sinclair (No 2) (2010) 28 VR 635; [2010] VSCA 195, cited
Freeman v Jaques [2006] 1 Qd R 318; [2005] QCA 423, cited
Hoff v Atherton [2004] EWCA Civ 1554, cited
Idemitsu Queensland Pty Ltd v Agipcoal Australia Pty Ltd [1996] 1 Qd R 26; [1993] QCA 565, cited
Lindsay v McGrath [2016] 2 Qd R 160; [2015] QCA 206, cited
Lippe v Hedderwick (1922) 31 CLR 148; [1922] HCA 44, cited
Re McIntyre [1993] 2 Qd R 383; [1991] QSCFC 99, cited
Van Essen v Lee [1971] Tas SR 324; [1971] TASStRp 31, cited
Veall v Veall (2015) 46 VR 123; [2015] VSCA 60, cited
Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9, cited

COUNSEL: D J Morgan for the appellant
C Heyworth-Smith QC for the first respondent
A P J Collins for the second respondent
No appearance for the third and fourth respondents

SOLICITORS: Woods Prince Lawyers for the appellant
de Groots wills and estate lawyers for the first respondent
Bell Legal Group for the second respondent
No appearance for the third and fourth respondents

[1] **FRASER JA:** I agree with the reasons for judgment of Jackson J and the orders proposed by his Honour.

[2] **MULLINS JA:** I agree with Jackson J.

[3] **JACKSON J:** This is an appeal against an order of the court revoking the grant of the probate of the will of Xin Li made on 12 July 2017, thereby leaving the deceased intestate.

[4] The will was executed on 9 March 2017 in circumstances of urgency, because the testator was in bad health. It was intended to be a temporary will pending preparation and execution of an instrument making better provision. As it turned out, the testator's condition deteriorated rapidly and he did not execute any further will.

[5] Prima facie, the execution of the will complied with the requirements of s 10 of the *Succession Act* 1981 (Qld). The appellant's argument was presented on the assumption that it did not, and therefore the question was whether the will should be admitted under s 18 of the Act. However, it is unnecessary to decide the question of non-compliance with s 10. The respondents did not rely on any point in connection to that submission. Nor did the decision below turn on it.

[6] The circumstances attending the execution of the will raised a real question as to whether the testator knew and approved of its contents and effect. The point of difficulty is a narrow one, namely whether the testator intended to execute a will that had the effect of leaving his estate to the four named beneficiaries equally, or executed it on the footing that the distribution was not to be equal and that he had not made up his mind as to what their shares would be.

[7] The primary judge found, in effect, that the former alternative had not been proved and that the latter was more likely. The sole question for determination on appeal is whether that finding, made by inference, was incorrect.

[8] The evidence tendered at the trial consisted of testimonial and physical evidence. The relevant physical evidence comprised a video recording of the events during which the will was executed, writings on paper made by the testator during those events and the document as it was executed. The testimonial evidence included evidence of an interpreter as to the meaning of things that were said in Mandarin and written in Chinese characters during the events and evidence in English by some of those present for those events.

[9] The events took place after 8.30 pm on 9 March 2017 in a hospital room in a private hospital at the Gold Coast. The testator was in the last stages of the disease of terminal lung cancer. He was a Chinese National with substantial investments in Queensland. There was no suggestion that he spoke English or any substantial amount of English. He was being supported through the last stages of his illness by a nephew who was present during the events. The testator had known the executor appointed under the will, Doris Choi, for some time, by reason of her involvement in his business affairs.

[10] On the morning of 9 March 2017, the testator spoke to his nephew about the preparation of a will and asked him to speak to Ms Choi. The testator also spoke to Ms Choi about making a will and preparation of a power of attorney. He asked her to be the executor, and she agreed. Ms Choi engaged a solicitor, Nicole Lloyd to assist in the preparation of the will. Ms Lloyd had regularly undertaken legal work for the testator's businesses, but was not an estate lawyer. However, she advised Ms Choi that the testator needed to name beneficiaries and specify the proportions of the estate for each beneficiary.

[11] During the morning, the nephew sent Ms Choi a video clip of the testator specifying four beneficiaries, being his two daughters and two sisters. At approximately midday, Ms Choi sent an electronic message to the testator enquiring whether his estate was to be distributed equally.

[12] Before receiving a response, Ms Choi sent details of the proposed beneficiaries to Ms Lloyd. Approximately 30 minutes later, Ms Choi received a response from the testator to her request (about equal distribution) stating that he hoped everyone would agree.[1]

[13] Late in the afternoon and in the early evening, Ms Choi and Ms Lloyd travelled together by car to the hospital to attend upon the testator at the hospital. Ms Lloyd was still drafting the will on her personal computer. She asked Ms Choi whether the testator had decided the distribution proportions and Ms Choi responded that the testator had replied that he hoped everyone would agree and she had received no further information after that.

[14] In the result, Ms Lloyd prepared the draft will on the basis that it provided expressly that the distribution to the beneficiaries would be made equally, although the clause was set out in way that would readily enable amendment to insert differential proportions.

[15] When they arrived at the hospital at about 8.30pm, Ms Choi and Ms Lloyd met with the nephew and another male who was to be the second witness. Ms Lloyd arranged for the nephew to video-record the events. Accordingly, the testator, Ms Choi, Ms Lloyd, the nephew and the other witness were in the testator's hospital room.

[16] The most relevant discussions during the events took place between Ms Choi and the testator in Mandarin. The draft will executed by the testator was written in English. It was not suggested that the testator understood written English. Ms Lloyd did not speak Mandarin, and did not understand what passed between Ms Choi and the testator. Ms Choi and Ms Lloyd spoke to one another in English, and the testator did not understand what passed between them. The nephew spoke both Mandarin and English. The language capabilities of the other witness were not established.

[17] In considering the sequence of events that follows, it is critical to bear in mind that the testator did not understand what passed between Ms Choi and Ms Lloyd. His appreciation of events, for the purpose of assessing his awareness and approval of the contents of the will, depended on what passed between him and Ms Choi. It is not suggested that the nephew played a role in explaining matters to the testator.

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[1] There was no consideration at the trial as to why the testator may have had that hope. Under article 15 of the *Law of Succession of the People's Republic of China* it is provided that questions pertaining to succession should be dealt with through consultation by and among the successors in the spirit of mutual understanding and mutual accommodation and the time and mode for partitioning the estate shall be decided by the successors through consultation. However, there was no evidence either as to the operation of that law or that the testator had any appreciation of Chinese law on the subject.

[18] Shortly after Ms Choi and Ms Lloyd arrived, the testator asked for the will. Ms Lloyd produced it. The testator took the document and signed it immediately. Ms Choi had not explained it before he affixed his signature. After the testator signed the document, he wrote on a piece of paper. The writing confirmed that his assets were to be given to four beneficiaries. He also wrote that he was "not yet decided" on the proportions.

[19] Ms Choi communicated that in English to Ms Lloyd.

[20] After that, the discussion between the testator and Ms Choi turned to matters unrelated to the will, and then to the execution of a power of attorney appointing Ms Choi as attorney.

[21] After the power of attorney was executed, the discussion between the testator and Ms Choi returned to the signed, but at that stage unwitnessed, will. Ms Choi told the testator that the document he first signed was his will. She said it provided "that the estate will be equally distributed among the four beneficiaries", and that "…if you have not yet decided… because you mentioned you have not yet decided, we will need to make amendment to the will outside".

[22] Ms Choi then said to Ms Lloyd in English that the testator said he wanted them to change the will. She said that he said it should be changed to "yet to be decided". Ms Lloyd responded in English that she could not do that.

[23] Ms Choi said to the testator in Mandarin that "we cannot wait longer" and that "it is written here that… it will be equally distributed among the four people", being his two daughters and two elder sisters.

[24] Ms Choi added that "in Australia, if the document did not indicate… it will be equally distributed, it will still be equally distributed among the beneficiaries".

[25] The testator's response was found by the primary judge to be that he "expressed his wish that his will record that he was yet to decide the proportions to be received by each beneficiary". The primary judge's finding was a matter of inference based on the evidence as a whole, but was supported by two particular pieces of evidence. First, that shortly after the testator signed the will, he wrote on a piece of paper in Chinese characters, that he was not yet decided on the proportions, before the events turned to other matters not relevant to the will.

[26] Second, after Ms Choi explained the operation of the express provision of the will as to equal distribution and that if the document did not indicate equal distribution, it would still be equally distributed, the testator said something which was unintelligible, after which Ms Choi asked one of the males in the room what the testator wanted and they conversed further, and then Ms Choi said to the testator in Mandarin "What do you want to write? Equally distributed among four people. No, not equally – not equally distributed."

[27] After discussing with Ms Lloyd in English what was to be done, Ms Choi said to Ms Lloyd that the testator wanted to cross out "equally".

[28] Then Ms Choi said to the testator in Mandarin "So we will delete the word", and said to him that he needed to initial the change, which he did after the word "equally" had been crossed out.

[29] Following that, the witnesses witnessed the will. The testator expressed his thanks by a formal hand gesture.

[30] The primary judge found that at no stage before or after the testator signed the deletion did Ms Choi seek confirmation from the testator that he understood that the deletion would have no impact on the assets being distributed equally between the four beneficiaries contrary to his express wishes.

[31] The primary judge found further that:

- if the testator understood Ms Choi's statement that the distribution would be equal, absent an allocation of proportions, there was no rational basis on which the testator would have required the word "equally" to be crossed out.
- it was significant that the testator was not asked, at the time Ms Choi gave her explanations to confirm that he understood them.
- in particular, he was not asked whether he understood and was not advised that crossing out the word "equally" would still result in an equal distribution of assets between the beneficiaries.

[32] None of the primary findings of fact made by the primary judge are challenged on the appeal. The appellant's challenge is limited to the narrow contention that on the evidence the primary judge should have reached the opposite conclusion as to the testator's knowledge and approval of the contents of his will.

[33] The primary judge found that the testator's actions were supportive of the conclusion that he did not understand Ms Choi's explanation that the will in its altered form would result in an equal distribution between the beneficiaries and did not understand or approve of a document which provided for an equal distribution to the beneficiaries as his last will. He found that conclusion was also supported by the consideration of the fact that the testator expressly asked that the document had inserted in it the words "yet to be decided".

[34] In addition to the events described so far, there was a later discussion between the testator and Ms Choi about a copy of the will that he had executed. The word "equally" had also been crossed out on that copy, which was unexecuted.

[35] Ms Choi said to the testator about that copy in Mandarin "If you have decided the proportion for the distribution you can write the proportion next to the names and ask any medical staff or a nurse to… witness and sign, initial and then you will initial that as well".

[36] She further said to the testator in Mandarin "so for the long version of the will, we'll find the opportunity later… for you to sign… This is a temporary will."

[37] And as well, Ms Choi said to the testator in Mandarin "So we'll leave you a copy."

[38] The primary judge found that this latter discussion was inconsistent with the deceased understanding that the executed document retained by Ms Lloyd was his last will.

[39] The appellant's strongest arguments revolved around three points. First, the appellant submitted that Ms Choi's explanation that in Australia a will that does not otherwise indicate the shares among four beneficiaries will be treated as an equal distribution meant that the testator knew and was aware by his subsequent acknowledgement by initialling the will that he was making a will that would see his estate distributed in that way.

[40] Second, the appellant submitted that it was not inconsistent with that conclusion for Ms Choi and Ms Lloyd to leave the unexecuted copy of the will with the testator with instructions that he could write percentages, sign the copy and have hospital staff witness his signature. It was possible that the testator understood that he could change his executed temporary will by doing so.

[41] Third, by his actions in initialling the deletion of "equally" and thanking the witnesses who proceeded to sign the will after that deletion, the testator should be taken to have intended to make a final will, even if temporarily.

[42] There is some force in these points, but none of them answers the consideration that was central to the primary judge's reasons that if the testator was aware that his estate would be divided equally under the will even if the word "equally" was deleted, what was the point in doing so? The appellant was unable to offer an alternative explanation for the testator's action.

[43] A possible explanation is that the testator may have wished to delete the word "equally" in the hope that his named beneficiaries would, in any event, be able to agree upon the shares to be distributed, as was his wish. But that is speculation. No evidence supports it.

[44] The appellant does not challenge the primary judge's findings as to the applicable legal principle that it is for the court, considering all of the relevant evidence and drawing such inferences as it can from the totality of the evidence to come to a conclusion whether or not it has been established that the testator knew and approved the contents and effect of the document which is put forward as a valid testamentary disposition.[2]

[45] Nor is it disputed that in deciding this appeal the court is in as good a position as the primary judge to decide on the proper inferences to be drawn from the undisputed primary facts, having regard to the function and duty of the court on an appeal by way of rehearing whilst giving weight to the primary judge's conclusion.[3]

[46] The arguments of those propounding the will were not wholly untenable and the ultimate conclusion reached by the primary judge was not the only possibility. Even so, in my view, for the appeal to succeed it is necessary for the appellant to demonstrate error in that conclusion.

[47] In my view, having regard to the facts as found and summarised above, no error is shown on the part of the primary judge in reaching the conclusion that the deceased did not understand or approve of the document providing for an equal distribution to the beneficiaries as his last will.

[48] Accordingly, the appeal must be dismissed.

Costs of the appeal

[49] As in the case of costs at first instance,[4] the court has an unfettered discretion as to the order for costs of an appeal; the court can make such order for the whole or any part of the costs of an appeal as it, in the circumstances, considers appropriate.[5]

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2 *Veall v Veall* [2015] VSCA 60, [173]; *Hoff v Atherton* [2004] EWCA Civ 1554, [64].

3 *Lindsay v McGrath* [2016] 2 Qd R 160, 177 [16]; *Costa v Public Trustee (NSW)* (2008) 1 ASTLR 56, 89 [113]; *Warren v Coombes* (1979) 142 CLR 531.

4 *Civil Proceedings Act* 2011 (Qld), s 15; *Uniform Civil Procedure Rules* 1999 (Qld), r 681.

5 *Uniform Civil Procedure Rules* 1999 (Qld), r 766(1)(d).

Although costs are in the court's discretion, the usual exercise of that discretion is that the costs of an appeal follow the event.[6]

[50] In disputes concerning the distribution of an estate or fund, the court has repeatedly distinguished between a proceeding at first instance (where costs may be ordered out of the estate or fund) and a second attempt by way of appeal.[7]

[51] Where a disappointed prospective beneficiary unsuccessfully contests a will, which is doubted because of the actions of the testator, their costs may be ordered out of the estate. Although the costs of an unsuccessful appeal will not usually be ordered to be paid out of the estate,[8] this general approach does not fetter the court's discretion.[9] If the court finds sufficient cause for bringing the appeal, such as where the judgment below was ambiguous, it may relieve an unsuccessful appellant of the obligation to pay the costs of the other parties.[10] It may even allow an unsuccessful appellant (at least some) costs out of the estate.[11] A useful question is whether the appellants were justified in taking a second opinion in the Court of Appeal.[12]

[52] In my view, this is a case at the margin, where the unusual course of allowing the costs of all the parties out of the estate, including the appellant should be followed, notwithstanding that the appeal must be dismissed.

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6 *Idemitsu Queensland Pty Ltd v Agipcoal Australia Pty Ltd* [1996] 1 Qd R 26, 42; *Bool v Bool* [1941] St R Qd 26; *Van Essen v Lee* [1971] Tas SR 324, 328.

7 *Freeman v Jaques* [2006] 1 Qd R 318, 325 [47]-[49]; *Re McIntyre* [1993] 2 Qd R 383, 387-388; *Baldwin v Greenland* [2006] QCA 424, [4]; *Chapman v Wilson* [2013] QCA 282, [4].

8 *Lippe v Hedderwick* (1922) 31 CLR 148, 154-155.

9 *Freeman v Jaques* [2006] 1 Qd R 318, 325 [47]-[49]; *Re McIntyre* [1993] 2 Qd R 383, 387-388.

10 *Currie v Glen* (1935) 54 CLR 445, 451.

11 *Forsyth v Sinclair (No 2)* [2010] VSCA 195, [23]–[26].

12 *Freeman v Jaques* [2006] 1 Qd R 318, 325 [48].