SUPREME COURT OF QUEENSLAND

CITATION:	*Public Trustee of Queensland v Jacob & ors* [2006] QSC 372
PARTIES:	**PUBLIC TRUSTEE OF QUEENSLAND (applicant)** **v** **MARGARET ADA JACOB, LEONARD GOUGH WALKER AND ROBERT JOHN WALKER (respondents)**
FILE NO/S:	BS 7760/06
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	9 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	3 October 2006
JUDGE:	White J
ORDER:	**1. The answers to the questions by the Public Trustee are** **(a) The use of the words "*as shall survive me for a period of thirty (30) days and if more than one in equal shares*" in clause 5 of the will indicates a contrary intention by the deceased thereby excluding the operation of s 33(1) of the *Succession Act* 1981.** **(b) Unnecessary to answer.** **(c) The Public Trustee of Queensland should distribute the rest and residue of the estate of the deceased to the respondents, Margaret Ada Jacob, Leonard Gough Walker and Robert John Walker.** **2. No order as to costs.**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCT AND EFFECT OF TESTAMENTARY DISPOSITIONS – STATUTORY RULES – GIFT TO CHILDREN OR ISSUE PREDECEASING TESTATOR – testatrix bequeathed the residue of her estate to such of her five remaining children as survived her for 30 days – two of the five children were living when the will was executed but predeceased the

testatrix – whether residue of estate should be distributed between three surviving children only or if issue of two deceased children should take their fathers' one fifth share

Succession Act 1981, ss 29, 32, 33

Re Arndt [1990] WAR 5, cited
Bassett v Hall [1994] 1 VR 432, discussed
Brennan v Permanent Trustee Co of NSW Ltd (1945) 73 CLR 404, cited
Burman v Burman [1998] QCA 250, discussed
Ex parte Campbell (1870) LR 5 Ch A, cited
Cancellor v Cancellor (1862) 2 Dr & Sm 194; 62 ER 595, cited
Re estate of Jenkinson [2000] NSWSC 495, cited
Lutheran Church of Australia South Australia District Inc v *Farmers' Co-Operative Executors and Trustees Ltd* (1970) 121 CLR 628, cited
Re King [1953] VLR 648, cited
Re the Will of Macaudo [1993] 2 Qd R 269, discussed
In Re The Will of Moore [1963] VR 168, cited
In re Paton, OS No 837 of 1994;15 December 1994, discussed
Pohlner v Pfeiffer (1964) 112 CLR 52, cited
Public Trustee of Queensland v Robertson [2000] QSC 301, discussed
Public Trustee of Queensland v Robertson [2005] 2 Qd R 444; [2004] QSC 331, discussed
Sherratt v Mountford (1873) 8 LR Ch App 928, cited
Re Trenfield OS No 52 of 1986; 10 October 1986, discussed

COUNSEL: D B Fraser QC for the applicant
Robert John Walker appeared on his own behalf
No appearance on behalf of Margaret Ada Jacob or Leonard Gough Walker

SOLICITORS: Official Solicitor to The Public Trustee for the applicant
Robert John Walker appeared on his own behalf
No appearance on behalf of Margaret Ada Jacob or Leonard Gough Walker

[1] Doreen Eunice Walker ("the testatrix"), a widow, died on 3 December 2004 aged 95 years leaving a will dated 9 July 1984. She was survived by three of her seven children, Margaret Ada Jacob, Leonard Gough Walker and Robert John Walker. Two daughters died without issue and prior to the execution of her will. The other children who predeceased her were living at the time her will was executed. They were Leslie Ray Walker who died on 18 May 1996 leaving 6 children each of whom is living and William Hugh Arthur Walker who died on 30 January 1997 leaving 3 children each of whom is living.

[2] The testatrix executed a will on 9 July 1984 in the following terms:

> "1. I REVOKE all former Wills and Codicils and declare this to be my last Will.
> 2. I APPOINT THE PUBLIC TRUSTEE OF QUEESNLAND (hereinafter called "my Trustee") to be the Executor and Trustee of this my Will.
> 3. I BEQUEATH my jewellery of every description (including watches) to my daughter MARGARET ADA JOCOB if she shall survive me for a period of thirty (30) days
> 4. I BEQUEATH all my household furniture and household effects (other than motor vehicles) at my death and all my articles of personal wear or adornment (including my clothing but excluding my jewellery and watches bequeathed by me under clause three (3) of this my Will) to my son ROBERT JOHN WALKER if he shall survive me for a period of thirty (30) days
> 5. I DEVISE AND BEQUEATH the rest and residue of my estate both real and personal UNTO such of them my children LESLIE RAY WALKER WILLIAM HUGH ARTHUR WALKER the said MARGARET ADA JOCOB LEONARD GOUGH WALKER the said ROBERT JOHN WALKER as shall survive me for a period of thirty (30) days and if more than one in equal shares"

The person named in the will as "Margaret Ada Jocob" is the same person as the respondent Margaret Ada Jacob.

[3] This simple will has given rise to an interesting question caused by the gift of the residue to the five named children "as shall survive me for a period of thirty (30) days and if more than one in equal shares". The Public Trustee proposed to distribute the residue of the testatrix's estate to her surviving named children and the children of Leslie Ray Walker and William Hugh Arthur Walker who would take their deceased fathers' one fifth share. This reflected the prevailing practice of the Public Trustee when construing such a provision in a will. Mr Robert Walker, a respondent, contends that his mother's intention was to benefit only her surviving children and he deposes to some extrinsic material in support. Margaret Ada Jacob and Leonard Gough Walker, the other respondents, do not oppose the distribution of the estate in the manner proposed by the Public Trustee and have indicated that they do not propose to attend the hearing of the Public Trustee's application. The children of the deceased children of the testatrix have been informed of the nature of the application, the issues and that the Public Trustee proposed to submit that the will should be construed in a way which would provide for a distribution to them. None have appeared.

[4] The estate is modest and the Public Trustee has already distributed one-fifth of the residuary estate to each of the surviving children. Mr Robert Walker has appeared on his own behalf. Whatever the outcome, the Public Trustee will not seek his costs of this application from Mr Robert Walker nor seek to recover them from the estate since the Public Trustee, in effect, seeks the guidance of the court about the construction of a commonly occurring provision in the many thousands of wills which the Public Trustee's Office has written since the introduction of the *Succession Act* 1981.

[5] The Public Trustee contends that there is a tension between the construction of a provision as is in this will in the decision of Derrington J in *Re the Will of Macaudo* [1993] 2 Qd R 269 and the decision of Douglas J in *Public Trustee of Queensland v Robertson* [2005] Qd R 444 where his Honour construed a similar clause so as to exclude the issue of non-surviving children from taking.

[6] The construction of this will is governed by ss 32 and 33 of the *Succession Act* 1981. That Act was extensively revised by the *Succession Act Amendment Act* 2006 which came into force as to its substantive provisions on 1 April 2006 but by s 7, relevantly, only applies to a will of a person who dies after 1 April 2006.

[7] Section 32 of the *Succession Act* 1981 provides:

> "32 **Lapse of benefit where beneficiary does not survive testator by 30 days**
>
> **(1)** Unless a contrary intention appears by the will, where any beneficial disposition of property is made to a person who does not survive the testator for a period of 30 days the disposition shall be treated as if that person had died before the testator and, subject to this Act, shall lapse.
>
> **(2)** A general requirement or condition that a beneficiary survive the testator is not a contrary intention for the purpose of this section."

[8] Section 33 provides:

> "33 **Statutory substitutional provisions in the event of lapse**
>
> **(1)** Unless a contrary intention appears by the will, where any beneficial disposition of property is made to any issue of the testator (whether as an individual or as a member of a class) for an estate or interest not determinable at or before the death of that issue and that issue is dead at the time of the execution of the will or does not survive the testator for a period of 30 days, the nearest issue of that issue who survive the testator for a period of 30 days shall take in the place of that issue and if more than 1 nearest issue so survive, shall take in equal shares and the more remote issue of that issue who survive the testator for a period of 30 days shall take by representation.
>
> **(2)** A general requirement or condition that such issue survive the testator or attain a specified age is not a contrary intention for the purpose of this section.
>
> **(3)** This section applies only to wills executed or republished after the commencement of this Act."

[9] The Public Trustee seeks answers to the following questions:

> "(a) Whether the use of the words "*as shall survive me for a period of thirty days and if more than one in equal shares*" in Clause 5 of the Will indicates a contrary intention by the Deceased thereby excluding the operation of s 33(1) of the *Succession Act 1981*.
>
> (b) If the answer to 1(a) is "*no*" whether The Public Trustee of Queensland should distribute the rest and residue of the Estate of the Deceased to the Respondents being the children of the Deceased who survived her for a period of thirty days and to the issue of two of the children of the deceased who pre-deceased the Deceased.
>
> (c) If the answer to 1(a) is "*yes*" whether The Public Trustee of Queensland should distribute the rest and residue of the Estate of the Deceased to the Respondents."

[10] In the alternative, the Public Trustee seeks an order stating a case to the Court of Appeal pursuant to s 251 of the *Supreme Court Act* 1995 and r 483(2) of the *Uniform Civil Procedure Rules*. The justification for such a course arises in this way: should I favour the construction contended for by the Public Trustee, it is highly unlikely that Mr Robert Walker would be in a position financially to appeal the decision. It is said there would then be two recent inconsistent decisions of single judges of this court together with that of Derrington J which has stood for over a decade. This would be unsatisfactory so far as the proper administration of estates in Queensland is concerned. It is, of course, possible that either the admission of extrinsic material or some other matter could cause the reasoning in the decisions of *Re Robertson* or *Re Macaudo* to be distinguished. Should Mr Robert Walker's argument prevail, then there is little doubt that the Public Trustee would appeal the decision. In the event that I am persuaded that a case ought to be stated to the Court of Appeal, the Public Trustee has proposed the questions to be answered. They are exhibit "A" to the originating application.

Extrinsic material

[11] Mr Robert Walker was the testatrix's youngest child. She appointed him her attorney in April 2002. Later that year the testatrix moved into a nursing home having sold her home at Lota where she had moved some time after the death of her husband in 1970.

[12] Mr Robert Walker deposes that he accompanied his mother at her request to a pre-arranged meeting with officers of the Public Trust Office on 13 December 2000 at the Wynnum Court House. That appointment and attendance is confirmed by Mr Fred William Werner, a senior Public Trust Officer. He deposes that, informed by the Public Trustee's records, he and another experienced Public Trust Officer, Ms Cheryl Kussrow attended the Wynnum Court House to meet persons desirous of making their wills. Ms Kussrow is no longer employed in the Public Trust Office. Mr Walker deposes that his mother expressly wished to remove the names of her deceased sons, Leslie and William, from her will. In par 5 of his affidavit filed 25 September 2006 Mr Walker deposes:

> "At that meeting, DOREEN was advised by that PUBLIC TRUSTEE OFFICER that removing her two deceased sons would have no effect on outcomes and so the will remained unchanged from it's [sic] preparation in 1984. That visiting PUBLIC TRUSTEE OFFICER made it very clear to me that she was wanting answers to her questions from DOREEN and not from myself."

The will was not altered as a consequence of that visit or otherwise.

[13] Mr Werner deposes that in 2000 he had been making wills for over twenty-five years on behalf of the Public Trust Office and Ms Kussrow was an experienced will maker whom Mr Werner regularly accompanied to will making appointments. Whilst Mr Werner is unable to recall the appointment with the testatrix, he deposes as to the usual practice of Ms Kussrow from his own observations

> "… I can say that she [Ms Kussrow] was most particular in the advice given and the Wills that she drew, and was an experienced Willmaker. From my own observations of Cheryl Kussrow, I can say that Cheryl Kussrow was aware of the effect of Section 33 *Succession Act* 1981 and she regularly provided advice to a Testator on the effect of the same." par 4 Affidavit filed 27 September 2006.

[14] Mr Werner added in the following paragraph:

> "Whilst I cannot say whether the late Doreen Walker was advised that by removing the names of her two deceased sons from the Will this would have no effect on outcomes, I can say that the usual practice, when a question to this effect was raised, was to discuss the effect of Section 33 *Succession Act* 1981 with the Testator and enquire if the Testator wished to benefit the children of the deceased beneficiaries."

Mr Werner went on to depose in par 7:

> "It was the usual practice for a Testator to be advised that the effect of Section 33 *Succession Act* 1981 applying to the Will meant that a gift to a child who had predeceased would not lapse, but that share would instead pass to the children of the Testator's child who had predeceased. It would be the ordinary practice that the advice that is usually given to a Testator at the time the original Will is made would be repeated when any changes to the Will were discussed."

[15] In support of this presumed explanation to the testatrix, Mr Werner referred to the instructions received from the testatrix in 1984 for the preparation of her will. Item 13 of the instructions contains the following:

> "(b) Does testator wish s. 33 of the Succession Act to apply?"

The box next to that question has provision for a mark to be placed after "Yes" or "No". There is a cross next to "Yes" indicating an affirmative choice.

[16] Item 15 of the instruction form states, "Please state clearly and concisely how you wish to dispose of all your estate, and give the full name and addresses of all beneficiaries. (If s. 33 of the Succession Act is not to apply state clearly any substitution of beneficiaries desired in respect of any possible beneficiary predeceasing the testator.)" The following, after referring to specific bequests, appears

> "I DEVISE AND BEQUEATH the rest and residue of my estate both real and personal UNTO such of them my children as shall be living at my death and if more than one in equal shares."

Mr Walker contends that the instructions are only a working document and ought not be used to ascertain the testatrix's intention pointing to numbers of minor errors throughout the document.

[17] The practice of the Public Trust officers, confirmed by the heading on the form "To take effect as a last WILL in the event of death before further testamentary instrument is executed," was to have the testator/testatrix execute the instructions and have them witnessed in the event of death occurring before a further testamentary document could be executed and that is what occurred on this occasion. It is clear, then, that the instructions form was meant as a serious document and not simply as notes for reference when preparing the will. The different wording of the dispositive clause – "UNTO such of my children as shall be living at my death…" – from the wording in the will – "as shall survive me" – is noted but as Dixon J observed in *Brennan v Permanent Trustee Co of NSW Ltd* (1945) 73 CLR 404 at 414, "survive" in its natural meaning means to outlive or to remain alive after the occurrence of some event. Nicholson J in *Re Arndt* [1990] WAR 5 considered that "survive" and the expression "who are living" had the same meaning.

[18] There is a further body of extrinsic material contained in the 1978 Report of the Queensland Law Reform Commission to the Attorney-General on recommendations to reform the law of succession and the draft provisions which became, virtually unchanged, the *Succession Act* 1981, which may inform the construction of the relevant sections of that Act, *Acts Interpretation Act* 1954, s 14B (1) and (3)(b) and Second Reading Speech by the Minister for Justice and Attorney-General, Hansard 7 May 1981 pp 1028-1030.

[19] The admission of extrinsic material to ascertain a testatrix's intention under the law governing this will (the 2006 amendments in s 33C provide for the admission of extrinsic evidence to ascertain intention in limited but nonetheless more extensive circumstances than had been the case hitherto) is restricted to the situation where the intention is equivocal. It is the words employed in the will itself read as a whole which must be equivocal before extrinsic evidence may be admitted. It is not the case that extrinsic evidence may be admitted to raise a doubt if a clear and sensible meaning can be ascertained. Windeyer J in *Lutheran Church of Australia South Australia District Inc* v *Farmers' Co-Operative Executors and Trustees Ltd* (1970) 121 CLR 628 quoted at 649 the following passage with approval from *Wigram on Extrinsic Evidence in Aid of the Interpretation of Wills* at p 8

> "… any evidence is admissible, which, in its nature and effect, simply explains what the testator *has* written; but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what he *intended* to have written. In other words, the question in expounding a will is not, – What the testator meant? as distinguished from – What his words express? but simply – What is the meaning of his words? And extrinsic evidence, in aid of the exposition of his will, must be admissible or inadmissible with reference to its bearing upon the issue which this question raises."

The conflict in authority demonstrates that the words in the will are ambiguous and extrinsic material may assist. See also *Sherratt v Mountford* (1873) 8 LR Ch App 928.

[20] Whilst Mr Werner has no independent recollection of the appointment with the testatrix in 2000, it would be very strange that advice would be given by an experienced officer at odds with the long established practice of the Public Trust Office as to substitution on lapse. It may be that there was no clear understanding by the testatrix as to how the substitution on lapse principle worked after it was explained to her. There may have been a mutual misunderstanding. But it is also possible that the testatrix was content with the explanation and only wished to "tidy up" her will since Leslie and William, her sons, had now died. There is little in Mr Walker's affidavit to suggest that she did not want her grandchildren to take their fathers' shares and in the circumstances of this body of extrinsic evidence it is not appropriate to speculate about the testatrix's intention by reference to the meeting on 13 December 2000, although the instructions may be of assistance. However they, too, are potentially infected by the quality of the explanation given. The better course is to accede to Wigram's directive and seek to ascertain what the words used in the will express.

Previous law and subsequent changes

[21] More assistance may be derived from the work of the Law Reform Commission and an understanding of the mischief sought to be remedied by the revised legislation. The Queensland Law Reform Commission ("the Commission") was charged with examining the law relating to the administration of estates on 15 February 1973. The working paper was widely circulated and in due course the Commission forwarded a draft bill and commentary to the then Attorney-General in 1978. As the report acknowledged, the Commission was much indebted to Mr W A Lee, a leading scholar in this field, then of the University of Queensland, for his contribution to its work. His work and that of Dr John Morris, also a member of the Commission, was praised by the Minister in his Second Reading Speech. The *Succession Act* 1981 was passed virtually unchanged from the Commission's draft save for some minor drafting revision.

[22] The Commission engaged in a wide-ranging revision of the laws on succession scattered, as they were, through many statutes. So far as this application is concerned much of the law about the construction and rectification of wills, the

provisions relating to which appear in Pt 2 Div 4 of the *Succession Act* 1981, underwent change from the previous law largely contained in the *Succession Act* of 1867.

[23] So far as the question of lapse is concerned, it is well to commence with s 29 dealing with the construction of residuary disposition clauses. Prior to the enactment of s 29, the rule was that where a testator left residue to a number of persons one or more of whom predeceased him, unless the gift could be construed as a class gift the lapsed share passed as an intestacy of the deceased, Law Reform Commission Report ("LRC Report") p 16. The Commission regarded the avoidance of unintentional partial intestacies as a legitimate object of a programme of revision of the succession laws. It was of the opinion that the old rule leading to a partial intestacy often led to unfairness and recommended that the lapsed share of residue should pass, not to the intestate estate of the deceased but to the other residuary beneficiaries who would take proportionately, LRC Report p 15. The Commission emphasised that s 29(1)(b) was subject to the Act, so as "to ensure that the substitutional provisions of section 33 are not cut back…" p 16. Section 29 was subsequently amended from the draft in a manner which makes clearer the meaning.

[24] Section 61 of the *Succession Act* of 1867 was concerned with the way in which certain words and phrases such as, "die without issue", should be construed. That provision was substantially retained in s 30(1) of the *Succession Act* 1981. Sub-section (2) was inserted to change what previously had been a somewhat capricious *per capita* distribution to issue and descendants of issue and the subject of much negative comment, *Cancellor v Cancellor* (1862) 2 Dr & Sm 194; 62 ER 595 per Kindersley VC at 198, and *In Re The Will of Moore* [1963] VR 168 per Adam J at 172. The example in the LRC Report illustrates the mischief identified at p 17

> "If a benefit is left to the 'issue' of A, and when it takes effect the issue of A consist of one child aged 30 who has four children and one child aged 20 who has no children each will take one-sixth of the benefit. Any further children born to the elder child would take nothing; and children born to the younger child would take nothing."

[25] The Commission recommended that benefits to the issue or descendants of a person should be distributed to them in equal shares among the nearest surviving issue and by representation among the more remote surviving issue. As the Commission recognised the expression "by representation" had a statutory origin in the *Statute of Distributions* of 1670

> "It means in principle that surviving issue more remote than the nearest surviving issue represent their parent, if deceased, and take (between them if more than one) the share that their deceased parent would have taken had he survived. …
>
> The formula works however remote the nearest surviving issue are, and however remote the more remote representatives are. Thus if a deceased person leaves only grandchildren and great grandchildren, the grandchildren will take in equal shares and the great grandchildren by representation. It is considered that this is fairer than the traditional *per stirpes* rule which bases itself on the factual

> assumption, generally but not universally correct, that a deceased person never dies leaving grandchildren surviving him without also leaving children surviving him. This formula is repeated in sections 33 and 36," p 18.

[26] Finally, on this significant change to the law, the Commission said at pp 18-19

> "There are added reasons, quite apart from the criticisms of the rule which exist, for changing this rule. One is that it is consistent with the *per stirpes* policy of this Act which emerges as part of the intestacy rules in Part III and as part of the rules against lapse in section 33. It is desirable that the *prima facie* rule of construction should coincide with the *prima facie* policy of the legislature. The other is that by having a settled, clear rule, the use of *per stirpes* clauses, which are very much the preserve of technical draftsmen, will not be so crucial, and indeed it may often be possible to omit them altogether. On the other hand, it will be very easy, technically, to displace the *per stirpes* presumption, which we now recommend should be brought into the law, by the use of the very simple layman's expression such as 'equally' or 'in equal shares'."

[27] Section 31 concerns the power to rectify wills with which this application is not concerned. Then come s 32 and s 33 which concern lapse.

[28] Section 95 of the *Succession Act* of 1867 provided that where two or more persons died in circumstances rendering it uncertain as to which of them survived the other(s) death it was presumed to have occurred in order of seniority, that is, the older was presumed to have predeceased the younger. That provision, as the Commission observed, proved unsatisfactory where a husband and wife died together, intestate, in an accident and there were no children. This meant that the younger spouse's estate took all. The burden of two sets of death duties when death did occur in close proximity had already led to the practice of wills being drafted with a survivorship clause, usually of some days. Legislative change to reflect this practice in other jurisdictions did not appear in Queensland statute law.

[29] Section 32(1) provides that unless a contrary intention appears in the will, a disposition of property to a person who does not survive the testator for 30 days will lapse. The Commission observed at p 21 of the LRC Report

> "In the case of issue of the testator a lapse brought about by the operation of this section will be saved by the operation of the next section. In other cases, lapse will occur in the ordinary way and the subject matter of the lapsed disposition will pass with the residuary disposition, if any, in accordance with s. 28(b)."

Section 32(2) provides

> "A general requirement or condition that a beneficiary survive the testator is not a contrary intention for the purpose of this section."

Of this provision the Commission observed at p 21 of the LRC Report

> "It seems prudent to make it clear that a general requirement or condition that a beneficiary survive the testator should not constitute a contrary intention of the will for the purposes of this section. A testator might say that a benefit is to go to 'such of' the members of a class 'as survive me'; and it might be argued that 'survive' should be construed strictly and so as indicating an intention contrary to the section. Since such survivorship requirements are common in precedent forms and their use may produce results which this section is designed to avoid, this provision seems to be desirable. If a testator wishes to avoid the provisions of this section he will have to state explicitly that the beneficiary is to take if he survives him for any length of time."

Nothing could be plainer than the articulation of the mischief sought to be remedied by the change in the law in s 32 and that s 32(2) was informed by the knowledge that will precedents are revised rarely even if the law changes.

[30] The forerunner of s 33 was s 65 of the *Succession Act* of 1867. It provided that where any issue of a testator to whom a benefit was given died in the testator's lifetime leaving issue who survived the testator, the benefit did not lapse but took effect as if the issue had died immediately after the testator – that is, it passed to that issue's estate. This meant that the benefit passed to whomsoever the deceased issue left property in his will (or on an intestacy) – not necessarily to his children. The many difficulties associated with this fictional survival provision or its analogues in other jurisdictions were discussed by Professor H A J Ford in *Lapse of Devises and Bequests* in (1962) 78 LQR 88 to which the Commission had reference.

[31] The Commission proposed to give effect in s 33(1) to a partial *per stirpes* distribution, that is, the issue of the deceased issue to take the deceased parent's share. That provision was then in consonance with the proposed intestacy provisions. In 1992 the Commission recommended a return to the original *per stirpes* rule for practical rather than theoretical reasons, LRC Report No 42 *Intestacy Rules* at para 3.3 and 3.4, W A Lee *Lee's Manual of Queensland Succession Law* 5th ed (2001). Those provisions were subsequently amended in 1997 to result in a strict *per stirpes* distribution, *Succession Act Amendment Act* 1997, s 36A. No amendment was made to s 33 (or s 32) which Mr Lee has suggested was an oversight, para 1205 at fn 18.

[32] To prevent derogation from distribution to a deceased child's issue s 33 (2) was included by the Commission in the same form as s 32(2) and for the same reason. That the purpose of s 33 was intended to be remedial in nature to provide for an anti-lapsing provision by way of a statutory substitution gift intended to provide for a wider distribution within a family is plain. It was the collective experience of the Commission and, it would seem, of bodies such as the Queensland Law Society who commented on the draft bill, that a mixed *per capita* and stirpital outcome was how testators wanted to leave their estates, LRS Report, p. 22, Second Reading Speech, p. 1030.

"Unless a contrary intention appears by the will"

[33] In *Pohlner v Pfeiffer* (1964) 112 CLR 52 the court considered whether the testatrix in her will had evinced a contrary intention to the rule of construction that the will shall speak and take effect as if executed immediately before the death of the testatrix with respect to the property comprised in the will. Windeyer J made the unsurprising observation at 77

> "But the correct view is, I think, that whether or not a contrary intention appears depends upon the meaning of the will construed according to ordinary principles of construction, and in the light of any extrinsic evidence properly admissible of facts, known to the testator, that existed at the time he made his will."

The question here is whether the testatrix has demonstrated an intention contrary to the rule enshrined in s 33 that where her issue does not survive her for a period of 30 days the nearest issue of that issue who survives her shall take in place of that issue. In other words, did she intend that her grandchildren, being the children of her children would not take in the event that one of her children predeceased her or did not survive her for more than 30 days?

[34] Accordingly, is the expression in the testatrix's will "as shall survive me for a period of 30 days and if more than one in equal shares" beyond a general requirement or condition that the issue survive the testatrix which, as a consequence of s 33(2) does not displace s 33(1) so as to give rise to a contrary intention? The Public Trustee contends that the expression at its highest is only a general condition or requirement that the testatrix's issue survive her and is not a contrary intention for the purposes of s 33 (1) of the *Succession Act* 1981. In short, the Public Trustee submits that the reference to "equal shares" merely describes how the one gift, namely the residuary estate, is to be shared between the beneficiaries and not a limitation on the number of beneficiaries. Mr Walker would contend that "if more than one in equal shares" is qualitative rather than quantitative. That is, describes the beneficiaries, not how much they take.

[35] The authorities in Queensland are not uniform in their approach to this question. In *Re Trenfield* OS No 52 of 1986 unreported decision of Kneipp J of 10 October 1986 his Honour concluded that the subject provision in the will was governed by s 65 of the *Succession Act* of 1867 rather than the 1981 Act. It will be recalled that s 65 provided for a fictional survival of the child of a testator where that child predeceased the testator and left issue. The share then went to the deceased child's estate. His Honour had to decide whether a devise in a will to the three named children of the testatrix as should survive her displaced the fictional survival rule in s 65. That deceased child was survived by a wife and son who survived the testatrix. In brief unreserved reasons, his Honour concluded

> "Although the lapse of the share of a deceased legatee or devisee is prevented only by the survival of issue of the deceased legatee or devisee, the benefit, it is clear, is not taken by the issue but by the estate of the deceased legatee or devisee."

His Honour, therefore, concluded that the wife of the deceased child as executrix of his estate was entitled to her deceased husband's share under the will. This occurred only because the deceased child was survived by a son. In other words, his Honour concluded that the expression "as should survive me" was insufficient to found a contrary intention to s 65.

[36] In *Re the Will of Macaudo* [1993] 2 Qd R 269 Derrington J was required to construe two expressions giving separate benefits to children. The first gave a gift of property "to such of them my sons the said… and… as shall be living at the date of my death and if more than one in equal shares as tenants in common." The other clause related to the gift of the residuary estate "for such of my children as shall be living at the date of my death and if more than one in equal shares as tenants in common provided always … that if any of my said children shall predecease me leaving a child or children… and if more than one equally between them shall take the share, benefit or interest to which his, her or their parent would have been entitled… had such parent survived me… " The will was governed by s 32 of the *Succession Act* 1981 so that a son who died 13 days after the testator was deemed to have predeceased him. But s 65 of the *Succession Act* of 1867 which otherwise applied to the will provided that where a son who predeceased (even presumptively) a testator left issue (as here) he was deemed to have died after the testator unless a contrary intention appeared in the will. Derrington J concluded that the clause in the will disposing of the residuary estate displaced s 65 so that s 32 prevailed and the residuary estate was to be distributed amongst the deceased son's surviving children as to one half share equally.

[37] By his Honour's failure to advert to the phrase "if more than one in equal shares" (he passingly refers to "as tenants in common") it must be concluded that he did not consider they evinced an intention contrary to s 32.

[38] Justice Byrne in *In re Paton*, OS No 837 of 1994 unreported decision of 15 December 1994, applied s 65 of the *Succession Act* of 1867 to the construction of a will where the testatrix gave her estate

> "… to such of them my children … as shall be living at my death and if more than one in equal shares."

Two of the testatrix's four children who were living at the time when she executed her will predeceased her. The question was whether the expression "as shall be living at my death" indicated a contrary intention to s 65. Section 65 applied only where a predeceased child left issue. No mention is made in the reasons of issue but it is unlikely that the Public Trustee would have sought the assistance of the court about the application of s 65 if there were not. There was no legislative provision the equivalent of s 33(2) in the 1867 Act. His Honour concluded

> "The language which the testatrix has chosen is only consistent with an intention on her part to leave the whole of the estate to those of the named children who survived her..."

[39] In *Burman v Burman* [1998] QCA 250, McPherson JA with whose reasons Pincus JA and Helman J agreed, construed a will, the original provision of which had left

the residue of the testatrix's estate to "such of my sons as shall survive me" but added that should her son, Neville, predecease her leaving his wife surviving the testatrix, then his wife should take the share which Neville would have taken had he survived. Neville died prior to the testatrix and shortly afterwards the testatrix executed a codicil in which she effected two changes to the dispositions made by the original will. The first was to revoke the clause which provided for Neville's wife to take should he predecease the testatrix and instead provided for the payment to her of a pecuniary legacy. The second was to add a further clause to the will which directed the executors to pay and transfer the residue of her estate to "such of my sons as shall survive me and if more than one as tenants in common in equal shares". There was a separate proviso in that clause for a gift over to different named charities in the event that either of the surviving sons predeceased the testatrix. At his death Neville had seven children who claimed that s 33 of the *Succession Act* 1981 entitled them to take their father's share. McPherson JA observed at para 6

> "A possible view of the expression 'such of my sons as shall survive me' is, however, that it is neither a requirement nor a condition but rather an essential element in the description of the beneficiaries. If the mere use of the word 'survivor', or some other form of that word, to designate a beneficiary is invariably neutralised by s 33(2), then the effect is, to some extent, to restrict the full testamentary freedom which has hitherto existed of disposing of property at death. It becomes considerably more difficult to expressly provide for lapse unless an apt synonym can be found for the word 'survivor' or 'survives' that will succeed in escaping the impact of s 33(2)."

[40] The court did not reach a final conclusion about the meaning of the expression because when the testatrix altered her testamentary dispositions as a consequence of the death of Neville her intention not to benefit Neville's children was clear both by the events which had happened and by the changes to the will providing for distribution to named charities in the event the surviving sons predeceased her. McPherson JA referred to *Re King* [1953] VLR 648 with apparent approval where a gift to "such of my two sons Sydney and Walter as shall be living at the time of my death" was held to display a contrary intention sufficient to displace the operation of the provision in s 31 of the *Wills Act* 1947 (Vict), corresponding to s 33(2) of the Queensland Act.

[41] I now consider *Public Trustee of Queensland v Robertson* [2005] 2 Qd R 444. The matter came on before me on an application by the Public Trustee for the opinion of the court pursuant to s 134 of the *Public Trustee Act 1978* as to the appropriate course to be taken by the Public Trustee pursuant to s 132. The testator died in 1996 leaving a will appointing the Public Trustee as his executor and trustee. He had two children, a son and a daughter, both adults. The son had one child, a daughter. By his will he gave his estate to his two named children "as shall survive me for a period of thirty (30) days and if both in equal shares". The son left Australia in about 1984 "under a cloud" and so far as the evidence revealed, had not returned. There was some evidence that a few years later he may have been alive in the United States of America. I was not persuaded on the material before the court

that there had been an adequate search undertaken for the son to permit the Public Trustee to distribute the estate on any basis. In the course of my reasons I wrote:

> "If Louis Robertson died before his father or did not survive the testator for a period of 30 days then it seems that Mrs Murray [the daughter] is entitled to the whole of the residuary estate. Without finally deciding that matter, the terms of the will appear to displace the operation of s 33(1) of the *Succession Act 1981* which is not revived by s 33(2), see *Bassett v Hall* [1994] 1 VR 432, and *Burman v Burman* unreported decision of the Queensland Court of Appeal No 11629 of 1997 BC9 804376 of 1 September 1998." [2000] QSC 301 at para 13.

The effect of s 33 was not fully argued and it was not necessary to decide the point in view of my conclusion about the evidence.

[42] Some years later, after causing extensive enquiries to be made, the Public Trustee again applied pursuant to s 134 of the *Public Trustee Act*. Justice Douglas concluded that it was reasonable for the Public Trustee to doubt the existence of the son. He then considered whether, in exercising those powers under s 132 the Public Trustee should do so on the basis that s 33(1) of the *Succession Act 1981* applied. His Honour referred to *Re Trenfield* and *Re Paton* but not to *Re Macaudo* and preferred the approach of Byrne J in *Re Paton* to that of Kneipp J in *Re Trenfield*. His Honour also referred to *Burman v Burman*, particularly the passage which I have cited above. His Honour concluded at 447

> "The language in this will goes beyond a general requirement or condition that the issue survived the testator in specifying that the residue goes to such of the children 'as shall survive me for a period of 30 days' and goes on to say and 'if both in equal shares'. The clear inference from that use of language is that if one child does not survive the testator for 30 days the other child takes the whole of the residuary estate.
>
> That seems to me to be something more than a general requirement or condition that the issue survive the testator …."

His Honour then ordered that the Public Trustee distribute the estate on the basis that the son was not alive when his father died so that the whole estate might be distributed to the testator's daughter.

[43] There are a number of authorities in other Australian jurisdictions which may assist. I have mentioned *Re King*. That decision was the subject of adverse comment by Professor Ford in his Law Quarterly Review article. Professor Ford argued that the anti-lapse provision in the legislation, the equivalent for these purposes to s 33 of the Queensland Act, "could not be excluded unless the testatrix showed that she had in mind one son predeceasing her leaving issue who survived her", at p 105. To similar effect is Hardingham, Neave and Ford *Wills and Intestacy in Australia and New Zealand* 2nd ed (1989) at 240. Unbowed by such formidable academic opinion, the Appeal Division of the Supreme Court of Victoria in *Bassett v Hall* [1994] 1 VR 432 upheld the reasoning in *Re King* at 435. In *Bassett v Hall* a testatrix by her will

gave the whole of her estate for the benefit of her two named sons "as shall be alive at the date of my demise". The testatrix further directed in that clause "that my estate shall be divided into two equal undivided parts or shares and each son of mine is to receive one equal undivided part or share". At the date of the testatrix's death one of her two sons had predeceased her but leaving five children who were the plaintiffs in the proceedings. Section 31 of the *Wills Act* 1958 (Vict), although expressed less succinctly that s 33 of the Queensland Act, provided for a gift to issue of deceased children who predeceased their parent unless a contrary intention appeared in the will and that a condition as to survivorship was not a contrary intention.

[44] The appellants, who were the children of the deceased son of the testatrix, submitted that no intention contrary to the anti-lapse provisions in s 31 was manifested in the will, and further that it had to appear that the testatrix had directed her mind to the existence of issue and to their exclusion, the position taken by Professor Ford and the learned authors of *Wills and Intestacy in Australia and New Zealand*. Their Honours (Marks, Gobbo and Coldrey JJ) said at 434-435

> "Turning first to the argument as to the meaning of contrary intention, we are unable to agree that these words have a special meaning in s 31 which they do not have elsewhere. It will be a question in each case as to whether a contrary intention is disclosed in the will. There is no warrant for reading into the statute a requirement that there must be manifested in specific terms an intention to exclude known issue of any beneficiary who does not survive the testator.
>
> In our opinion, where the will provides that in the event of one of the two named beneficiaries predeceasing the testator, the surviving beneficiary was to take the whole gift this would ordinarily suffice to demonstrate a contrary intention for the purposes of s 31. It is not necessary that there be an exclusion of a gift over to the issue of the beneficiary who predeceased the testator. Such a requirement would be tantamount to saying that the only effective contrary intention would be an express exclusion of s 31".

McPherson JA referred to *Bassett v Hall* with apparent approval in *Burman* at para 7. So too, did Young J, as his Honour then was, in *Re estate of Jenkinson* [2000] NSWSC 495 although that was a case of a clear gift over.

[45] Mr Fraser in his very thorough submissions has referred to numerous other cases but I think it unnecessary to discuss them. He contended that it would be an odd result if a phrase such as "and if both in equal shares" which was designed to demonstrate that the gift to the children of the deceased was not a gift for an estate or interest determinable at or before death of those children so as to qualify the gift for the purpose of s 33 (1) had exactly the opposite effect. He submitted that the phrase qualifies the extent of the gift and is by way of description of the nature of the gift which will be received by the children if there are more than one who survive the deceased. It is not, he submitted, descriptive of the persons who are to

take. That submission is in the face of the observations made by McPherson JA in *Burman*.

The amending legislation of 2006

[46] At my request Mr Fraser provided submissions about the 2006 amendments to the *Succession Act*. The *Succession Amendment Act* 2006 made substantial changes to the *Succession Act* 1981and in particular a new s 33N repealed s 33. However, that provision only applies, as mentioned, to wills of persons who died after 1 April 2006. A number of modifications to s 33 have been introduced without altering its essential meaning. It seems that this was to conform to the recommendations of the National Committee for Uniform Succession Laws.

[47] It cannot be said that the legislation was enacted to accommodate or reflect any particular curial construction, *Ex parte Campbell* (1870) LR 5 Ch A pp 703 per James LJ at 706. Accordingly no assistance can be obtained from the amending legislation in construing the will.

Conclusion

[48] The words "if more than one in equal shares" cannot be surplusage. Without s 33(2) the plain meaning is that the testatrix wished to benefit survivors. The mischief sought to be remedied by the inclusion of s 33(2) is also plain. But the meaning contended for, namely, that the words are descriptive of the size of the gift is not compelling. Anything other than equality of shares would need to be specified not the reverse. Whatever the commentators might wish and what might be the practice and without adhering to form over substance, when a testatrix says "to those of my children [who are named] as shall survive me for a period of thirty (30) days and if more than one in equal shares" she must intend to benefit by those words only her surviving children and not their issue. This conclusion is amply supported by the authorities to which I have referred.

[49] The final question is whether this conclusion should be modified in light of the instructions for this will. In my opinion it should not because the words themselves are sufficient to displace the operation of s 33 and such an outcome does not lead to and absurd or capricious result.

[50] The answers to the questions by the Public Trustee are

(a) The use of the words "*as shall survive me for a period of thirty (30) days and if more than one in equal shares"* in clause 5 of the will indicates a contrary intention by the deceased thereby excluding the operation of s 33(1) of the *Succession Act* 1981.

(b) Unnecessary to answer.

(c) The Public Trustee of Queensland should distribute the rest and residue of the estate of the deceased to the respondents, Margaret Ada Jacob, Leonard Gough Walker and Robert John Walker.