SUPREME COURT OF QUEENSLAND

CITATION:	*Sadleir v Kähler & Ors* [2018] QSC 67
PARTIES:	**ANNE SADLEIR** (applicant) **v** **HANS-GERD KÄHLER AND ANTJE CHRISTINE ELSE ELISABETH GIEHR** (first respondent) **JULIA DECKER AND LAURA ISABEL PINTO** (second respondent) **MAIKE KÄHLER AND TIM KÄHLER** (third respondent)
FILE NO/S:	SC No 11828 of 2017
DIVISION:	Trial
PROCEEDING:	Originating Application
DELIVERED ON:	6 April 2018
DELIVERED AT:	Brisbane
HEARING DATE:	19 February 2018. Further submissions provided 19 February 2018 and 1 March 2018.
JUDGE:	Atkinson J
ORDERS:	**1. Pursuant to section 18 of the *Succession Act* 1981 (Qld), the handwritten document dated 15 January 1984, a copy of which is exhibit AS-2 to the affidavit of Anne Sadleir filed on 10 November 2017 forms the will of Hannes Kähler, deceased.** **2. Pursuant to section 6 of the *Succession Act* 1981 (Qld) and rules 603(1)(e) and 603(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) that, subject to the formal requirements of the Registrar, Letters of Administration with the Will of Hannes Kähler, deceased, dated 15 January 1984 be granted to the applicant.** **3. Pursuant to s 6 of the *Succession Act* 1981 (Qld), I declare that upon the proper construction of the Will of Hannes Kähler, deceased, dated 15 January 1984 and in the events that have occurred, the estate of the said deceased should be distributed to the applicant and the third respondents as tenants in common in equal shares.** **4. I will hear the parties' submissions as to costs.**

CATCHWORDS: SUCCESSION – MAKING OF A WILL – TESTAMENTARY INSTRUMENTS – EXECUTION – INFORMAL DOCUMENT INTENDED TO BE WILL – GENERALLY – where the deceased deposited a handwritten document referred to as "my will" with a firm of solicitors – whether the document forms a valid will

SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – PRINCIPLES OR RULES OF CONSTRUCTION – PRESUMPTION AGAINST INTESTACY – where the disposition to the deceased's brother was contingent on the deceased's brother not having divorced or separated from his wife – where the gift over was to the deceased's brother's three children – where the deceased's brother pre-deceased him, having not divorced or separated from his wife – whether the rule in *Jones v Westcomb* (1711) Prec Ch 316; 1 Eq C Ab 245, pl 10; 24 ER 149 applies – whether the real contingency has been satisfied and the gift over to the deceased's brother's children should operate

Succession Act 1981 (Qld), s 6, s 10, s 18

Uniform Civil Procedure Rules 1999 (Qld), r 603(1)(e), r 603(2)

Wills Act 1936 (SA) s 12(2)

Fell v Fell (1922) 31 CLR 268, cited

Fraser & Anor v Melrose & Ors [2016] QSC 213, cited

In the will of Dianne Margaret Cardie [2013] QSC 265, cited

Jones v Westcomb (1711) Prec Ch 316; 1 Eq C Ab 245, pl 10; 24 ER 149, followed

Kirby-Smith v Parnell [1903] 1 Ch 483, cited

Lightfoot v Maybery [1914] AC 782, cited

Mahlo v Hehir [2011] QSC 243, cited

Mellino v Wnuk [2013] QSC 336, cited

Re Bailey [1951] Ch 407, cited

Re Bowen, Treasury Solicitor v Bowen [1949] 1 Ch 67, cited

Re Buchanan [2016] QSC 214, cited

Re Edwards; State Trustees Limited v Edwards [2014] VSC 392, cited

Re Fox's Estate [1937] 4 All ER 664, cited

Re Grindrod (deceased) [2014] QSC 158, cited

Re Grosert [1985] 1 Qd R 513, cited

Re Harrison, Turner & Hellard (1885) 30 Ch D 390, cited

Re Johnston [1985] 1 Qd R 516, cited

Re Nichols; Nichol v Nichol & Anor [2017] QSC 220, cited

Re Rowney (deceased); Re Application by Watson for determination of construction of Will of Rowney (deceased) [1992] QSC 66, cited

Re Sinclair [1985] Ch 446, cited

Re Stacey, deceased [1949] St R Qd 244, cited

Re Tinker (deceased) [2016] QSC 217, cited

Re Yu [2013] QSC 322, cited

The Trust Company Limited v Gibson [2012] QSC 183, cited

Verrall v Jackson [2006] QSC 309, cited

COUNSEL:	R T Whiteford for the applicant The first respondent Hans-Gerd Kähler appeared on his own behalf The first respondent Antje Christine Else Elisabeth Giehr was heard on the papers No appearance by the second respondent No appearance by the third respondent
SOLICITORS:	The Estate Lawyers for the applicant The first respondent Hans-Gerd Kähler appeared on his own behalf The first respondent Antje Christine Else Elisabeth Giehr was heard on the papers No appearance by the second respondent No appearance by the third respondent

[1] By an amended originating application filed by leave on 19 February 2018, the applicant, Anne Sadleir, sought the following orders:

> "1A. Pursuant to s.18 *Succession Act 1981*, an order that the handwritten document dated 15 January 1984, a copy of which is Exhibit AS-2 to the affidavit of A Sadlier filed on 10 November 2017, forms the Will of Hannes Kähler, deceased.
>
> 1B Pursuant to s.6 *Succession Act 1981* and rules 603(1)(e) and 603(2) of the *Uniform Civil Procedure Rules 1999* that, subject to the formal requirements of the Registrar, Letters of Administration with the Will of Hannes Kähler, deceased, dated 15 January 1984 be granted to the Applicant.
>
> 2A. Pursuant to s.6 *Succession Act 1981* a declaration that, upon the proper construction of the Will of Hannes Kähler, deceased, dated 15 January 1984 and in the events which have occurred, the estate of the said deceased should be distributed to the Applicant and the Third Respondents as tenants in common in equal shares.

2B. Alternatively, pursuant to s.6 Succession Act 1981 a declaration that, upon the proper construction of the Will of Hannes Kähler, deceased, dated 15 January 1984 and in the events which have occurred, the estate of the said deceased should be distributed:

(a) One-quarter to each of the First Respondents;

(b) One-eighth to each of the Second Respondents; and

(c) One-twelfth to each of the Applicant and the Third Respondents.

2. That all parties' costs of this Application be paid from the estate of Hannes Kähler, deceased, on the indemnity basis."

[2] The application requires the determination of two major questions:

1. Is the handwritten document dated 15 January 1984 to be regarded as a Will; and

2. If so, how is it to be construed?

Personal circumstances of Hannes Kähler

[3] Hannes Kähler was one of four children born to Elisabeth Giehr and Hans Kähler.[1] Hannes died on 5 November 2016 at the age of 72, never having married and without issue. Elisabeth and Hans had three other children together who were full siblings of Hannes. They were Jorst Kähler and Gesine Kähler, both of whom pre-deceased Hannes and neither of who had issue, and Steffen Kähler. Steffen also pre-deceased Hannes. He died on 2 December 2009. Unlike his siblings, Steffen had issue, all of whom are still alive. They are Maike Kähler, Tim Kähler and Anne Sadleir. Steffen was also survived by his widow, Frauke Kähler,[2] the mother of Maike, Tim and Anne.

[4] Both Elisabeth and Hans, Hannes' parents, had issue from other marriages, making those children Hannes' step-brothers and sisters. Of those, Antje Koistinen[3] and Hans-Gerd Kähler survived Hannes and are still alive. Another step-brother, Jochen Kähler, pre-deceased the testator and left no issue. Another step-sister, Anne-Kathrin Kähler, pre-deceased Hannes, and left two issue who are still alive, Julia Decker and Laura Pinto.

[5] All of the potentially interested parties were served with this application which was brought by Anne Sadleir, Hannes' niece. Submissions were made orally and in writing by Anne's legal representatives and by Hans-Gerd Kähler who is resident in Germany and appeared by telephone. Written submissions were also received from Antje Koistinen who is also resident in Germany. All of those submissions have been considered together with the evidence filed in this court.

---

1 After initially identifying various people I shall refer to members of the family by their first given names not out of disrespect but to avoid confusion as a number of them have the same surname.

2 Frauke Kähler is also referred to as "Frauke Kaehler" in the material, a spelling also used elsewhere for the other members of the Kähler family. For the sake of consistency, the parties will be referred to as "Kähler".

3 Antje Koistinen uses that name in her written submissions and is referred to by that name in the family tree provided by Hans-Gerd Kähler. She is referred to as "Antje Christine Else Elisabeth Giehr" in the originating application.

[6] Shortly after Hannes' death, on 10 November 2016, his nephew Tim searched his house for a Will. During his search of Hannes' home, Tim found a family tree prepared by Hannes with some handwritten notes written in German at the bottom and Hannes' Australian Passport. The handwritten notes on the family tree are dated 18 August 2011. They are consistent with the family tree referred to at the commencement of these reasons except that they show that Hannes did not know if his step-brother "Gerd" or his step-sister "Kathrin" had any children. Under their names he has written "(?? Kinder)".

[7] Tim did not find a Will but he did find a receipt for documents from Sutherlands, a firm of solicitors in Kingaroy, acknowledging that Hannes had deposited documents with them on 12 July 1994. The receipt included a document described as "Will dated 15 January 1984". Further investigations revealed that the documents that had been held in safe custody by Sutherlands had been transferred to the custody of KF Solicitors of Kingaroy.

[8] Anne sought to obtain the document referred to in the receipt as "Will dated 15 January 1984". She received a scanned certified copy of that document. Following that, she engaged solicitors, the Estate Lawyers, and KF Solicitors then sent the documents that were deposited by Hannes into their safe custody to the Estate Lawyers. Those documents were described by KF Solicitors as follows:

> "1. Original handwritten document which purports to be a Will dated 15 January 1984;
>
> 2. Original Geburtsurkunde[4] dated 13 November 1944;
>
> 3. Original Australia nugget – Certificate of Authenticity and Despatch Notice dated 12 September 1988;
>
> 4. Original Certificate of Australian Citizenship dated 16 May 1978; and
>
> 5. Original Queensland Certificate of Title for Lot 18 on RP 169794 with Title Reference 15944146."

[9] The handwritten document is in the following terms:

> "MY WILL DATED 15TH JANUARY 1984
>
> I, Hannes KAHLER, nominate as my sole beneficiary my brother, Mr. Steffen KAEHLER, of 52 Walkleys Road, Valley View, Adelaide, provided that he is not separated or divorced from his wife, Frauke Edith, nee BROLL, in which case my beneficiaries in equal shares shall be their children MAIKE, ANNE and Tim KAEHLER (3).
>
> Townsville, the 15th of January 1984. *H Káhler*
>
> My assets to date:
>
> - Strata Title, Unit 4, 29 Stagpole St., West End (C/T in Safebox C'wealth Trad. Bank, Hermit Park)
>
> - Cheque A/C and others with above Bank

---

[4] German for Birth Certificate.

- Superannuation Qld. Electricity Generating Board (to be Qld. Electricity Commission)
- Contents of above Home Unit

H Káhler 15/1/84."

[10] Where "H Káhler" appears at the end of each paragraph, it appears to be consistent with Hannes' signature on his passport, a copy of which was deposited by Hannes with the handwritten document.

[11] By the time of Hannes' death, his brother Steffen had died. Steffen was married to his wife Frauke at the time of his death. They had not separated or divorced prior to his death.

Was the handwritten document a Will?

[12] The first question to be determined is whether the handwritten document dated 15 January 1984 should be considered to constitute Hannes' Will.

[13] Section 10 of the *Succession Act* 1981 (Qld) provides for the formal requirements for the execution of a Will. Essentially they are that a Will must be in writing and signed by the testator,[5] in the presence of two witnesses who attest and sign the Will in the presence of the testator.

[14] However, s 18 of the *Succession Act* provides that the court may dispense with those formal execution requirements. It provides:

> "18 **Court may dispense with execution requirements for will, alteration or revocation**
>
> (1) This section applies to a document, or a part of a document, that–
>
> (a) purports to state the testamentary intentions of a deceased person; and
>
> (b) has not been executed under this part.
>
> (2) The document or the part forms a will, an alteration of a will, or a full or partial revocation of a will, of the deceased person if the court is satisfied that the person intended the document or part to form the person's will, an alteration to the person's will or a full or partial revocation of the person's will.
>
> (3) In making a decision under subsection (2), the court may, in addition to the document or part, have regard to –
>
> (a) any evidence relating to the way in which the document or part was executed; and
>
> (b) any evidence of the person's testamentary intentions, including evidence of statements made by the person.

---

[5] Instead of the testator it may be signed by someone else in the presence of and at the direction of the testator: *Succession Act* s 10(2)(b)(ii).

> (4) Subsection (3) does not limit the matters a court may have regard to in making a decision under subsection (2)."

[15] Before the *Succession Act* was amended, the court had a limited power to admit a testamentary instrument to probate if the court was satisfied that the instrument expressed the testamentary intention of the testator and was in substantial compliance with the prescribed formalities.

[16] Section 18 gave effect to the recommendations of the Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills by the National Committee for Uniform Succession Laws.[6] The Queensland Law Reform Commission observed that the requirement that there must be "substantial compliance" had proven to be so great a stumbling block that the provision had had poor success.[7] The recommendation was made that the new power of dispensation be uniform across Australia. It followed a model first introduced in South Australia in 1975[8] and refined in subsequent model legislation.

[17] The matters that will concern the court when there is an application under s 18 of the *Succession Act* include:

1. Is there a document by the deceased person?

2. Does the document fail to comply with the execution requirements found in Part 2 Div 2 of the *Succession Act?*

3. Does the document purport to state the testamentary intentions of the deceased person?

4. Is the court satisfied that the deceased person intended the document to form the person's Will?

[18] The remedial nature of this legislation has meant that a liberal approach has been taken to the construction of s 18. Examples of documents that have been declared to be Wills which can be admitted to probate have included: an electronic version of a Word document;[9] a copy of a Will;[10] documents created on an iPhone;[11] a DVD;[12] unwitnessed handwritten amendments to a previous Will;[13] and even an unsent text message.[14]

---

6 Queensland Law Reform Commission, *Consolidated Report to the Standing Committee of Attorneys General on The Law of Wills*, Miscellaneous Paper No 29 (1997), chapter 3.3; see also Queensland Law Reform Commission, *The Law of Wills*, Report No 52 (1997), chapter 2.4.

7 See for example *Re Grosert* [1985] 1 Qd R 513 where, although the testator's signature appeared to be witnessed by two witnesses' signatures, the only witness who could be found said that she was the only witness present when the testator signed the Will; and *Re Johnston* [1985] 1 Qd R 516 where the deceased signed the Will in the absence of witnesses but obtained the signatures of two "witnesses" over the following week. In neither case was the document admitted to probate as a Will.

8 *Wills Act* 1936 (SA) s 12(2).

9 *Mahlo v Hehir* [2011] QSC 243.

10 *In the Will of Dianne Margaret Cardie* [2013] QSC 265.

11 *Re Yu* [2013] QSC 322.

12 *Mellino v Wnuk* [2013] QSC 336.

13 *Fraser v Melrose* [2016] QSC 213; *Re Buchanan* [2016] QSC 214.

14 *Re Nichols; Nichol v Nichol* [2017] QSC 220.

[19] Of particular relevance to this case, an unwitnessed handwritten Will was admitted to probate in *Re Grindrod (deceased)*[15] and *Re Tinker (deceased)*.[16]

[20] There are a number of circumstances which have satisfied me on the balance of probabilities that the handwritten document was Hannes' document. The handwriting and signature appear to be identical with other examples of Hannes' handwriting and signature. It was he who deposited it into safe deposit with a firm of solicitors in Kingaroy where it was referred to as his "Will dated 15 January 1984". The receipt for a document by that description was found in his home shortly after his death. The document appears to describe accurately Hannes' assets as at 15 January 1984 and shows his ultimate knowledge of his brother Steffen and Steffen's family.

[21] The document is not witnessed and so fails to comply with the formal requirements of s 10 of the *Succession Act*.

[22] There are a number of factors which have satisfied me that the document does purport to state the testamentary intentions of Hannes. The first of those is that the document is referred to in his handwriting as "my Will". It is dated and signed. It appears to state the assets which were then available for distribution on his death. Although it does not appoint an executor, the document identifies the beneficiaries to whom his property is to be disposed upon his death.

[23] Those factors together with the fact that he deposited it into safe custody with a firm of solicitors who gave him a receipt which described the document as a Will satisfy me that Hannes intended the handwritten document to be his Will. There is no suggestion that Hannes intended the document to only be a draft to be later formally executed. Hannes intended the handwritten document to be his Will.

[24] As the Will does not appoint an executor, Letters of Administration with a Will attached are required. The applicant's siblings, Maike and Tim have equal priority with the applicant for the grant under rule 603 of the *Uniform Civil Procedure Rules* 1999 (Qld) but do not oppose the applicant taking the grant.

[25] Accordingly I would order that:

1. Pursuant to section 18 of the *Succession Act* 1981 (Qld), the handwritten document dated 15 January 1984, a copy of which is exhibit AS-2 to the affidavit of Anne Sadleir filed on 10 November 2017 forms the Will of Hannes Kähler, deceased.

2. Pursuant to section 6 of the *Succession Act* 1981 (Qld) and rules 603(1)(e) and 603(2) of the *Uniform Civil Procedures Rules* 1999 (Qld) that, subject to the formal requirements of the Registrar, Letters of Administration with the Will of Hannes Kähler, deceased, dated 15 January 1984 be granted to the applicant.

---

[15] [2014] QSC 158
[16] [2016] QSC 217.

How should the Will be construed?

[26] In construing a will, the golden rule is that, if it is possible, the court should prefer a construction which avoids intestacy.[17] In *Fell v Fell*,[18] Isaacs J set out a number of principles relevant to the construction of wills. The most apposite to this case is the principle which his Honour expressed by quoting from a decision of the House of Lords and a decision of the Chancery Division as follows:

> "'The mind never inclines towards intestacy; it is a *dernier ressort* in the construction of wills' (Lord *Shaw* in *Lightfoot v Maybery* [1914] AC 782 at 802). 'In ascertaining the intention, I ought to a certain extent – we all know what the expression means – to lean against an intestacy, and not to presume that the testator meant to die intestate if, on a fair construction, *there is reason for saying the contrary*' (*Buckley* LJ in *Kirby-Smith v Parnell* [1903] 1 Ch at 489."

[27] Higgins J agreed citing the golden rule of Lord Esher referred to above concluding with his Lordship's words:[19]

> "You ought, if possible, to read the will so as to lead to a testacy, not an intestacy."[20]

[28] Applying that principle to this case, it is necessary to ask if there is a rule of construction which allows this will to read so as to be valid rather than leading to an intestacy. It is necessary in this case, as the testator, Hannes, did not state in his will, when read literally, what should happen if his brother, Steffen, pre-deceased him not having separated from or divorced his wife. The will stated that Steffen's children would take under the will if their father was separated or divorced from his wife.

[29] This was a contingent gift over to Maike, Anne and Tim. The general rule is that when there is a gift over upon a certain contingency, it will not take effect unless the exact contingency happens.[21]

[30] There are however exceptions to that rule. The relevant exception is referred to as the rule in *Jones v Westcomb*.[22] In *Jones v Westcomb*, a man who was possessed of "a long term for years" devised it by will to his wife for life, and after her death to the child with whom she was then pregnant. The will provided that if such child died before reaching the age of 21, then the property was to be devised one third to his wife and two thirds to other persons. The testator appointed his wife executor of the will. He then died. His wife, as it turned out, was not in fact pregnant; so the contingency on which she was to take, that is the death of the child before reaching the age of 21, could never happen as there was no such child.

[31] The question was posed whether the devise to the wife of the one third part of the property was good, because the contingency on which she was to take never happened.

---

17 *Re Harrison, Turner & Hellard* (1885) 30 Ch D 390 at 393 per Lord Esher MR.
18 (1922) 31 CLR 268 at 275-276.
19 (1922) 31 CLR 268 at 284.
20 (1885) 30 Ch D 390 at 392 per Lord Esher MR.
21 John G Ross Martyn et al, *Theobald on Wills* (17th ed, Sweet & Maxwell, 2010) at [28-095] citing *Re Bailey* [1951] Ch 407 at 411, 421 and *Re Sinclair* [1985] Ch 446 at 455.
22 (1711) Prec Ch 316; 1 Eq C Ab 245, pl 10; 24 ER 149.

The Lord Keeper[23] answered that, although she was not pregnant at the time of the will, the devise to her was good.

[32] *Theobald on Wills* describes this exception to the general rule in the following terms:

> "There is, however, a class of cases where, though the exact event upon which the gift over is to take effect does not happen, the gift over must a fortiori have been intended to take effect in the event that happens."[24]

Later *Theobald on Wills* further explains it as a class of cases:

> "in which, though the contingency is not penned in terms which include the event which happens, yet the court will consider what was the contingency really contemplated by the testator, and will give effect to the will if that contingency happens."[25]

[33] There are examples of the application of the rule in *Jones v Westcomb* in Australian cases. These cases show the application of the rule in such a way as to save a Will from intestacy when a contingent gift over might fail because the precise contingency has not occurred; but, nevertheless, the court found that the circumstances fell within the contingency in which the gift over must, *a fortiori*, have been intended to take effect.

[34] An example is found in a case in the Full Court of the Supreme Court of Queensland in *Re Stacey, deceased*.[26] In that case the testator left his estate to his sister with a contingent gift over to her son. The contingent gift over was in the following terms:

> "provided that at the time of my death she shall not be married, and in the event of her being married at such time, then such gift to her shall lapse and the whole of my said estate shall be transferred and handed over absolutely to her son Edwin Johnsen."[27]

[35] At the time the testator executed the Will, his sister was a widow. She predeceased the testator not having remarried. It was held by the Full Court that the gift to her son Edwin did not lapse and that he was entitled to the testator's estate, notwithstanding the death of his mother during the lifetime of the testator. Macrossan CJ, who wrote the leading judgment, referred to the passage from *Theobald on Wills* referred to above and the express approval of that class of case by Romer LJ in *Re Fox's Estate*:[28]

> "The principle is applicable, therefore, only in those cases where the court, looking at all the relevant circumstances of the case, including, of course, the will itself, comes to the conclusion that the testator must *a fortiori* having intended the disposition over to take effect in the event which has actually happened although it is not the event which he has specified in his will as the one in which the gift over is to take effect."

---

[23] The Lord Keeper of the Grand Seal of Great Britain and Lord High Chancellor in 1711 was the Right Honourable Simon Harcourt, 1st Baron Harcourt PC.
[24] John G Ross Martyn et al, *Theobald on Wills* (17th ed, Sweet & Maxwell, 2010) at [28-096].
[25] John G Ross Martyn et al, *Theobald on Wills* (17th ed, Sweet & Maxwell, 2010) at [28-098].
[26] [1949] St R Qd 244.
[27] [1949] St R Qd 244 at 246 per Macrossan CJ.
[28] [1937] 4 All ER 664 at 669.

Macrossan CJ rejected the argument that the testator by his Will had shown an intention to die intestate if his sister predeceased him and intended to benefit Edwin only in the event of his mother surviving the testator and being married at the time of the testator's death. The Chief Justice cited a decision of Wynn-Parry J in *Re Bowen, Treasury Solicitor v Bowen*[29] where His Honour observed that "in applying the principle enunciated in *Jones v Westcomb* the courts have considered what was the real contingency guarded against." The Chief Justice held that the real contingency intended to be guarded against was the failure of the testator's sister to take under the Will, whether that failure was caused by her dying before the testator or her being married at the date of the testator's death.

[36] Applying that case to the circumstances of this case, it appears that the real contingency that Hannes was intending to guard against was the failure of Steffen to take under his Will whether that failure was caused by his dying before Hannes or his being separated or divorced at the time of Hannes' death. The real contingency was therefore that Steffen was not living with his wife at the time of the testator's death. As it transpired this was caused not by Steffan being separated or divorced from his wife but because he had died.

[37] The principle of construction has been examined and applied or not applied, depending on the circumstances of the case, in numerous Queensland decisions including *Re Rowney (deceased); Re Application by Watson for determination of construction of Will of Rowney (deceased)*[30] where Cooper J applied the rule to save a contingent gift over; *Verrall v Jackson*[31] where Margaret Wilson J held that the rule could not save the contingent gift over and in *The Trust Company Limited v Gibson*[32] where Mullins J applied the rule in *Jones and Westcomb* to save a contingent gift over. The most comprehensive recent examination of the rule is found in the Victorian case of *Re Edwards; State Trustees Limited v Edwards*.[33]

[38] In this case one might ask the question, looking at all the circumstances, that if Hannes had been asked what was to happen to his estate if his brother Steffen separated from his wife not by choice but by death, it seems apparent that Hannes would have said: *a fortiori* his estate was to go to Steffen's children.

[39] I conclude that the real contingency has been satisfied and the gift over should operate. Accordingly, pursuant to s 6 of the *Succession Act* 1981 (Qld), I declare that upon the proper construction of the Will of Hannes Kähler, deceased, dated 15 January 1984 and in the events that have occurred, the estate of the said deceased should be distributed to the applicant and the third respondents as tenants in common in equal shares.

[40] I will hear the parties' submissions as to costs.

---

29 [1949] 1 Ch 67 at 70.
30 [1992] QSC 66.
31 [2006] QSC 309.
32 [2012] QSC 183.
33 [2014] VSC 392 at [145]-[180].