SUPREME COURT OF QUEENSLAND

CITATION:	*Re Marshall* [2020] QSC 109
PARTIES:	**BRENDAN ROBERT ANDREW STEWART** (Applicant)
FILE NO/S:	SC 30 of 2020
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	12 May 2020
DELIVERED AT:	Cairns
HEARING DATE:	27 March 2020
JUDGE:	Henry J
ORDERS:	**1. A grant of letters of administration upon intestacy be made to Brendan Robert Andrew Stewart in respect of the estate of Gayle Leigh Marshall, such grant being subject to the formal requirements of the Registrar.** **2. The balance of the application filed 22 January 2020 is dismissed.** **3. Liberty to apply on the giving of written notice, including to the Registrar, within five business days hereof.** **4. If the applicant seeks costs, written submissions in support thereof, not exceeding three pages, should be filed within no later than ten business days hereof.**
CATCHWORDS:	SUCCESSION - MAKING OF A WILL – EXECUTION - INFORMAL DOCUMENT INTENDED TO BE WILL – OTHER CASES - where shortly after suffering a heart attack the deceased drafted an informal will – where the informal will purported to appoint her son to "be my power of eterny [attorney] to distribute my worldly posetions [possessions] or take care of my affairs if needed" – where the informal will declared that the deceased's son was "aware of my wishes" – whether the informal will "purports to state the testamentary intentions of a deceased person" pursuant to s 18(1)(a) *Succession Act 1981* (Qld) – whether the document indicates that the disposition of the deceased's property is to take effect

upon death – whether the document indicates what is to be done with the deceased's property

SUCCESSION - MAKING OF A WILL – EXECUTION - INFORMAL DOCUMENT INTENDED TO BE WILL – GENERALLY – where s 18(3) *Succession Act 1981* (Qld) permits recourse to extrinsic evidence to determine whether an informal will was intended to be the deceased's will pursuant to s 18(2) *Succession Act 1981* (Qld) – where s 33C *Succession Act 1981* (Qld) permits recourse to extrinsic evidence to interpret a will where the will is meaningless, ambiguous on the face of the will, ambiguous in the light of surrounding circumstances – whether extrinsic evidence admissible under s 18(3) can be used to determine the threshold issue in s 18(1)(a), namely, whether the document "purports to state the testamentary intentions of a deceased person" – whether s 33C can be relied upon before a document purporting to be an informal will has been declared to form a will under s 18 *Succession Act 1981* (Qld)

Powers of Attorney Act 1998 (Qld), s 19, s 51
Succession Act 1981 (Qld), s 10, s 18, s 33C

Bothwick v Mitchell [2017] NSWSC 1145, distinguished
Cook v Cooke (1866) LR 1 P & D 241, applied
Costa v The Public Trustee of NSW (2008) 1 ASTLR 56; [2008] NSWCA 223, cited
Estate of Angius; Angius v Angius [2013] NSWSC 1895, cited
Estate of Kallidis; Kallidis v Kallidas [2012] NSWSC 1485, cited
Estate of Masters (deceased) (1994) 33 NSWLR 446, applied
Federal Commissioner of Taxation v Vegners (1989) 90 ALR 547; (1989) 89 ATC 5274; (1989) 20 ATR 1645, cited
Fell v Fell (1922) 31 CLR 268, cited
In re Berger (deceased) [1990] 1 Ch 118, cited
In the Estate of Knibbs (deceased) [1962] 1 WLR 852, cited
Lindsay v McGrath [2016] 2 Qd R 160; [2015] QCA 206, cited
Re Estate of Brock (2007) 1 ASTLR 127; [2007] VSC 415, cited
Re Garris [2008] 2 Qd R 59; [2007] QSC 181, distinguished
Re Nichol; Nichol v Nichol [2017] QSC 220, distinguished
Re O'Connor [2011] QSC 360, distinguished
Re Quinn (deceased) [2019] QSC 99, distinguished
Re Trethewey (2002) 4 VR 406; [2002] VSC 83, cited
Re Yu [2013] QSC 322, distinguished
Rhodes v Rhodes (as Executor of the Will of Cecil Ronald Rhodes) [2017] QSC 21, distinguished

Robertson v Smith (1870) LR 2 P&D 43, cited
Russell v Scott (1936) 55 CLR 440, applied
Sadleir v Kähler [2019] 1 Qd R 52; [2018] QSC 67, cited
Union Bank of Australia Ltd v Harrison, Jones and Devlin Ltd (1910) 11 CLR 492, cited

COUNSEL:	L Neil for the applicant M Chong appeared on her own behalf
SOLICITORS:	Maurice Blackburn for the applicant M Chong appeared on her own behalf

Introduction

[1] Shortly after suffering a heart attack, Ms Gayle Lee Marshall decided to draft a document she described as her will. It was dated 21 February 2016 and signed by Ms Marshall but not by any witnesses.

[2] Despite being described as Ms Marshall's will the document's articulation of her wishes had little resemblance to a statement of testamentary intentions. The high point is that it appointed her son, Brendan Stewart, to "be my power of eterny [sic] to distribute my worldly posetions [sic] or take care of my affairs if needed", noting "he is aware of my wishes". It did not say it was to take effect upon her death. Nor did it indicate who her property should be distributed to.

[3] Ms Marshall made no other purported testamentary instrument before her death on 2 February 2019, three years later. Brendan[1] contends the document signed by his mother on 21 February 2016, hereinafter referred to as "the document", should be treated as her will. He applies for orders dispensing with the requirements of s 10 *Succession Act 1981* (Qld) ("the Act") regarding the proper witnessing of wills on the basis the court should be satisfied, pursuant to s 18 of the Act, that Ms Marshall intended the document to form her will.

[4] Brendan also seeks a grant of letters of administration and a declaration that on the document's proper construction the estate should be distributed to him subject to a testamentary trust. The declaration was sought on the premise the document is a will, not some other form of disposition. That Brendan needs a declaration clarifying the meaning of the document as a will reflects a more fundamental problem. The document is ineligible for consideration as an informal will because it does not purport to state testamentary intention.

The players

[5] Ms Marshall did not leave a spouse. She was survived by all of her six adult children, who are (including their ages as at the time Ms Marshall's death was registered): Hailey (34), Melissa (33), Brendan (28), Andrew (22), Jaycob (22) and Jesse (19).

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[1] In these reasons, intending no disrespect, I refer to Mr Stewart and his siblings by their first names to avoid confusion.

[6] Brendan is the only one of them to have supplied an affidavit in the application. His siblings were all served with his application and supporting affidavit.[2] Of them, only Melissa entered an appearance.

[7] Melissa was self-represented. In the course of submissions apparently calculated at resisting the application, she made factual allegations potentially adverse to the application, which I told her I could not act upon in the absence of evidence. However, she declined to request an adjournment of the matter in order to file affidavit evidence in the application. This has the consequence that Brendan's evidence, sparse as it is, is uncontested.

The facts

[8] After Ms Marshall's death Brendan and his brother Jaycob searched her personal papers in a box at a property in Frankston, which Jaycob and Ms Marshall owned. They there found a small red envelope which contained the document. Brendan does not depose whether the envelope was sealed. It is exhibited. It appears from its state that the flap of the envelope was once sealed to the envelope by sticky tape which is still present.

[9] Brendan searched all of Ms Marshall's paperwork in Victoria, with Jaycob's assistance, and at her address in Queensland. No "other wills or documents appearing testamentary in nature" were located.[3] Brendan also contacted solicitors his mother had dealt with, but none held a will.[4]

[10] Turning in more detail to the document, the red envelope in which it was contained was labelled as follows, in handwriting in capital letters:

> "MY WILL
> LAST WISHES
> 21/FEB[5] 2016".

[11] Inside the envelope was a page from a spirax notebook. The page contained handwriting in capital letters, in apparently the same handwriting and pen as the handwriting on the envelope. The writing traversed both sides of the page. It stated:

> "23 BELAR RD
> TOOKGAROOK
> VIC 3941
>
> ON THIS DAY SUNDAY 21st FEBRUARY 2016
>
> I GAYLE MARSHALL
> ~~DO~~ #[6]
> BEING OF SOUND MIND TO[7] HEARBY GIVE MY SON
> BRENDAN STEWART TO TAKE CARE OF ALL OF MY

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2 Affidavit of Kerrie Maree Wood, 23 March 2020, [2]–[3]. Indeed, Mr Stewart's solicitor advised the same persons of a variation in hearing times from 10.00 am 27 March 2020 to 12.45 pm 27 March 2020: Affidavit of Kerrie Maree Wood, 27 March 2020.

3 Ibid, [10].

4 Ibid.

5 It appears a "3" was originally written and then a "1" superimposed over the "3".

6 The word "DO" is crossed out and a hash symbol appears next to it.

7 Perhaps "TO" is an error and should read "DO".

AFFAIRS IF I CAN NOT DO THIS MYSELF.

I GIVE HIM NOT ONLY NEXT OF KIN BUT TO BE MY POWER OF ETERNY[8] TO DISTRIBUTE MY WORLDLY POSETIONS OR TAKE CARE OF MY AFFAIRS IF NEEDED.

HE IS AWARE OF MY WISHES AND I TRUST HIM TO TAKE CARE OF ANYTHING I CANT.

THESE ARE MY WISHES AND THIS MY LAST WILL AND TESTOMENT.

DATED ON THIS 21st FEB 2016.

[*Ms Marshall's signature appears*] D.O.B 7/2/66

GAYLE MARSHALL
23 BELAR ROAD
TOOKGAROOK
VIC 3941."

[12] The signature that appears on the document appears to be in the same ink as the rest of the writing and is the same as the signature on Ms Marshall's driver's licence.[9] The box in which the envelope was found also contained other belongings of the deceased. I infer the document was signed by Ms Marshall.

[13] As to the circumstances in which the document was signed, Brendan deposes he was not present when it was drafted and signed.[10] He states, "[t]he only knowledge I have of the circumstances surrounding the drafting of the will is that the deceased had suffered a heart attack shortly prior to her drafting this will".[11] No other evidence about the heart attack is before the court, although such an ailment was consistent with Ms Marshall's ultimate cause of death three years later.[12] There is no suggestion the heart attack gave rise to any issue regarding mental capacity and Brendan deposes that to the best of his knowledge his mother had testamentary capacity.

[14] While it may reasonably be inferred Brendan would know when his mother had a heart attack he does not identify the source of his knowledge that the heart attack occurred shortly before the document was drafted. Perhaps he inferred that fact by reason of the date upon the document. That is the most likely explanation given the absence of any assertion by him that he even knew of the document's existence prior to it being found after his mother's death.

[15] As to the document's reference to Brendan knowing his mother's wishes, Brendan deposes to the following discussions:

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8 The letters "N" and "Y" appear written over one another but it is tolerably clear that the phrase "power of attorney" was intended (or, perhaps a malapropism "power of eternity" with a corruption of "eternity" into "eterny"). It is unclear whether a full stop appears after "eterny".

9 Ex BS-4.

10 Affidavit of Brendan Stewart, [14].

11 Ibid.

12 Ibid, Exhibit BS-2. Her death certificate records cause of death as "1. Chronic obstructive pulmonary disease 2. Diabetes, previous cardiomyopathy".

> "11. The deceased discussed her wishes regarding her estate with me on more than one occasion. I believe that she also spoke to Jaycob about her wishes.
>
> 12. The deceased told me she wanted her estate to be distributed between my brothers and I, and that she didn't want Melissa or Hailey to receive anything. I was aware that the deceased's relationship with my sisters was very strained and that she rarely spoke to either of them.
>
> 13. The deceased also told me that she wanted me to look after her affairs in the event that anything should happen to her."

[16] Whether Ms Marshall actually used the word "estate" or whether Brendan's use of that word is his interpretative reference is uncertain, but the latter is more likely. Notably, Brendan did not depose that his mother made any mention of the document in the above discussion.

Relevant legal principles

[17] The document does not meet the Act's requirements for execution of a will. Specifically, it fails to meet the Act's requirements at s 10(3) that the testator's signature must be made in the presence of two witnesses and at s 10(4) that two witnesses must attest and sign the will. Because of that non-compliance the document can only form Ms Marshall's will if the requirements of s 18 of the Act are met.

How s 18 saves informal wills

[18] Section 18 relevantly 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.

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

[19] Section 18(2) has the effect of saving informally executed wills if the court is satisfied the deceased person intended the document to form the person's will. Whether a court is so satisfied involves consideration of a subjective fact – what the deceased intended. It may be that such a document does not, in an objective sense, meet all the legal requirements of a will. Quite apart from not being executed properly its language might be legally ineffective in validly implementing the alleged intentions of the deceased. That is an objective fact a court may of course have regard to in inferring whether the deceased person intended the document to form the person's will. But many deceased persons are not lawyers. Depending on the circumstances, a court may well be satisfied a deceased person intended a document to form the person's will, despite its legal flaws.

[20] If the court is so satisfied, then the document will then fall for consideration as the deceased's will and question's regarding the validity of its individual provisions and their construction will remain to be resolved as a subsequent exercise. So, for example, the court may rectify a will pursuant to s 33 of the Act if the will does not affect the testator's intentions. It may also conduct a proceeding to interpret meaningless or ambiguous language in a will by reference to extrinsic evidence pursuant to s 33C of the Act. In carrying out such tasks it is well established interpretations which avoid the failure of the will's operation and thus avoid intestacy are to be preferred.[13]

A threshold requirement

[21] However, the court does not get to those legal tasks unless it has first concluded the document forms a will. In the case of a document which is not properly executed it cannot form a will unless saved by s 18(2). It cannot fall for potential rescue by s 18(2) unless it is first established, pursuant to s 18(1)(a), that the document "purports to state the testamentary intentions" of the deceased person. If s 18(1)(a)'s threshold requirement is not met, the potential remedial mechanism of s 18(2) has no application.

[22] That there should be such a threshold requirement is unsurprising. The amendment giving rise to s 18 was of course of a remedial nature, as Atkinson J explained in *Sadleir v Kähler*.[14] But to entirely dispense with execution requirements and conclude a document forms a will merely on satisfaction that a deceased person intended it to be the person's will would have meant documents which did not even purport to state testamentary intention could be wills. This would have represented an extraordinary drift from the anchoring guidance of a will's traditional and most elementary purpose, its statement of testamentary intention.

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13 *Fell v Fell* (1922) 31 CLR 268, 275–6 (Isaacs J).

14 [2019] 1 Qd R 52, 57–58.

The meaning of testamentary intention

[23] While a will may serve other purposes, s 18(1)(a)'s concern is with the singular purpose of expressing testamentary intention. Thus, in *Estate of Masters (deceased)*[15] Mahoney JA observed in reference to the New South Wales equivalent of s 18(1)(a):[16]

> "... [T]he document must state the deceased's 'testamentary intentions', that is, his wishes or intentions as to how, voluntarily, his property is to pass or be disposed of after his death. A will may of course do other things: it may for example, appoint a legal representative, exercise a special power, appoint a guardian or the like: see *Halsbury's Laws of England*, par 202. <u>But it is the disposition of the deceased's property voluntarily after his death which is, for present purposes, the relevant characteristic</u> of a will." (emphasis added)

[24] In the same case Priestly JA observed:[17]

> "A document in which a person says what that person intends shall be <u>done with that person's property</u> upon <u>death</u> seems to me to be a document which embodies the testamentary intentions of that person." (emphasis added)

[25] From these descriptions two aspects of a statement of testamentary intention are discernible in aid of analysis here: its indication that it is to take effect upon death and its indication of what should be done with the deceased's property.

[26] The first aspect, the indication that the intended disposition of property is stated to take effect upon death, has long been fundamental to an expression of testamentary intention. So, for instance, in 1866 in *Cook v Cooke*, Sir JP Wilde (later Lord Penzance) observed:[18]

> "It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary."[19]

[27] It follows a document which is not dependent upon death is not testamentary in character. As Starke J explained in *Russell v Scott*:[20]

> "A testamentary disposition can only be made by will. But a disposition which does not require the death of the donor for its consummation is not testamentary."

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15 (1994) 33 NSWLR 446, 469.

16 (1994) 33 NSWLR 446, 455, a passage cited with approval by the Queensland Court of Appeal in *Lindsay v McGrath* [2016] 2 Qd R 160, 185 [58] (Boddice J, Gotterson JA agreeing).

17 (1994) 33 NSWLR 446, 469. *Masters* dealt with s 18A *Wills, Probate and Administration Act 1898* (NSW). See now, *Succession Act 2006* (NSW) s 8, which replaced "purporting to embody" with "purports to state", a distinction of no significance in the NSW jurisprudence relevant here.

18 (1866) LR 1 P & D 241, 243.

19 To similar effect see *Robertson v Smith* (1870) LR 2 P&D 43, 45, where Lord Penzance (as he by this time was) observed the guiding principle was a document "will be held testamentary if it were the intention of the testator that the gifts made by it should be dependent upon his death".

20 (1936) 55 CLR 440, 448.

[28] As to the second aspect - the indication of what should be done with the deceased's property - it has also been described as:

- "the deceased's wishes for the disposition of his property after his death";[21]
- the "ambulatory disposition of the maker's property which is to take effect on death";[22]
- "what a person wants to happen to his or her property upon death";[23]
- "[purporting] to govern the disposition of the deceased's property after his death".[24]

[29] It is difficult to see how such descriptions could ever embrace a form of words which do not in some way articulate to who or to what legal entities the deceased's residuary estate should pass.

"Purports"

[30] It is important to bear in mind s 18(1)(a) requires that the document "purports" to state the testamentary intentions of the deceased person.

[31] The word "purport" is not defined by the Act. It carries its ordinary meaning. Dictionary definitions of apparent relevance include:

- from the *Macquarie Concise Dictionary*,[25] "to convey to the mind as the meaning of the thing intended; express, imply"; "tenor, import or meaning";
- from the *Oxford English Dictionary,*[26] "that which is conveyed or expressed, esp. by a formal document; bearing, tenor, import, effect; meaning, substance, sense"; "to convey to the mind"; "to bear as its meaning; to express, set forth, state; to mean, imply"; and
- from *Black's Law Dictionary*,[27] "to seem to be"; "the idea or meaning that is conveyed or expressed". [28]

[32] The ordinary meaning of "purports", in the context of s 18(1)(a), means that a document will purport to state the testamentary intentions of the deceased if its content apparently conveys the effect or meaning of those intentions. The qualifying effect of the word "purports" in this context is a concession to the prospect of poor use of language. It ensures that assessment of the requirement does not descend into assessing the legal or grammatical validity of the document's content and focuses instead upon the apparently intended meaning of that content. It does not, however,

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21 *In the Estate of Knibbs (deceased)* [1962] 1 WLR 852, 855-856.
22 *In re Berger (deceased)* [1990] 1 Ch 118, 129.
23 *Re Trethewey* (2002) 4 VR 406, 409 [16]*; Re Estate of Brock* (2007) 1 ASTLR 127, 132.
24 *Costa v The Public Trustee of NSW* (2008) 1 ASTLR 56, 70 [26].
25 (Macquarie, 4th ed, 2006) 985.
26 (Oxford University Press, 2nd ed, 1989) 878.
27 (Thompson Reuters, 11th ed, 2019) 1492.
28 Also see discussions of the word's meaning in *Estate of Kallidis; Kallidis v Kallidas* [2012] NSWSC 1485, [97]–[101]; *Estate of Angius; Angius v Angius* [2013] NSWSC 1895, [252]–[253].

remove the need for content that actually purports to state what the testamentary intentions of the deceased were.

[33] That is because s 18(1)(a) requires it is the document – not some other source – which must purport to state the deceased's testamentary intentions. Extrinsic evidence of the deceased's testamentary intention cannot be a substitute for a void in that threshold requirement. Such a view is consistent not only with the terms of s 18(1)(a) but also with the fact that s 18(3)'s permitting of recourse to extrinsic evidence, including evidence of the deceased's testamentary intention, only relates to the determination under s 18(2).[29] The court does not get to that phase unless the threshold requirement of s 18(1)(a) is met.

Limited guidance of other case examples

[34] Despite the importance of s 18(1)(a)'s threshold requirement, it is not a provision which has attracted much interpretive consideration. Many of the published s 18 cases appear to focus more on s 18(2)'s requirement of satisfaction of the deceased's intention and miscellaneous matters, such as whether the document is the deceased's document, particularly where it is stored electronically. They seem to involve little real issue over whether the document purports to state testamentary intention. Even in those cases where the deceased has obviously authored the document without legal assistance, the deceased has typically done more than merely call the document a will and has purported to state how the deceased's property is to be disposed of after death.[30]

[35] Such cases are fundamentally different from the present in that, despite Ms Marshall's document calling itself a will, it did not purport to state how her property was to be disposed of after death.

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29 *Expressio unius est exclusio alterius* ["the expression of one thing is the exclusion of another"]; See generally, D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014) 178–81.

30 See for example, *Re Garris* [2008] 2 Qd R 59, where the deceased signed a brief unattested document described "Last will & testament" which stated that he did "hereby leave my house and all possessions" to his de facto spouse and that she was to "have ownership of all my assets and possessions"; *Re O'Connor* [2011] QSC 360, where, the document signed by the deceased was described as his will, gave his wife and two daughters "all of [his] belongings" and appointed them the "execetors [sic] of the above arrangement"; *Re Yu* [2013] QSC 322, where a document created in the deceased's iPhone before his suicide was expressed to be his last will, appointed an executor and an alternative executor to deal with his affairs in the event of death and dealt with how the whole of his property was to be distributed; *Bothwick v Mitchell* [2017] NSWSC 1145, where in notes dictated by a dying farmer he left most of his property to two close friends, made specific gifts of some farm equipment and concluded, "You and Rinsie can keep or sell everything whatever you want but if selling stuff Uncle Peter is to have first offer on the red truck and the trailer"; *Re Nichol; Nichol v Nichol* [2017] QSC 220, where the document in the form of an unsent pre-suicide text message described it as Mr Nichol's will, contained dispositive content regarding who should have what property and indicated where his ashes should put; *Sadlier v Kähler* [2019] 1 Qd R 52, where the handwritten document referred to itself as a will, listed "assets to date" and nominated the testator's brother "as my sole beneficiary" but provided should the brother be separated or divorced that the brother's children would be the testator's "beneficiaries in equal shares"; *Re Quinn (deceased)* [2019] QSC 99, where in a CD of an iPhone video recording by the deceased he said it was his last will and in the event of his death he "would like" all his share of his goods, interests in property, cash, superannuation "to go to my wife…[s]o in essence, I am leaving everything to my wife".

Consideration of s 18's application in this case

[36] In order to purport to state testamentary intention, the document must, in what it states, purport to indicate what should be done with the deceased's property upon death. Breaking that requirement into its two aspects to aid analysis, it must purport to indicate that it is to take effect upon death and purport to indicate what should be done with the deceased's property.

Does the document purport to indicate it is to take effect upon death?

[37] The document in the present case contains no words referring to the death of Ms Marshall. Nor does it contain words capable of being construed as indicating it shall not take effect until her death. At first blush this omission might not be thought troubling because the document asserts it is Ms Marshall's "last will and testament". Such language potentially raises the inference that the document only purports to take effect upon death. Such an inference derives support from the document's use of terms a lay person may adopt in trying to emulate the legal jargon of a will, such as "being of sound mind", "next of kin" and "worldly possessions".

[38] However, the document also refers to a "power of eterny", which I interpret to be a purported reference to a power of attorney. Such a power operates *inter vivos*.[31] Of course a non-lawyer may not understand the exact nature of a power of attorney, including that it ceases operation upon the death of the principal. Nonetheless the difficulty in reconciling the purported intention of the document's obscure mix of pseudo-legal jargon suggests better guidance is to be derived from the operative language of the document. Reference to that language excludes the inference that the document only purports to take effect upon death.

[39] It will be recalled the operative language of the document is contained in these three paragraphs:

1. "BEING OF SOUND MIND TO HEARBY GIVE MY SON BENDAN STEWART TO TAKE CARE OF ALL OF MY AFFAIRS IF I CAN NOT DO THIS MYSELF."

2. "I GIVE HIM NOT ONLY NEXT OF KIN BUT TO BE MY POWER OF ETERNY TO DISTRIBUTE MY WORLDLY POSETIONS OR TAKE CARE OF MY AFFAIRS IF NEEDED."

3. "HE IS AWARE OF MY WISHES AND I TRUST HIM TO TAKE CARE OF ANYTHING I CANT." (emphasis added)

[40] The words emphasised above indicate the power being given to Brendan commences in the event it is necessary because Ms Marshall can no longer take care of her affairs herself. That is not an event dependent upon death.

[41] At best for the applicant it might be the document's language, particularly bearing in mind the description of it as a "last will and testament", allows of the possibility the document could take effect after death, in the sense a dead person cannot do or take care of anything. However, it is not the event of death and rather the event of incapacity upon which the document purports to rely for its vigour and effect.

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31 *Powers of Attorney Act 1998* (Qld) ss 19, 51.

[42] This is a significant obstacle to the applicant's position. The only sensible argument to meet it is that, because the document called itself Ms Marshall's "last will and testament", it purports by implication to take effect in the alternative, namely upon death, if it has not earlier done so because of incapacity arising when alive. However, use of the words "if needed" or "if I cannot", even for a lay person, are curious ways to refer to the event of death. That is not the only feature telling against the alternative meaning argument.

[43] The argument would presumably be that s 18(1)(a) applies to "part of a document" that purports to state testamentary intention so that a document is not deprived of s 18(1)(a)'s application if it states testamentary intention in the alternative to some other intention. But the document does not purport to state the alternative possibilities. They at best could only arise by implication from the document generally, not by reference to distinct parts.

[44] Further, interpreting the purport of the document as having such an alternative effect does not rest comfortably with the unique testamentary character of a will, discussed by Dixon and Evatt JJ in *Russell v Scott*.[32] Their Honours observed:

> "Law and equity supply many means by which the enjoyment of property may be made to pass on death. Succession *post mortem* is not the same as testamentary intention. But what can be accomplished only by a will is the voluntary transmission on death of an interest which up to the moment of death belongs absolutely and indefeasibly to the deceased." (emphasis added)

[45] Even if the document in the present case is regarded as impliedly intending to allow Brendan to distribute Ms Marshall's property at a time which may be after her death, the problem remains that intention is not even purportedly expressed as being operative or dependent upon the occurrence of death. That such an intention may permit of the possibility of succession post mortem does not make it the same as a testamentary intention.

[46] For these reasons, even allowing for the flexibility of interpretation introduced by the word "purports" in s 18(1)(a), my tentative view is that the document lacks the first aspect of a purported statement of testamentary intention. I refrain from expressing a concluded view however, because the point did not attract material argument and because, in any event, there has been such a clear failure regarding the second aspect.

Does the document purport to indicate what should be done with the deceased's property?

[47] As explained above, a testamentary intention is an expression of what should be done with a person's property after the person's death. The document in this case does not purport to indicate what should be done with the deceased's property.

[48] In considering this aspect I am of course conscious the document states it is a will. That a document's author describes the document as the author's will, tends to evidence the author's intention that the document should form the person's will (the requirement with which s 18(2) is concerned). However, while stating that a

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32 (1936) 55 CLR 440, 454.

document is a will might indicate the document's author harbours testamentary intentions, it does not purport to state those intentions (the threshold requirement with which s 18(1)(a) is concerned).

[49] Returning to the content of the document's three active paragraphs, that content is predominantly focussed upon Brendan taking care of Ms Marshall's affairs. The first and third paragraphs do not purport to state anything as to the fate of Ms Marshall's property. Their vague and general language might arguably purport to confer an implied power upon Brendan to manage his mother's property on her behalf but says nothing as to whom ownership of her property should pass.

[50] This leaves the second paragraph, particularly its words, "to be my power of eterny to distribute my worldly posetions".

[51] For the sake of argument, let it be ignored this purported power to distribute was apparently not made dependent on death and let it be assumed the words did purport to confer a power to distribute Ms Marshall's property upon death. Giving a person power to distribute property does not mean the person has been given ownership of the property and says nothing as to what should be done with the property. The notion that someone must distribute a deceased's property or at least a deceased's residual estate is an unremarkable incident of the death of any person with property. Appointing a person, however described, to be in charge of distributing property of a deceased or property in a deceased's residual estate says nothing as to the fate of that property, that is, what should be done with it. On those wishes the document is entirely silent. Indeed, the document's use of the words, "he is aware of my wishes" suggests that far from purporting to state what should be done with Ms Marshall's property the document deliberately makes a secret of it.

[52] The absence not only of any apparent indication of how Ms Marshall's property should be distributed but also of any apparent giving over of ownership of Ms Marshall's property is determinative. It means the document did not purport to state what should be done with Ms Marshall's property on her death. It did not purport to state her testamentary intentions.

[53] In reaching that conclusion I am conscious there is authority which arguably supports the proposition that a will which merely appoints an executor is a good will,[33] albeit that there would be an intestacy for beneficial purposes. However, while the appointment of an executor is one of the purposes a will may serve it will be recalled it not the purpose with which the threshold requirement of s 18(1)(a) is concerned.

[54] I am also conscious that another purpose from time to time served by wills is the appointment of a trustee to administer a trust created by the will. The extrinsic evidence from Brendan as to his mother's wishes is relied upon by him in that part of his application which relies upon s 33C to resolve purported ambiguity. He contends the court should declare, on the document's proper construction, that the estate should be distributed to Brendan subject to a testamentary discretionary trust.[34] Two points should be made about that.

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33 *Union Bank of Australia Ltd v Harrison, Jones and Devlin Ltd* (1910) 11 CLR 492, 515 (Isaacs J).

34 Counsel referred to the definition of a discretionary trust provided by Gummow J in *Federal Commissioner of Taxation v Vegners* (1989) 90 ALR 547, 551–2.

[55] First, as earlier explained, the use of extrinsic evidence permitted by s 33C relates to the interpretation of a document which forms a will. Therefore, it only has utility when the stage is reached that the court has concluded the document to be interpreted forms a will. The applicant is yet to pass the threshold stage of establishing the document forms a will via s 18. To the extent s 18(3) permits the use of extrinsic evidence it only relates to the determination under s 18(2). The court does not get to that phase unless the threshold requirement of s 18(1)(a) is met and s 18 does not permit the use of extrinsic evidence in considering that requirement.

[56] Second, even if Brendan's extrinsic evidence of his mother's wishes were admissible to resolve ambiguity in deciding whether the document purports to state his mother's wishes, it would not assist for these three reasons:

(a) There is no ambiguity to resolve – the document does not purport to indicate what should be done with the deceased's property. It does not purport to give the property to anyone. The case may be contrasted with *Rhodes v Rhodes (as Executor of the Will of Cecil Ronald Rhodes)*,[35] a case relied upon by the applicant, because the will there had a dispositive clause giving the estate "to my ex wife who will distribute it to my children as she sees fit". The issue was whether in becoming owner of the property she did so in her own right or as trustee for the children. The document here empowers Brendan to distribute Ms Marshall's property but does not purport to give ownership of her property to him or anyone.

(b) The discussions, like the document, did not address how property in Ms Marshall's estate was to pass; for example, whether to Brendan for him to in turn distribute at his discretion (as if a trustee)[36] or whether Brendan should simply distribute the estate of his mother directly.

(c) The evidence of Brendan's discussions with his mother, recited earlier, had no apparent connection with the document. The evidence of the discussions did not indicate when they occurred, not even when they occurred relative to when the document was created. The discussions contained no reference at all to the existence of the document, let alone to what was written in it.

[57] Because the document does not purport to state the testamentary intentions of Ms Marshall, s 18 does not apply to the document and the application to dispense with s 10's execution requirements must fail.

[58] It follows the application for a declaration cannot succeed either.

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35 [2017] QSC 21.

36 If property were given to him to distribute as a trustee then, if the document were a will, its silence as to whom Brendan should distribute might not be fatal, for the law permits of secret trusts in some circumstances – see G E Dal Pont and K F Mackie, *Law of Succession* (LexisNexis, 2nd ed, 2017) 133–9. But the discussions, like the document, were silent as to whether Brendan would distribute as a trustee. No argument was raised that the document would take effect as a secret trust *inter vivos*. Such an argument would face a number of difficulties, not least of which are the formalities necessary for the creation of a trust of real property and the lingering doubt as to whether a secret trust can even be created *inter vivos*: see Thompson Reuters, *Ford and Lee: The Law of Trusts* (online at 9 October 2019) [6.2090].

Grant of letters of administration

[59] The application also sought a grant of letters of administration to Brendan. Admittedly the order sought was a grant of letters of administration with the alleged will, as distinct from a grant of letters of administration on intestacy. However, the application also sought such other orders as the court deems appropriate and there remains an estate to be administered, even if on intestacy.

[60] For the purposes of r 610 *Uniform Civil Procedure Rules 1999* (Qld) Brendan had equal priority to his siblings in seeking the grant. They were all on notice of his application. It would have been apparent to them it had a number of components including an application for a grant of letters of administration. It was always a possibility some components of the application might fail, as they have, and that the application for a grant would be left to be considered as an application for a grant on intestacy. No one else sought a grant. In the circumstances Brendan should be granted letters of administration on intestacy.

Orders

[61] It was not suggested Brendan did not wish to pursue his application for a grant if the other components of his application were unsuccessful. The possibility that I have misunderstood his position can be catered for by my orders giving liberty to apply.

[62] There is no suggestion anyone other than the applicant has incurred legal costs in respect of the application. The applicant has had mixed success but may still seek an order that his costs or a proportion thereof should be borne by the estate. My orders will cater for that possibility by permitting short written submissions on the topic.

[63] My orders are:

1. A grant of letters of administration upon intestacy be made to Brendan Robert Andrew Stewart in respect of the estate of Gayle Leigh Marshall, such grant being subject to the formal requirements of the Registrar.

2. The balance of the application filed 22 January 2020 is dismissed.

3. Liberty to apply on the giving of written notice, including to the Registrar, within five business days hereof.

4. If the applicant seeks costs, written submissions in support thereof, not exceeding three pages, should be filed within no later than ten business days hereof.