SUPREME COURT OF QUEENSLAND

CITATION:	*Morrison v Luckman* [2012] QSC 361
PARTIES:	**Leanne Maree MORRISON** (first applicant) **Paul DAVIS** (second applicant) **John Owen MARTIN** (third applicant) **v** **David Julian LUCKMAN** (first respondent) **Domino Guiseppe SORBELLO** (second respondent)
FILE NO/S:	SC 358/12
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	2 November 2012 (ex tempore)
DELIVERED AT:	Cairns
HEARING DATE:	2 November 2012
JUDGE:	Henry J

ORDER:

1. The Court declares that:

(a) The late John Joseph Sorbello intended the handwritten alteration dated 23 February 2012 that appears within clause 3(c) of the last will of the late John Joseph Sorbello dated 26 May, 2010 to form an alteration of the said Will within the meaning and for the purposes of s. 18(2) of the *Succession Act 1981*.

(b) The late John Joseph Sorbello intended the handwritten document dated 27 February, 2012 whereby he:

(i) released his sister, the first named Applicant, and his brother-in-law, Evan Morrison, from any monies owing on vacant land at 8 Coreega Close, Mooroobool; and

(ii) appointed the first named Applicant and the second named Applicant as new executors of the Will;

to form an alteration of the last Will of the late John Joseph Sorbello dated 26 May, 2010 within the meaning and for the purposes of s. 18(2) of the

***Succession Act 1981*.**

(c) The first and second named Applicants, in their capacity as the appointed executors and trustees of the estate of the late John Joseph Sorbello, would be justified in holding so much of the late John Joseph Sorbello's real and personal estate as comprises the residuary estate upon the trusts provided for under clause 4(b) of the last Will of the late John Joseph Sorbello dated 26 May, 2010 as so amended pending the effluxion of the life estates provided for under clause 4(a) of the said Will, rather than distribute the said residuary estate upon a partial intestacy for want of an existing qualifying beneficiary as at the date of death of late John Joseph Sorbello.

2. Subject to any formal requirements of the Registrar, that last Will of the late John Joseph Sorbello dated 26 May, 2010 as amended by:

(a) the handwritten alteration that appears within clause 3(c) of the said instrument;

(b) the handwritten documents dated 27 February, 2012 (a copy of which comprises exhibit JAV1 to the affidavit of Julie Ann Veronese filed 27 September, 2012);

be admitted to probate in solemn form of law.

3. The Applicants' and the Second Respondent's costs of an incidental to this application by paid out of the estate of the late John Joseph Sorbello on an indemnity basis.

CATCHWORDS: SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND THE EFFECT OF TESTAMENTARY DISPOSITIONS – GENERALLY – where a clause of the will refers to the offspring of a nephew or niece "who shall survive me" – where the intended beneficiaries under that clause were not yet living at the time of the testator's death – whether the clause should be interpreted to include such beneficiaries

The Public Trustee of Queensland v Smith [2009] 1 Qd R 26
Re Benn, Benn v Benn (1885) 29 Ch D 839
In re Hill, Chapman (1885) 54 LJ Chancery 595
Brennan v Permanent Trustee Company of New South Wales Ltd (1945) 73 CLR 404

COUNSEL: MA Jonsson for the applicant

SOLICITORS: Greenwoods Solicitors for the applicant

J Parisi for the second respondent

HIS HONOUR: The late John Joseph Sorbello passed away on 27 February 2012 as a result of a shotgun wound to the head. His death occurred against a background where he appears to have been fatally ill with cancer.

He made a will on 26 May 2010. There is no particular dispute as to the validity of its execution.

He, in the days leading up to his death, consulted with his solicitor and his accountant raising with both of them variations to aspects of his will. Relevantly here, on 23 February 2012, he amended part of his will, in particular paragraph 3C, by deleting the words, "the proceeds of any superannuation policies of which I may die possessed, together with". He explained in making that amendment and signing it and having it witnessed by one other person that his intention was that proceeds of superannuation should go to the residue of the estate.

The amendment to the will was not performed in accordance with the requirements of the *Succession Act* 1981 (Qld); in particular there were not two witnesses who signed the changes.

On the morning of his death on 27 February 2012, he signed a document, which was also witnessed by one person only and thus suffers from the same technical deficiency, saying:

> "Further to my last will and testament, I hereby release my sister Leanne Morrison, and brother-in-law Evan

Morrison from any monies owing on vacant land at 8 Coreega Close, Mooroobool.

I also appoint new executors to my will as Paul J. Davies my accountant) and Leanne Morrison (my sister)."

The question arises whether or not those changes have legal effect. They do not meet the requirements of s 10(4) of the *Succession Act* 1981 in that at least two of the witnesses must attest and sign. In a similar vein, they do not meet the requirements of s 16 which effectively adopts the requirements of s 10 in relation to will alterations.

Those problems are not fatal in that the Court, under s 18(2), can dispense with execution requirements for a will for alteration or revocation if the Court is satisfied that the person intended the document or part to form the person's will, an alteration of the person's will or a full or partial revocation of the person's will.

As at s 18 (3), it is made plain the Court can have regard not only to the documentary changes, but to any evidence relating to the way in which they occurred and any evidence of the person's testamentary intentions including evidence of statements made by the person.

That these changes were intended is undoubted. The purpose behind the changes and the intention to make them was communicated to the professionals I have already referred to.

As I have already indicated, there was no difficulty with the validity of the initial will's execution. Whilst the purported alterations are problematic for the reasons I have given, in the sense of strict compliance, there is evidence in this case clearly showing that the changes are entirely consistent with the testamentary intentions of the deceased. That the evidence is so clear on this is illustrated by the second respondent's position here today, which is not to argue those aspects of the matter. I note for completeness that the first respondent does not wish to take a partisan role in the matter and will abide the order of the Court. The orders I will make in due course will recognise the conclusion I have just reached.

The more difficult issue in this case relates to that part of the will which purports to distribute the rest and residue of the estate. The relevant part of the will reads as follows:

> "4. My Trustees shall hold the rest and residue of my estate UPON THE FOLLOWING TRUSTS:
>
> (a) TO PAY the net annual income arising therefrom as follows:
>
> (i) 25% to my sister LEANNE MAREE MORRISON during her life;
>
> (ii) 25% to my nephew JOHN OWEN MARTIN during his life;
>
> (iii) 25% to my friend DAVID JULIAN LUCKMAN during his life;
>
> (b) TO PAY AND /OR CONVEY the rest and residue of my

> estate to the first male offspring of my nephew JOHN OWEN MARTIN who shall survive me and attain the age of fortyfive (45) years and if no such male offspring shall survive me and attain the age of fortyfive (45) years THEN to the first female offspring of my nephew JOHN OWEN MARTIN who shall survive me and attain the age of fortyfive (45) years and if no such female offspring shall survive me and attain the age of fortyfive (45) years THEN to the first male offspring of my niece CASEY LEE MARTIN who shall survive me and attain the age of fortyfive (45) years and if no such male offspring shall survive me and attain the age of fortyfive (45) years THEN to the first female offspring of my niece CASEY LEE MARTIN who shall survive me and attain the age of fortyfive (45) years."

There are two potential issues.

Dealing very briefly with the first of them which, in my view, is obviously not problematic, a potential impediment, at least as the law once might have been, was the common law rule against perpetuities in respect of that clause. However, that rule no longer operates in unadulterated form in this State: see, eg, ss 210 and 214 of the *Property Law Act* 1974 (Qld). The second respondent does not agitate to the contrary.

The trust established under clause 4(b) of the will must be deemed for the time being to be operative notwithstanding that

it allows for the possibility of a vesting outside the traditional perpetuity period. It is only when it becomes inevitable at some stage in the future that the vesting of the trust property must occur outside the perpetuity period that the gift can be taken to have failed on the ground of repugnancy under the rules against perpetuities.

I express no particular view as to whether it will or would have failed at that future time. I am not seized of all the evidence that may then be in place, nor for that matter do I have knowledge of what the law will then be. I am therefore untroubled in the circumstances by the rule against perpetuities as it presently applies in this State and to the extent it may be relevant in this case. It does not bear upon the validity of the contentious clause.

Turning then to the major bone of contention between the parties in relation to clause 4(b), the nub of the issue is this: the clause refers to the offspring of a nephew and niece "who shall survive me". Ordinarily, use of language such as "who shall survive me" contemplates that the person being referred to is living at the time of death of the deceased. See in that regard the analysis by Atkinson J in *The Public Trustee of Queensland v Smith* [2009] 1 Qd R 26, 34-35. As Her Honour put it:

> "In order to survive another, the survivor must be alive both before and after the death of a person who is survived. There is nothing in the will to suggest that any other meaning was intended."

The broader meaning that may arise in the use of a form of words such as that used in this case is not that there be a requirement that the person referred to is yet living at the time of the deceased's death and merely only that they have not yet died at the time of the deceased's death.

In this case, the intended beneficiaries under clause 4(b) were not living when the will was written and were not living at the time of death. The second respondent contends that the will ought be interpreted according to the ordinary meaning to which I have referred and which was discussed by Atkinson J in *The Public Trustee of Queensland v Smith*.

The question arises how the clause falls to be constructed. The starting point has to be that one has regard to the words of the will alone, but that consistent with modern principles of construction, the words "shall survive me" are looked at in the context of the entire use of language in the will. It will only be appropriate to have regard to matters beyond the content of the will itself in order to interpret its meaning if the language used in the will makes the will or part of it meaningless or ambiguous on its face or ambiguous in the light of surrounding circumstances: see s 33C(1) of the *Succession Act* 1981.

The second respondent's position in effect is that the language with which we are presently concerned is not meaningless or ambiguous, whether on the face of the will or in the light of surrounding circumstances. The position of

the applicant is that it is not meaningless either, but the applicant's fallback position is that if it is wrong in asserting the broader less ordinary meaning of "shall survive me", then at the worst, there is ambiguity on the face of the will in that language used in which case it is appropriate to have regard to extrinsic circumstances, that is to say, evidence beyond the mere language of the will.

Approaching the matter, firstly having regard only to the language of the will itself, one needs only look to clause 4(a) to identify context suggesting that the meaning urged by the applicant is the meaning which ought be attributed to the words in the will itself.

In simple terms, the point made by the applicant is that through 4(a), there were arrangements being made, in effect through a trust, for the payment of net annual income arising from the rest and residue of the estate in certain percentages to certain beneficiaries during their life. Clause 4(b) commences "TO PAY AND/OR CONVEY the rest and residue of my estate."

It must necessarily be that any determination of what is to be paid or conveyed of the rest and residue of the estate ultimately cannot conceivably be determined until the death of the beneficiaries named in 4(a). Putting it simply, 4(b) is inextricably linked with 4(a) and necessarily involves knowledge of events in the future.

The applicant referred to a number of cases in which the meaning for which it contends prevailed. In *re Benn, Benn v Benn* (1885) 29 Ch D 839 at 844, Cotton LJ observed:

> "'Surviving' means living beyond some period. Now the true rule for construing the rule is, that if a rule has been laid down fixing in the absence of any expressed intention the meaning of a word, then that meaning is to be given to it unless there is something in the context to vary the meaning, and if no such definite rule has been laid down, then the words are to be taken in their natural sense. There is no canon as to the period to which survivorship is to be referred, except that in an immediate gift it is to be referred to the death of the testator, and if there is a life estate then to the determination of a life estate."

The distinction there drawn echoes the future events expressly referred to in clause 4 of the will with which I am presently concerned. An application of Cotton LJ's observations from *Benn* to the present case would plainly favour the applicant. The second respondent, in submitting to the contrary, emphasised that the language used in *Benn* was “surviving” rather than "survive me", but it appears plain enough in the passage I have quoted that that is a distinction without a difference in the context of the principle discussed.

I was also taken to, *In re Hill, Chapman* (1885) 54 LJ Chancery 595 at 597. In that matter, Cotton LJ observed at 597 that "[t]he term 'survivor' after the determination of a previous interest undoubtedly means, as a rule, those who are living at that time." Again, that passage is apposite here. Here, we are not concerned in construing the effect of clause 4 only at the date of death. The question of who will be living at the time of the determination of the interest referred to in clause 4(a) is plainly a matter for the future.

The second respondent again sought to distinguish this case, or at least the principle referred to therein, on the basis the language there referred to "survive them" rather than "survive me", but again, with respect, it is the underlying reasoning that I have identified that is the important feature of the matter, and again the distinction is one without a difference for present purposes.

In *Brennan v Permanent Trustee Company of New South Wales Ltd* (1945) 73 CLR 404, Rich J observed at 409:

> "No one can doubt that according to the correct use of English the word 'survive' imports life before and after the event survived. A man does not survive another unless he was born before the other's death. But the testator and his draftsman do not appear to have been

> masters of English...courts of construction recognize that testators, in common with others, may misuse language."

I do not interpret those comments as calling in aid any subjective interpretation of the language of the will, which plainly must be on its face interpreted objectively, but rather an acknowledgement that words can sometimes mean different things and that that will be apparent from the context in which they are used.

In *Brennan's case*, the relevant passage was "for all her children who shall survive me and attain the age of 21 years or die in my lifetime leaving issue". At the date of that will, which was made a year before the death, six of the 12 legatees were married and had children, but since the death other legatees had married and more children had been born. The court determined that the provision in question included all children of the nieces of the testator who lived after his death and attained or should attain the age of 21 years, whether such children were born in his lifetime or after his death. This High Court authority appears to provide powerful support for the position of the applicant.

The second respondent sought to distinguish it from the present case on the basis that that was a case where at least

some of the children had been born, whereas here none had been born by the time of death. The force of the High Court's conclusion in *Brennan* must necessarily have been, regardless of whether anyone had been born at the time of death, that children born after the death still came within the language of "who shall survive me".

In my view then, this is a case in which the language used ought be given the meaning urged by the applicant, so that it was not a requirement of that language that the future beneficiaries had been born by the time of the deceased's death. If such future beneficiaries had been born by the time of the deceased's death, the clear intention of the language considered in context was to require that those who had been born did outlive the deceased, not to exclude as future beneficiaries those who had not yet been born by the time of death.

If I am wrong about that conclusion as to the meaning of the language based on the content of the will, then it seems to me that, at the worst, I would be dealing with a situation in which there is ambiguity as to the meaning. It follows, if that was so, that I would have regard to the broader evidence in the case. So, if I am wrong in my primary conclusion, it is permissible to have regard to that broader evidence to aid me in determining the intended meaning of the words. That broader evidence again supports the conclusion that it is not necessary that the future beneficiaries had been born by the time of death and necessary only that if any had been born,

they did survive the deceased.

The evidence is a one way street in that regard. None of the future beneficiaries were living at the time of the will, nor two years or so later were any of them living when the deceased, in obvious contemplation of his pending death, made the final changes to which I have referred. He was undoubtedly aware that they had not yet been born. He went to the trouble of making changes to his will, but not to the clause with which we are concerned. It is inconceivable that he intended that clause to be meaningless by reason that none of the potential beneficiaries had been born.

His clear intention was not that it be a requirement of the language he used that they had been born by the time of his death, and merely that if any of them had been, they outlived him. Putting it differently, it was clearly not his intention to exclude those potential beneficiaries who were not yet born by the time he died.

The upshot is the vesting and distribution of the ultimate residue cannot happen until the expiration of the prior life interest to which I have referred. The class of beneficiaries who might potentially qualify for that ultimate gift should not be taken to have closed until the point of cessation of the prior life interests. Clause 4(b) thus applies to all potentially qualifying offspring living at that point of time, even if not living now and even if not living at the time of death.

The form of orders sought, consistent with the reasoning I have just articulated, avoids the making of any final conclusive determination or declaration, given the future events to which I have referred. Rather, the form of orders are, in a sense, advisory orders (taking the form of, in part, a declaration) of a kind which will leave the executors charged with due administration of the estate in no doubt.

I have made minor amendments to the draft order, which I have indicated during the course of argument.

...

The draft order that was proposed contemplated a costs order only favouring the applicant. In my view, in the circumstances of this case, it is plain that the orders that are contemplated bring benefit, generally, to the estate and guidance to the executors as to the way in which it ought be administered. It was helpful, therefore, that the matter was agitated.

In the circumstances, my view is the second respondent should also get his costs on an indemnity basis, as is the regular course in estate matters. So, in clause 3 of the draft order, after the words "applicants", I have included "and second respondents".

Having made those changes, I order as per the amended draft,

signed by me and placed with the papers.
