SUPREME COURT OF QUEENSLAND No S8553 of 2000

CIVIL JURISDICTION

HELMAN J

RICHARD MICHAEL JACKWITZ AS SOLE EXECUTOR OF THE ESTATE OF JOAN INSULA HUTH, DECEASED — Applicant

and

MAUREEN OTTILIE HUTH — First Respondent

and

ERIC WILFRED HUTH — Second Respondent

and

GORDON ROY HUTH — Third Respondent

and

LEANNE JOY JACKWITZ — Fourth Respondent

and

JOHN ROBERT HUTH — Fifth Respondent

and

MARGARET BERYL KINGSTON (NEE HUTH) — Sixth Respondent

and

ROSLYN JAN JOHNSON — Seventh Respondent

BRISBANE

..DATE 20/03/2001

JUDGMENT

HIS HONOUR: This is an application in which construction is sought of a clause, 2(a), in the last will of Joan Insula Huth, director of nursing at Haigslea, who died on 23 December 1998. The will is dated 22 July 1981. In clause 1 the applicant and the testatrix's nephew, the fifth respondent, were appointed executors and trustees. On 7 October 1999 the fifth respondent renounced his appointment, leaving the applicant as the sole executor. A grant of probate was made to the applicant on 31 January 2001.

In clause 2 of the will the testatrix provided for the disposition of her property: in paragraph (a) all her estate and interest “in and to the property located at Mellabar Road Haigslea Marburg in paragraph (b) all moneys standing to her credit with any bank, building society, or other financial institution; in paragraph (c) any superannuation fund to which she was entitled; in paragraph (d) her estate and interest in land and a residence and contents at Labrador; in paragraph (e) her estate and interest in a unit and contents at Labrador; and in paragraph (f) “the balance of [her] residuary estate (if any)”. The testatrix's sister, the first respondent, who died on 25 January 2001, was to take absolutely the property referred to in (a), (b), and (c) and a life interest referred to in (e). The testatrix's brothers who survived her were to take in equal shares as tenants in common absolutely the property referred to in (d). The fifth respondent and the testatrix's nieces, the fourth, sixth and seventh respondents who survived the first respondent, were to take the property referred to in (e) on the first respondent's death, if more than one in equal shares per capita as tenants in common absolutely. The fourth, fifth, sixth and seventh respondents who survived the testatrix and who attained the age of twenty-one years

were to take the property referred to in paragraph (f), if more than one in equal shares per capita as tenants in common absolutely.

It is the reference to “the property located at Mellabar Road Haigslea Marburg” that has given rise to this application. The testatrix lived at Malabar Road, Haigslea for many years until her death. The parcel of land on which she lived is 31.97 hectares (seventy-nine acres) in area and is described as resubdivision 2 of subdivision 1 of portion 393 on registered plan no 35705 in the County of Churchill, Parish of Walloon, certificate of title volume 3948, folio 86. Adjoining it is a square parcel 8.094 hectares (twenty acres) in area described as subdivision 2 of portion 393 on registered plan no 35704 in the County of Churchill, Parish of Walloon, certificate of title volume 3948, folio 84. Resubdivision 2 of subdivision 1 is roughly L-shaped, and the two parcels together make up a rough square. Malabar Road - “Mellabar” is an obvious misspelling in the will - runs along one side of resubdivision 2 of subdivision 1, and another road, Mount Marrow Quarry Road, runs along one side of subdivision 2 and then beside resubdivision 2 of subdivision 1 until it intersects with Malabar Road.

Subdivision 2 has no frontage to Malabar Road, its only frontage being to Mount Marrow Quarry Road. A rough sketch plan of the two parcels is Exhibit A to an affidavit of Mr Francis Grant filed by leave on 13 November 2000.

The applicant seeks a declaration pursuant to s.6(1) of the Succession Act 1981 that upon its true construction paragraph 2(a) of the last will and testament of the testatrix devises in total to the first respondent the testatrix's estate and interest in resubdivision 2 of subdivision 1.

The testatrix and the first respondent were tenants in common in equal shares of both parcels, having been given them in 1966. The two parcels had once been worked together as the one farm. There was no fence dividing them and they

remained so after the sisters acquired them. The testatrix used the land only as a residence and never worked it as a farm.

In the light of the history of the two parcels I conclude there is a latent ambiguity in the description of the property devised in clause 2(a). It is therefore permissible to consider extrinsic evidence in order to resolve the ambiguity. This is a case to which the “armchair” rule applies, in particular to reveal the testatrix's habits of language: see W.A. Lee, Manual of Queensland Succession Law (4th ed., LBC Information Services, Sydney, 1995), paras. 1420 and 1421, pp. 248-250. In the Huth family the two parcels were always referred to collectively as “the Malabar Road property”, although they knew that there were two certificates of title. The larger parcel they knew as “the big paddock and the bull paddock”, the smaller as “the gully paddock”.

There is no reason to conclude that the testatrix departed from family usage in clause 2(a) so that in disposing of all her estate and interest “in and to the property located at Mellabar Road Haigslea Marburg” she was referring to the two parcels that together had been the old farm. That then removes the ambiguity. It means that the applicant should not have the declaration he seeks, but should give effect to what I consider to be the correct construction of clause 2(a): the testatrix intended her interest in both two parcels to go to the first respondent.

I shall invite further submissions on the form of the order to be made and on costs.

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The application is refused, and I order that the costs, including reserved costs, of the applicant and those of the second, third, fourth, sixth, and seventh respondents be paid out of the estate.