SUPREME COURT OF QUEENSLAND

CITATION:	*Trust Company of Australia Limited v Krannin & ors* [2006] QSC 280
PARTIES:	**TRUST COMPANY OF AUSTRALIA LIMITED** (ABN 59 004 027 749) (as executor of the will of JOAN BETHSEBA KRANNIN, deceased) (applicant) v **CONSTANTIN KRANNIN** (first respondent – not a party to the application) **ELEANORE DILLMAN** (second respondent) **EUGEN DILLMAN** (third respondent) **HELEN DOUGLAS** (fourth respondent) **HENRYKA KRANNIN** (fifth respondent) **HELEN CLEARY** (sixth respondent) **MARINA ALBERT** (seventh respondent)
FILE NO:	SC No 7372 of 2006
DIVISION:	Civil
PROCEEDING:	Civil application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	3 October 2006
DELIVERED AT:	Brisbane
HEARING DATE:	21 September 2006
JUDGE:	Fryberg J
ORDER:	**1. Declare that clause 6(a) of the will of the deceased dated 24 November 1965, as substituted by the codicil dated 15 July 1968, is void for uncertainty.** **2. Declare that such part of the residue of the testator's estate as would have passed under the substituted clause 6(a) passes proportionately as between the parts disposed of by clauses 6(b) and 6(c) respectively.** **3. Order that the costs of each party be assessed on the indemnity basis and paid out of the estate**

CATCHWORDS: Succession – Wills, probate and administration – Construction and effect of testamentary disposition – Generally – Death regarded simply as a contingency – Effect of divorce on disposition

Succession – Wills, probate and administration – Construction and effect of testamentary disposition – Generally – General principles of construction – Effect of codicil – Codicil inserted clause that makes compliance with will impossible – Ordinary meaning of words – Admissibility of extrinsic material – To identify object of gift – Ambiguity on face of will – Regard to circumstances in which will made – Doctrine of dependent relative revocation – Testamentary intention - Unnecessary to decided admissibility – Clause void for uncertainty – Gift fails

Succession – Wills, probate and administration – Construction and effect of testamentary dispositions – Legacies and devises – Lapse and interest undisposed of – Inclusion in residue – Queensland – New statute intervening between will and death – Effect of subsequent legislation – Disposition of residue

Succession Act 1981 (Qld) s 18, s 33P, s 74(b)

Re Harvey [1990] 2 Qd R 508, distinguished

COUNSEL: R M Treston for the applicant
D J McAuliffe for the first respondent
S J English for the second, third and fourth respondents
D R Murphy for the fifth, sixth and seventh respondents

SOLICITORS: Thynne and McCartney for the applicant
McAuliffe and Associates for the first respondent
S J English directly instructed by the second, third and fourth respondents
Mullins Lawyers for the fifth, sixth and seventh respondents

[1] **FRYBERG J:** The trustee and executor of the will of Joan Bethsheba Krannin ("Johanna"), who died on 14 October 2004, has applied for the construction of cl 6 of the will. Probate of the will was granted in common form on 1 July 2005.

[2] As amended by a codicil which was included in the grant of probate, the relevant portions of the will are:

> "2. I APPOINT THE UNION-FIDELITY TRUSTEE COMPANY OF AUSTRALIA LIMITED (hereinafter referred to as "my Trustee") Executor and Trustee of this my Will.
>
> 3. I GIVE AND BEQUEATH the following legacies free of all death duties costs charges and expenses whatsoever:-
> …

> 4. If my said husband shall survive me for a period of one calendar month I GIVE DEVISE AND BEQUEATH all the rest and residue of my estate of whatsoever nature and wheresoever situate unto and to the use of my trustee UPON TRUST:-
> (a) AS TO the sum of TWO HUNDRED AND FIFTY POUNDS (£250) together with my mink stole and four pieces of my jewellery the choice whereof is to be in the absolute discretion of my said husband for my dear sister-in-law HENRYKA KRANNIN wife of Wadim Krannin free of all death duties costs charges and expenses absolutely;
> (b) AS to the remainder of my residuary estate for my deeply beloved husband the said CONSTANTIN KRANNIN for his own sole use and benefit absolutely.
>
> 5. If my said husband shall predecease me or fail to survive me for a period of one calendar month then and in such case I GIVE AND BEQUEATH the following additional legacies free of all death duties costs charges and expenses whatsoever:-
> (a) To the QUEENSLAND CONSERVATORY OF MUSIC my piano, music, music books and autographs of famous musicians, with the wish that my said piano will be used only by students of great promise AND I DIRECT that the receipt of the Treasurer or other proper officer of the Queensland Conservatorium of Music shall be a full and sufficient discharge to my trustee in respect of the bequest under this sub-clause
> (b) To my dear sister-in-law HENRYKA KRANNIN my mink stole and my jewellery.
>
> 6. If my said husband shall predecease me or fail to survive me for a period of one calendar month then and in such case I GIVE DEVISED AND BEQUEATH my residuary estate unto and to the use of my trustee UPON TRUST:-
> (a) AS TO one-half thereof for my said husband for his use and benefit absolutely.
> (b) As to one quarter thereof for my dear sister-in-law the said HENRYKA KRANNIN;
> (c) As to the remaining one quarter thereof UPON TRUST for the said HENRYKA KRANNIN for her life, such life interest to be determinable upon her marrying a second time, and after the death or second marriage of the said Henryka Krannin to hold as well the capital as the income thereof UPON TRUST for such of the children of the said Henryka Krannin and Wadim Krannin as shall attain the age of 21 years and if more than one in equal shares … ."

Clauses 2 and 6(a) were inserted into the will by the codicil.

[3] For clarity and simplicity, I shall refer to the principal non-corporate parties by their given names. No disrespect is intended by this. The respondents to the application are Constantin Krannin ("Con"); Henryka Krannin ("Henryka"); Helen Cleary and Marina Albert, Henryka's two and only children; and Eleanore Dillman ("Eleanore"), Eugen Dillman ("Eugen") and Helen Douglas née Dillman ("Helen"),

all of whom were named in cl 6(a) prior to its amendment and to whom I shall refer collectively as "the Dillmans". At the beginning of the hearing the solicitor for Con conceded that his client had no entitlement under the will, and upon the other parties' assurances that no order for costs would be sought against him, was given leave to withdraw.

[4] The facts, which are material for the operation of the will, are common ground. First, Con survived Johanna by more than a month. In fact he is still alive. That is material because of the opening words of cl 4, cl 5 and cl 6. Second, Con and Johanna were divorced on 7 April 1980. That is material by reason of s 18 of the *Succession Act 1981* ("the Act") as it stood on the date of death:[1]

> "**Effect of divorce on will**
> 18(1) The dissolution or annulment of the marriage of a testator revokes—
> (a) any beneficial disposition of property made by will by the testator in favour of the testator's former husband or wife; and
> (b) any appointment made by will by the testator of the testator's former husband or wife as executor, trustee, advisory trustee or guardian.
>
> (2) So far as any beneficial disposition of property which is revoked by the operation of subsection (1) is concerned the will shall take effect as if the former husband or wife had predeceased the testator."

[5] It is common ground that by reason of this section, the beneficial disposition to Con in cl 4(b) of the will was revoked.[2] The parties were inclined to make their submissions on the basis that none of cl 4 operated by reason of s 18(2), but I do not think that is correct. That subsection applies only "so far as any beneficial disposition of property which is revoked by subsection (1) is concerned". It therefore has no application to the disposition contained in cl 4(a) of the will. In the present case no practical consequence turns on this point.

[6] It is also common ground that the dispositions made in cl 5 of the will take effect. That agreement relieves me of the need to determine two points. First, s 18 operates to require the property which would have gone to Con under the revoked cl 4(b) to be disposed of as if Con had predeceased Johanna. Clause 5 is apt to dispose of some of that property. That property does not include the mink stole and four unascertained pieces of jewellery, so that on one view it would not be possible to apply cl 5(b) fully and literally. Second, cl 4 devises and bequeaths the residuary estate to the trustee. That disposition, not being a beneficial disposition, is unaffected by s 18. It might therefore be argued that since the legal title to the residuary estate has vested in the trustee under cl 4, the same title cannot pass by way of direct bequest under cl 5. I shall assume that the trustee is obliged to give effect to the bequests in that clause.

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1 This section was repealed and re-enacted in slightly different form by the *Succession Amendment Act 2006*, but it continues to apply where both the will and the divorce occurred before the commencement of that Act: see *Succession Act 1981*, s 76(4).

2 Con having withdrawn from the contest, no party challenged the correctness of the decision of Vasta J in *Re Jones* [1985] 2 Qd R 100. I express no opinion on that question.

[7] The balance of the property must be disposed of in accordance with cl 6. On its face however, and quite apart from s 18, it would be impossible to comply with cl 6(a) by reason of the opening words of the clause. That being so, how should the clause be treated?

[8] For Henryka and her daughters, Mr Douglas Murphy submitted that either cl 6(a) was void for uncertainty or the clause was intended to make a beneficial disposition to Con, in which case the disposition lapsed under s 18(2). In either case, he submitted, the half share of the residuary estate referred to in the clause passed to his clients under s 29(1)(b) of the Act. On the other hand, Mr English for the Dillmans submitted that the effect of the codicil was to revive the original will or, if not, that the codicil should be rectified by deleting so much of it as purported to revoke and replace cl 6(a).

[9] There can of course be no doubt that in interpreting the will it is legitimate to have regard to the codicil which has been admitted to probate. Evidence of earlier testamentary documents is admissible for limited purposes, as, for example, where revival is alleged. Evidence of extrinsic circumstances may also in some circumstances be admissible. The Dillmans gave some such evidence and Mr Murphy either objected to it or submitted that it could not be used for the purpose for which Mr English sought to use it. The objection was taken in a fairly generalised way. Mr English submitted that the evidence was admissible in accordance with principles enunciated by Isaacs J in *Fell v Fell*.[3] He also relied on s 33C of the Act, a provision inserted only this year. As will appear, I have found it unnecessary to rule on Mr Murphy's objection or analyse the precise purpose for which the evidence may be used. Before I explain why that is so, I shall set out the evidence and the inferences which I draw from it.

[10] Johanna was born in England on 29 November 1917. It does not appear when she migrated to Australia. Her family background was one of wealth and she developed a strong work ethic. She belonged to the Jewish faith.[4] She was well read and had an excellent grasp of the English language. She frequently wrote articles and poetry for magazines.[5]

[11] Con migrated to Australia, apparently from Russia, in the early 1950s.[6] He must have met Johanna before or soon after he arrived here, for they married on 25 September 1951.[7] She was then approaching 34 years of age. Con's brother Wadim married Henryka, but it does not appear when. Wadim and Henryka had two daughters: Marina (now Albert) born on 17 October 1960 and Helen (now Cleary) born on to July 1962.[8] Con and Johanna remained childless.

[12] Eleanore, Eugen and Helen were the three children of an old friend of Con, their mother, who had migrated to Australia at the same time as he. Their father died in 1958 and their mother remarried in 1960 and had two more children. The three Dillman children had a poor relationship with their stepfather and in November 1963 their mother arranged a holiday for them with Con and Johanna "as respite

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3 (1922) 31 CLR 268 at 273 - 276.
4 Exhibit PJO'B1; affidavit of Helen, paras 31, 40; affidavit of Eleanore, para 26.
5 Affidavit of Helen, para 39.
6 Affidavit of Helen, para 3.
7 Exhibit SF6.
8 Exhibit SF9.

from the situation". After six weeks, the holiday turned into an indefinite stay. At that time Helen was nearly 13, Eugen was nearly 15 and Eleanore was 18. For the next few years the children lived with and were supported by the Krannins. They arranged for Eleanore to work for Johanna's solicitor Mr G Fynes-Clinton while she studied law part time. In 1964 Johanna and Con purchased a new house which they renovated to create living space for the children and for Con's mother. In reality the house was probably paid for by Johanna, since at that time Con was studying medicine. Helen and Johanna became particularly close. [9]

[13] In 1965 Johanna made the will now before the court. In its original form, para 2 appointed Con as sole executor and trustee with a proviso appointing Mr Fynes-Clinton if Con should predecease her or be unwilling or unable to act. Paragraph 6(a) began:

> "(a) as to one half thereof for such of the following persons viz. ELEANOR DILLMAN (known as Hall), EUGENE DILLMAN (known as Hall) and HELEN DILLMAN (known as Hall) as shall survive me and attain the age of 30 years and if more than one in equal shares …".

The paragraph went on to make provision for the investment of the share and the contingency of early death with and without issue. In the event of death before vesting and without issue there was a gift over to Henryka.[10] The will was evidently made through Mr Fynes-Clinton's firm; it was witnessed by two clerks.

[14] Toward the end of 1966 the children's mother requested that they return home to assist with the care of their half-siblings. Eleanore and Eugen, who were by then over 18, refused to go, but Helen was obliged to return.[11] Johanna was very upset by this, but maintained a close relationship with Helen by mail and phone.[12]

[15] The same was not true of her relationship with Eleanore and Eugen. During 1967 they found the Johanna increasingly difficult to live with. She became enraged with them and with Con's mother over trifles. She was consulting Dr Neville Parker, a psychiatrist. During that year Con was seldom home, as he was doing a year's residency at Ipswich Hospital. In August Johanna demanded that Eleanore leave the home, which she did. That same month Johanna saw her solicitor and executed a codicil to her will. By that codicil she deleted the reference to Eleanore in cl 6(a) and in all other respects confirmed the will. I infer that she did so in response to her falling out with Eleanore.[13]

[16] Eugen dropped out of his university course halfway through 1967. Johanna told him that if he did not get a job immediately he would have to leave the house. Con told him that this was not the case and that it was Johanna's condition that was causing her to threaten him in this way. He had some difficulty finding a job, but eventually was employed by the Commercial Bank of Australia, where he commenced work on 13 November 1967. He left the Krannins' home in the fortnight prior to that day. On 14 November Johanna had her solicitors draw a

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9 Affidavit of Helen, paras 5-24; affidavit of Eugen, para 4; affidavit of Eleanore, para 3.
10 Exhibit SF2.
11 Affidavit of Helen, paras 26-29.
12 Affidavit of Eleanore, paras 9, 11.
13 Affidavit of Eleanore, paras 13-15; affidavit of Eugen, para 25; exhibit SF3.

second codicil to her will. By that codicil she deleted the reference to Eugen in cl 6(a) and in all other respects confirmed the will and the earlier codicil.[14]

[17] During 1967 Johanna also became very dissatisfied with the presence of Con's mother in the house. Eventually she refused to have any contact with her mother-in-law.[15] By early 1968 the marriage was in serious trouble. Johanna insisted that her mother-in-law must leave the house. In the event both Con and his mother left in mid-1968. They moved to a house about a kilometre away. Con would see Johanna from time to time during the early stage of the separation.[16] However it seems they were not reconciled and on 7 April 1980 they were divorced.[17]

[18] On 15 July 1968 Johanna executed a third codicil to her will. It is this codicil of which probate has been granted. I infer it was executed immediately after Con separated from her. In view of the arguments advanced, it is necessary to set it out in full:

> "THIS IS A THIRD CODICIL TO THE LAST WILL AND TESTAMENT OF ME JOAN BETHSHEBA KRANNIN of 40 Park Avenue East Brisbane in the State of Queensland wife of Constantin Krannin which Will bears the date the Twenty-fourth day of November One thousand nine hundred and sixty-five.
>
> I REVOKE Clause 2 of my said Will and direct that the following Clause be read in lieu thereof
>
> 2. I APPOINT THE UINION-FIDELITY TRUSTEE COMPANY OF AUSTRALIA LIMITED (hereinafter referred to as "my Trustee") Executor and Trustee of this my Will.
>
> I REVOKE Sub-Clause (a) of Clause 6 of my said Will AND DIRECT that the following sub-clause be read in lieu thereof.
>
> (a) AS TO one-half thereof for my said husband for his use and benefit absolutely.
>
> I REVOKE Codicil dated 28th August 1967 to my said Will.
>
> I REVOKE Second Codicil dated 14th November 1967 to my said Will.
>
> AND IN ALL OTHER RESPECTS I CONFIRM my said Will."

On this occasion she did not see Mr Fynes-Clinton's firm, possibly because Eleanore was working there or possibly because she had had some sort of falling out with Mr Fynes-Clinton. By the codicil she replaced both Con and Mr Fynes-Clinton as executors with the present applicant (it has since changed its name). The codicil was witnessed by two employees of the applicant, who are now deceased. I infer that the codicil was prepared for her by the applicant, although it has been unable to locate any notes or instructions indicating that it was engaged for this purpose.

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14 Affidavit of Eugen, para 28; affidavit of Eleanore, para 18; exhibit SF4.
15 Affidavit of Eleanore, paras 16-17; affidavit of Eugen, paras 22-23, 31.
16 Affidavit of Eugen, paras 33-35.
17 Exhibit SF6.

[19] Eleanore and Eugen had little contact with Johanna after she and Con separated.[18] However Helen maintained a warm and close relationship with Johanna for about six years. Contact ceased in about 1974 when Johanna could not recall who Helen was. In 1972 Johanna sent Helen a 21st birthday card. It contained a series of blessings written in poetic style. They included the following:

> "The gift of wealth is the last I would
> wish because without the rest
> it means nothing and brings no joy."[19]

[20] There is little more to tell. Both Eleanore and Eugen had chance meetings with Johanna at concerts in 1991, but she had difficulty recognising them.[20] At some stage, presumably subsequently, she ceased to be able to manage her own affairs, and the Public Trustee was appointed to be what his employee described as her administrator.[21] On 14 October 2004 Johanna died in a nursing home at the age of 86. One of the three causes of death was said to be dementia.[22]

[21] For the Dillmans, Mr English submitted that it was clear from the third codicil that Johanna's intention:

(a) was not to benefit Con's estate;
(b) was not to benefit Con;
(c) was to reinstate cl 6(a) in its original form.

He submitted that the use of the words "for his use and benefit absolutely" rather than "for the benefit of my husband's estate" supported the first proposition, and the removal of Con from his position as executor supported the second. He further submitted than that the purported revocation of cl 6(a) and its replacement were unintelligible. Finally, he submitted that the revocation of the first codicil as coupled with the confirmation of the will "in all other respects" indicated an intention to revive the original will, that is to reinstate the Dillmans.

[22] The greatest difficulty which that submission faces is the fact that by the third codicil Johanna explicitly revoked cl 6(a). There is no ambiguity to the codicil in this respect. The words are not meaningless; effect can be given to them. If one turns to the evidence, one finds no reason not to give the words their ordinary effect. There is no evidence to suggest that they were the result of an engrossing error on the part of the applicant. Johanna executed the codicil less than a year after she cut Eleanore from the will and only eight months after she did the same to Eugen, in each case in circumstances of acrimony. Although she maintained a continuing good relationship with Helen, she evidently saw little virtue in reflecting that relationship in financial reward. These matters suggest that the words mean what they say and that there was no intention to benefit the Dillmans. On the other hand, Johanna did revoke the two earlier codicils. It might be asked, why would she do this unless she intended to benefit Eleanore and Eugen? But that question might be answered on the basis that it was simply a drafting quirk.[23] It is also true that she confirmed the will in all other respects, but to rely on that is to argue with circularity: until one knows the effect of the words of revocation of cl 6(a), one

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18 Affidavit of Eleanore, para 28; affidavit of Eugen, para 39.
19 Affidavit of Helen, para 44; exhibit HD1.
20 Affidavit of Eleanore, paras 30-31; affidavit of Eugen, paras 39-41.
21 Exhibit PJO'B1.
22 Death certificate in Supreme Court probate file BS 5188/05.
23 Compare s 22C of the *Acts Interpretation Act 1954*.

cannot identify the "other" respects in which the will is confirmed. The question may legitimately be asked: if Johanna had intended to reinstate the Dillmans, why did she say that she revoked the very provision under which they took?

[23] I accept that the substituted gift of half the residue to Con for his own use in the event that he should predecease Johanna or fail to survive her for a month was unintelligible. Try as I may, I cannot divine from the terms of the testamentary documents what Johanna was trying to do. If I have regard to the evidence, my uncertainty remains. Johanna was a writer and was well able to understand the ordinary meaning, if not the legal effect, of the words she used. Had she cut Con out of her will after they separated, one could have understood why. She removed him as executor but nothing in the third codicil could be construed as an attempt to deprive him of all beneficial interest under her will. One could speculate that she might have wished to halve his entitlement under cl 4(b), but the words used simply will not stand such a meaning; and in any event there is insufficient evidence from which to infer any such intention. Neither the words nor the evidence supports the existence of an intention to revive the original bequest to the Dillmans or even to preserve the bequest to Helen alone. In my judgment the substituted cl 6(a) is unintelligible regardless of whether one takes all of the evidence into account as an interpretive aid or not. It is void for uncertainty. It therefore fails to dispose of anything.

[24] That being so, did the revocation of cl 6(a) also fail by the application of the doctrine of the dependent relative revocation?[24] In *Baird v Huang*,[25] Young J cited as authoritative the following passage from *Theobald on Wills*:

> "The doctrine is of general application and applies if the testator destroys his will, intending to revoke it conditionally on the existence, or future existence, of a particular fact: if this condition is not satisfied the will is not revoked. But the doctrine is not applicable simply because the testator made a false assumption when he revoked his will. The true view is that a revocation grounded on an assumption of fact which is false takes effect unless…the truth of the fact is the condition of the revocation, or, in other words, unless the revocation is contingent, upon the fact being true."[26]

[25] The difficulty with applying that doctrine in the present case is that there is insufficient evidence to found the conclusion that Johanna intended the revocation to be effective only if the substituted gift was also effective. On the evidence it is not unlikely that she intended to deprive Helen of her gift in any event. That view gains some support from the inscription on Helen's 21st birthday card. It is of course true that the revocation was followed by a fresh disposition; but I cannot be satisfied that Johanna intended the revocation to be conditional upon the effectiveness of that fresh disposition.

[26] These conclusions make it unnecessary for me to rule on Mr Murphy's objections to the evidence or to identify the limitations upon its use. No matter how I use the

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24 I assume without deciding that the doctrine can apply to the revocation of part of a testamentary document as well as to the revocation of the whole document.

25 [2001] NSWSC 409.

26 14th ed (1982), pp 83-4.

evidence, the result is the same as I would reach if I were to disregard it and to determine the case solely upon the documents admitted to probate.

[27] To summarise my conclusions so far:

(a) the balance of the estate after distribution of specific legacies pursuant to cl 3 vested in the applicant on trust under cl 4;
(b) the gift under cl 4(a) took effect free of all duties etc;
(c) the parties accept that the gift under cl 4(b) was revoked by former s 18 of the *Succession Act 1981*;
(d) the parties accept that the dispositions under cl 5 take effect and are to be paid by the trustee out of the property the subject of the revoked gift free of all duties etc;
(e) the parties accept that subject to the payment of all duties etc, one half of the balance of that property is held by the trustee upon the trusts set out in cl 6(b) and cl 6(c) of the will;
(f) cl 6(a) of the will is void for uncertainty, with the result that the distribution of the balance of the estate fails.

[28] But for the intervention of statute that failure would mean that the balance of the estate passed as on intestacy. However s 33P of the Act provides:

> "**Disposition of fractional part in particular case**
>
> **33P** (1) If a part of a disposition in fractional parts of all, or the residue, of the testator's estate fails, the part that fails passes to the part that does not fail and, if there is more than one part that does not fail, to all those parts proportionately.
>
> (2) Subsection (1) does not apply if a contrary intention appears in the will."

That section constitutes a re-enactment with some amendment of the former s 29, which has been repealed. In 2006 no transitional provision preserves the operation of the former section. Section 33P is contained within Division 5, "Interpretation of wills". It does not bring about the failure of a disposition, but provides for what is to happen to the property the subject of a failed disposition. Contrary to the submissions of Mr Murphy and Ms Treston, it is not in my judgment possible to apply the former section in the present case because of its repeal.[27]

[29] I have no doubt that cl 6 of the will constitutes a disposition in fractional parts of the residue of Johanna's estate. It is a clause which distributes what remains after several earlier distributions. In support of a contrary conclusion, Mr English sought to rely on the decision of Dowsett J in *Re Harvey*.[28] He submitted that in this case, as in that, no provision was made for the executor to pay the debts etc and thereafter to hold the balance on trust. That is true; but such a case is simply one given by Dowsett J as an example of where the application of the former s 29 was uncertain. His Honour held that the lapsed gift went as on intestacy because the disposition in question was of the whole estate. There being no earlier disposition, the one in question could not be called a residuary disposition. Until the coming into force of Act No. 9 of 1997, the former s 29 applied only to residuary dispositions. That Act

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27 Compare *Re Rutley*, unreported, Supreme Court, OS 243/1986, 1 May 1986, Ryan J.

28 [1990] 2 Qd R 508.

was enacted to overcome the effect of the decision in *Re Harvey*.[29] In any event, as I have said, cl 6 does not dispose of the whole estate; it disposes of what remains after several earlier dispositions. *Re Harvey* has no present application.

[30] It follows that s 33P applies in the present case; cl 6 plainly constituted a disposition in fractional parts. That means that the part of the disposition of the residue of Johanna's estate which has failed must pass proportionately to those entitled under cl 6(b) and cl (c), namely Henryka and her daughters.

[31] At the time of the hearing, the Dillmans had not filed any application for rectification. I refused at that time to deal with an oral application but accepted an undertaking from the Dillmans by their counsel to file such an application by 4 pm on 25 September. Mr Murphy opposed my dealing with any such application on the ground that the other parties had not addressed the question. I indicated that if such an application remained alive after I determined the present application, I would not deal with it without affording the parties the opportunity to be heard. In the event, no application has been filed. I shall, therefore, not consider the question of rectification.

[32] I shall hear the parties as to the form of order which should be made.

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29 [1997] 1 *Explanatory Notes* Part 21 p 369.