SUPREME COURT OF QUEENSLAND OS No 1193 of 1993

CIVIL JURISDICTION

BYRNE J

IN THE MATTER OF THE TRUSTS ACT 1973 (AS AMENDED)

IN THE MATTER OF THE SUCCESSION ACT 1981 (AS AMENDED)

IN THE MATTER OF THE SUCCESSION ACTS 1867 TO 1943 (AS AMENDED)

IN THE MATTER OF THE TRUSTS OF THE WILL OF EDWARD BRACKETT NEVIN, DECEASED

IN THE MATTER OF AN APPLICATION BY PERPETUAL TRUSTEES QUEENSLAND LIMITED AS TRUSTEE OF THE TRUSTS IN THE WILL

BRISBANE

..DATE 08/04/94

JUDGMENT

HIS HONOUR: There will be a declaration that, on the true construction of the will and the two codicils of Edward Brackett Nevin, deceased, with reference to the facts and circumstances of the date of his death and the events which have occurred since his death, the testator Edward Brackett Nevin died intestate in respect of his residuary estate in remainder that is located in Australia, upon the determination of the life interest provided in the will and codicils.

I publish my reasons.

...

HIS HONOUR: The costs of all parties of and incidental to the application are to be taxed as between solicitor and own client and paid out of the estate.

IN THE SUPREME COURT OF QUEENSLAND O.S. No. 1193 of 1993

Before Mr Justice Byrne

[Re Nevin and Perpetual Trustees Queensland Limited]

IN THE MATTER of the *Trusts Act 1974*

- and -

IN THE MATTER of the *Succession Act 1981*

- and -

IN THE MATTER OF THE *Succession Act 1867*

- and -

IN THE MATTER of the trusts of the will of EDWARD BRACKETT NEVIN late of 320, 42nd Street, New York, in the State of New York, United States of America, Retired Military Officer, Deceased

- and -

IN THE MATTER of an application by PERPETUAL TRUSTEES QUEENSLAND LIMITED as trustee of the trusts in the will

JUDGMENT - BYRNE J.

Judgment delivered 08/04/1994

CATCHWORDS:

Wills - interpretation.

Counsel: A.M. Wilson for the applicant
G.H. Brandis for the Corporation of the Synod of the Diocese of Brisbane
R.M. Derrington for Ms Nevin

Solicitors: McCullough Robertson for the applicant
Flower and Hart for the Corporation of the Synod of the Diocese of Brisbane
de Groot and Co for Ms Nevin

Hearing date: 8 December 1993; 6 April 1994

IN THE SUPREME COURT OF QUEENSLAND O.S. No. 1193 of 1993

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IN THE MATTER of an application by PERPETUAL TRUSTEES QUEENSLAND LIMITED as trustee of the trusts in the will

JUDGMENT - BYRNE J.

Judgment delivered 08/04/1994

E.B. Nevin died in New York city, where he was domiciled, on 29 April 1975. He was 74. He left a will and two codicils relating to his Australian estate. The will

was made on 16 May 1955, the first codicil on 2 August 1955 and the second codicil about four months later. The testator was survived by his only child, Patricia Nevin, who was born on 26 January 1931. This application concerns the meaning of the first codicil ("the codicil"). The principles of interpretation to be applied are those of the law of Queensland, as the deceased requested by cl. 2 of his will.[1]

The codicil substituted a new cl. 5 stipulating that all the Australian estate remaining after discharge of liabilities was to be held "upon the following trusts:—

(a) To pay one-tenth part of the net income thereof unto ... WILFRED MANNING HALL ... during his lifetime and after his death to pay such income to my daughter PATRICIA NEVIN during her lifetime;

(b) To pay a further one-tenth part of the net income thereof to my friend DR. EDWARD ARNOLD BURKHART and his wife KAY BURKHART ... during their joint lives ... and after the death of either of them to pay the same to the survivor during his or her life and upon the death of the survivor to pay such income to ... Patricia Nevin during her lifetime;

(c) To pay a further five-tenths part of the net income thereof to ... Patricia Nevin during her lifetime;

(d) To accumulate the remaining three-tenths part of the net income thereof and to invest the same as an accretion to capital in any of the securities or investments hereinafter authorised for a period of twentyone years from the date of my death or during the lifetime of ... Patricia Nevin (whichever period is the shorter) and to pay the resulting income from such accumulation and investment in the manner and to the persons and in the proportions hereinbefore

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1 cf. re Lungley (deceased) [1965] S.A.S.R. 313, 316-317.

described and at the end of twentyone years from my death or on the death of ... Patricia Nevin (whichever period is the shorter) to pay the remaining three-tenths part of the net income and the resulting income from any accretion thereof in the manner and to the persons and in the proportions hereinbefore described;

(e) Subject as aforesaid as to both capital and income of my Australian estate UPON TRUST for all and every the children or the child (if only one) of my said daughter who being sons or a son shall attain the age of twentyone years or being daughters or a daughter shall attain that age or previously marry and if more than one in equal shares as tenants in common;

(f) IF ... Patricia Nevin has died or shall die before me without issue who being sons or a son shall attain the age of twentyone years or being daughters or a daughter shall attain that age or previously marry THEN I DIRECT my Trustee to stand possessed of my Australian estate both capital and income upon the following trusts:—

(i) TO pay four-fifths part of the income thereof for such hospital established in Brisbane ... as my Trustee in its absolute discretion shall determine ... which shall from time to time be conducting research work for the prevention relief and treatment of cancer for the benefit of such hospital in carrying out such work AND I FURTHER DIRECT AND DECLARE that if my Trustee in its absolute discretion shall decide that there is no such hospital in Brisbane at the date of my death conducting such work as aforesaid or if at any time thereafter there is no such hospital continuing to conduct such work then UPON TRUST for THE CORPORATION OF THE SYNOD OF THE DIOCESE OF BRISBANE to be applied by it for the aid and care of cancer

patients of St. Martins Hospital Ann Street ... absolutely;

(ii) TO accumulate the remaining one-fifth part of the net income thereof and invest the same as an accretion to capital in any of the securities or investments hereinafter authorised for a period of twentyone years from the date of my death and to pay the resulting income from such accumulation and investment to the hospital or institution entitled to receive the income directed to be paid under the terms of the preceding sub-paragraph (i) hereof;

(iii) After the expiration of twentyone years as aforesaid to pay the whole of the said one-fifth part of the net income (including any income from such accumulation and investment as shall be then accrued and undistributed) to such hospital or institution as shall be determined by my Trustee in manner aforesaid."

Mr W.M. Hall and Dr E.A. Burkhart have since died. Mrs Dow (formerly Mrs Burkhart) is 93. Ms Nevin has no children and, on the medical and other evidence, no prospect of becoming a parent. The fact that Ms Nevin will die without issue accounts for this application. The question is whether, on the proper construction of the will and the codicil, the residuary estate expectant upon the determination of the life interests of Ms Nevin and Mrs Dow goes on intestacy or else is to be dealt with in accordance with cl. 5(f) of the codicil.

Clauses 5(a)-(d) establish entitlements to income until the death of the last of the life tenants. Then, by cl. 5(e), upon the extinction of those life interests, the capital and income are to be held for the benefit of children of Ms Nevin. Their entitlements were to vest once they reached twenty-one or, if daughters, on earlier marriage. A logical scheme for disposing of the entire Australian estate would next have dealt with the contingency that Ms Nevin died without descendants. But

subcl. (f), the only other dispositive provision, instead begins with words which at first blush seem directed to a different contingency. The expression “if ... Patricia Nevin has died or shall die before me without issue ...” is somewhat cryptic. However, according them the meaning the words naturally suggest in the context of a will, the words appear to be an inelegant attempt to describe the same event, viz. that the testator's daughter predeceases him without children.[2] If so, the codicil has failed to anticipate that Ms Nevin would survive her father but die childless and a partial intestacy will result.

The Court generally favours a construction of words of doubtful import which will avoid an intestacy because the general scheme of the will usually discloses an intention to dispose of the entire estate.[3] Mr Brandis relies on this inclination in submitting that the words which matter most should be read as though the testator had written “... has died (by the time of my death) or shall die (thereafter) without issue The words “before me”, or so Mr Brandis contends, have been included by mistake and the testator's intention, as disclosed by the whole instrument, can be given effect to only by a construction which elides “before me”. Such an interpretation avoids a partial intestacy. Unfortunately, it also empties “before me” of all content. Despite that, the construction for which Mr Brandis contends has some appeal.

Clause 5(e) provides for grandchildren to take, and whether or not Ms Nevin survives. So it might have been expected that the testator would make the subcl. (f) bequests dependent on the contingency that no grandchild,

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2 It is clear enough from the context that “issue” means children: cf. Perpetual Trustee Co. Ltd v. Wright (1987) 9 N.S.W.L.R. 18.

3 See Re Scott deceased: Public Curator of Queensland v. Hass [1957] St.R.Qd. 507, 510; Re East, deceased [1964] Q.W.N. 16.

whether born before or after the testator's death, attained the age of twenty-one or, if female, married earlier. Mr Brandis contends that this is what the testator has attempted to achieve in the opening words of subcl. (f). The testator, he submits, was directing his mind to two distinct eventualities: (i) that Ms Nevin is alive when the codicil is made but “has died” childless before the date from which the will is to speak, i.e. the time immediately preceding the testator's death; and (ii) that she “shall die” childless after the testator's death. This result has its attractions. First, it avoids a partial intestacy. Secondly, it is congruent with subcl. (e), because it comprehends both relevant possibilities, not just the possibility of Ms Nevin's dying before her father. Thirdly, it gives separate meanings to “has died” and “shall die”: the expressions encompassing both Ms Nevin's predeceasing him and her later death.

There are, however, reasons for preferring an interpretation of the codicil which gives some effect to “before me”; and, in my opinion, the trusts created by subcl. (f) cannot take effect now that Ms Nevin has survived. The directions to the trustee in the subclause indicate as much, but before discussing their significance, the meaning of “has died or shall die ...” should be mentioned.

The interpretation suggested by Mr Brandis depends to an extent on reading “has died or shall die before me ...” in subcl. (f) as speaking from the moment before death. In submitting that the expression should be understood in that sense, Mr Brandis mentioned the presumption created by s. 28(a) of the *Succession Act 1981* that “unless a contrary intention appears by the will, the will is to be construed, with reference to the property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator.” Looked at in this light, it is said that the inclusion of “before me” must be an error. If the will speaks from the moment before death, then (i) if “before me” relates to “has died”, “before me”

is surplusage; and (ii) if “before me” qualifies “shall die”, the words lead to an absurdity.

But this argument draws too much from the s. 28(a) presumption, which is concerned with “the property comprised” in the will,[4] not with such a contingency as the testator is addressing in the opening words of subcl. (f). The expression “has died or shall die before me ...”, though its meaning would have been clearer had commas had been inserted after “died” and “me”, seems designed to avoid the ambiguity which would arguably have arisen if the testator had simply said “dies before me” and, unbeknown to him, his daughter was already dead.[5] In short, there is no justification for construing “has died” as referring to a death after execution of the codicil. Nor should “shall die before me” be held to mean “shall die after me”. The choice of words is directed to two possibilities, but both are exhausted if Ms Nevin predeceases her father.

This brings me to the consideration that the trust created by subcl. (f) is of the same estate, and commences on the same date (the testator's death), as the trusts arising under subcl. (a)-(d).

The first direction in subcl. (f) requires the trustee to pay a stated proportion of the income to a private hospital satisfying nominated criteria. If, as the subclause says, “there is no such hospital .... at ... death the income is to be paid to the Corporation of the Synod of the Diocese of Brisbane. This direction presupposes that it takes effect, if at all, from death.

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4 cf. Amyot v. Dwarris [1904] A.C. 268, 271-272; Theobald Wills 15th ed. pp. 240-241.

5 There is nothing to show that the testator was aware of his daughter's state of health when the codicil was executed, apparently in New York.

Yet, if the interpretation Mr Brandis contends for is correct, this direction must be suspended while Ms Nevin is alive because, under the preceding subclauses, it is Ms Nevin, not a hospital or Mr Brandis's client, who is to be paid income “during her lifetime”. Moreover, the testator can scarcely have intended that, many years later, his trustee is to ascertain whether a Brisbane private hospital was, “at the date of ... death”, “conducting research work for the prevention relief and treatment of cancer”.

The other directions in subcl. (f) also matter. The provision for accumulation for 21 years “from the date of my death” in subcl. (f)(ii) plainly proceeds on the assumption that it also will operate, if at all, from death. So does the third direction, which requires the trustee to “pay”, not to accumulate, the whole of the remaining one fifth of income “after the expiration of” 21 years from death. These directions can only operate sensibly if the trustee is not bound to apply part of the fund under the directions in cl. 5(a)-(d).

Clause 5, read as a whole, shows that the bequests in subcl. (f) were not to take effect should Ms Nevin survive.

There will therefore be a declaration that, on the true construction of the will and two codicils of Edward Brackett Nevin, deceased, with reference to the facts and circumstances at the date of his death and the events which have occurred since his death, the testator Edward Brackett Nevin died intestate in respect of his residuary estate in remainder that is located in Australia, upon the determination of the life interests provided in the will and codicils.