Construction of Wills: Extrinsic Evidence and the Impact of

*Marley v Rawlings*

Richard Williams

In a judgment delivered on 22 January 2014, *Marley v Rawlings*, the UK Supreme Court held that the Court’s approach to the interpretation of wills should be the same as for commercial contracts, the aim being to identify the testator’s intention by interpreting the words used in their documentary and factual context. Reference was made to s 21 of the *Administration of Justice Act 1982* (UK) (the statutory provision that extends the admissibility of extrinsic evidence, including evidence of a testator’s intention), as ‘confirming’ that finding. This is a significant development in the law, as regards the construction of wills.

In this paper, I outline the facts of the case and the Court’s findings (Part I of the paper) and its impact in England & Wales (Part II). The approach taken by the Supreme Court has been embraced in New Zealand and Australia (Part III); in particular, it has been applied by the South Australian Full Court in *Farrelly v Phillips* (Part IV). There are, however, some further complications in Australia because the statutory provisions derived from s 21, in each of the States and Territories except South Australia, lack uniformity (Part V). The outcome in *Farrelly v Phillips* may have been different, had the relevant gift been to *children or issue* of the testatrix; the Court would have needed to consider whether the will evinced a ‘contrary intention’ for the purposes of the statutory substitutional provision (*Wills Act 1936* (SA) s 36). This issue arose in the recent case of *In the Estate of Koppie*, in the Australian Capital Territory (Part VI).

I: *MARLEY V RAWLINGS*

On 17 May 1999, Mr Rawlings and his wife were visited by their solicitor, to execute wills drafted on their instructions. The wills were in mirror terms: each spouse left their estate to the other or, if the other had predeceased or did not survive for one calendar month, then to Terry Marley, who was not related to them but whom they treated as their son. By an oversight, the solicitor gave Mr and Mrs Rawlings each other’s will, and Mr Rawlings signed the will meant for his wife, and vice versa.

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Mrs Rawlings died in 2003 and the mistake went unnoticed. It was, however, noticed upon Mr Rawlings’ death, in 2006.

The value of Mr Rawlings’ estate at his death was approximately £70,000. The house in which he and Terry both lived was held by them both as joint tenants; accordingly, that property passed to Terry by survivorship.

Mr and Mrs Rawlings’ two sons, who would be entitled to his estate on intestacy, disputed the validity of the will. Terry commenced probate proceedings, seeking rectification of the will so as to record what Mr Rawlings had intended. His claim was dismissed. Proudman J found that the document did not satisfy the formal requirements for a valid will prescribed by s 9 of the Wills Act 1837 (UK), since Mr Rawlings did not intend by his signature to give effect to the will which he signed. It was further found that, even if it had done so, it was not open to the Court to rectify the will under the statutory power of rectification in s 20 of the Administration of Justice Act 1982 (UK) because that power was not engaged, as there had not been a failure to understand the testator’s instructions nor a clerical error.

Terry appealed. The Court of Appeal upheld the decision on the first ground, namely that the will did not satisfy the requirements of s 9(b). Black LJ, in considering English and overseas authorities, observed that in Australia, this same factual scenario (the signature of transposed wills) had been resolved by way of the ‘judicial dispensing power’, in two cases in South Australia: In the Estate of Blakely and In the Estate of Hennekam.

3 Under s 9, no will is valid unless “(a) it is in writing and signed by the testator, or by some other person in his presence and by his direction, and (b) it appears that the testator intended by his signature to give effect to the will”.


5 Wills Act 1936 (SA) s 12(2).

6 (1983) 32 SASR 473. The Blakely case pre-dated the enactment of the statutory power of rectification, Wills Act 1936 (SA) s 25AA.

7 (2009) 104 SASR 289. In Hennekam, Gray J held that, in the case of transposed wills signed in error, it was more appropriate to utilise the ‘judicial dispensing power’ (s 12(2)) rather than the statutory power of rectification (s 25AA). Having regard to the legislative intention of s 12(2), such circumstances were found to be precisely the ‘mischief’ to which the section is directed. To delete the portions of the will of the deceased’s wife which the deceased actually signed, so that the document complied with the known intentions of the deceased, would be of greater artificiality than to admit to probate the actual will of the deceased, despite its lack of appropriate execution.

See also: Estate of Daly (2012) 8 ASTLR 48; [2012] NSWSC 555, in which White J (as his Honour then was) held that the statutory power of rectification (Succession Act 2006 (NSW) s 27) and the ‘judicial dispensing power’ (s 8) are each potential sources of power to resolve this problem, but the correct course is to deploy the latter, since before the statutory power of rectification can be exercised, there must be a will and the document in question would not, without an exercise of the judicial dispensing power, be a valid will of the deceased. In Re Estate Johnson Deceased [2014] NSWSC 512, however, Lindsay J held that both s 8 and s 27 were engaged by the underlying facts, and
Terry appealed to the Supreme Court. The appeal was allowed. It was held that, adopting a wide meaning of what constitutes a ‘clerical error’ for the purposes of the statutory power of rectification, the will should be rectified, to contain, in place of the typed parts of the will signed by Mr Rawlings, the typed parts of the will signed by his wife.

The judgment is significant not only because of the analysis of the statutory power of rectification, but also because of the findings made concerning the Court’s approach to the interpretation of wills. Lord Neuberger, with whom Lords Clarke, Sumption, Carnwath agreed, said:

“18. During the past forty years, the House of Lords and Supreme Court have laid down the correct approach to the interpretation, or construction, of commercial contracts in a number of cases … culminating in Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900.

19. When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party’s intentions. …

20. When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context. As Lord Hoffmann said in Kirin-Amgen Inc v Hoechst Marion Roussel Ltd [2005] 1 All ER 667, para 64, “No one has ever made an acontextual statement. There is always some context to any utterance, however meagre.” To the same effect, Sir Thomas Bingham MR said in Arbuthnott v Fagan [1995] CLC 1396, that “[c]ourts will never construe words in a vacuum”.

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23. In my view, at least subject to any statutory provision to the contrary, the approach to the interpretation of contracts as set out in the cases discussed in para 19 above is therefore just as appropriate for wills as it is for other unilateral documents. This may well not be a particularly revolutionary conclusion in the light of the currently understood approach to the interpretation of wills … Indeed, the well known suggestion of James LJ in Boyes v Cook (1880) 14 Ch D 53, 56, that, when interpreting a will, the court should “place [itself] in [the testator’s] arm-chair”, is consistent with the approach of interpretation by reference to the factual context.”

whether one or the other is employed in any particular case is a matter for discretionary judgment, not a matter of jurisdiction. His Honour made orders pursuant to s 8, “as a matter of administrative convenience”.

8 Lord Hodge confined himself to making observations on how the problem might have been dealt with had Scots law been the governing law.
Lord Neuberger found that this approach to the interpretation of wills was confirmed by the statutory provision concerning the admissibility of extrinsic evidence, s 21 of the Administration of Justice Act 1982 (UK):

“21 Interpretation of wills – general rules of evidence

(1) This section applies to a will –

(a) in so far as any part of it is meaningless;

(b) in so far as the language used in any part of it is ambiguous on the face of it;

(c) in so far as evidence, other than evidence of the testator’s intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.

(2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator’s intention, may be admitted to assist in its interpretation.”

His Lordship said:

“In my view, section 21(1) confirms that a will should be interpreted in the same way as a contract, a notice or a patent, namely as summarised in para 19 above. In particular, section 21(1)(c) shows that “evidence” is admissible when construing a will, and that that includes the “surrounding circumstances”. However, section 21(2) goes rather further. It indicates that, if one or more of the three requirements set out in section 21(1) is satisfied, then direct evidence of the testator’s intention is admissible, in order to interpret the will in question. Accordingly, as I see it, save where section 21(1) applies, a will is to be interpreted in the same way as any other document, but, in addition, in relation to a will, or a provision in a will, to which section 21(1) applies, it is possible to assist its interpretation by reference to evidence of the testator’s actual intention (eg by reference to what he told the drafter of the will, or another person, or by what was in any notes he made or earlier drafts of the will which he may have approved or caused to be prepared).”

II: THE IMPACT OF MARLEY v RAWLINGS IN ENGLAND & WALES

Marley v Rawlings has been followed in various decisions of the English High Court. This appears to have resulted in the High Court adopting a broad interpretation of s 21, thereby enabling some obvious drafting errors to be remedied by construction, rather than by rectification:

In Burnard v Burnard, Judge Behrens found that the will in question was ambiguous in the light of surrounding circumstances, in that a reference to ‘Grangeway Properties Limited’ was ambiguous in light of the fact that the testator never held shares in that company. Extrinsic evidence was admissible, including evidence of the testator’s intention, as to what he meant.

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9 Lord Neuberger had, in the earlier case of RSPCA v Sharp [2011] 1 WLR 980 at 989-990; [2010] EWCA Civ 1474, similarly held that the court’s approach to the interpretation of wills is, in practice, very similar to its approach to the interpretation of contracts.
10 At [25]-[26].
11 [2014] EWHC (Ch) 340 (Ch).
It was found to be ‘quite clear’ that the testator intended to refer to ‘Grangeway (Contractors) Limited’ and that the reference to Grangeway Properties Limited was plainly a mistake and should be interpreted as a reference to Grangeway (Contractors) Limited. It was therefore unnecessary to consider rectification, although his Honour noted, obiter, that there would appear to be a powerful argument that there was a clerical error.

Similarly, in 

**Brooke v Purton**, Donaldson QC considered a claim for construction and/or rectification of a will, where something “went seriously wrong in the drafting”. The deceased sought advice from his solicitors regarding his will and inheritance tax planning. He met with Ms Greenhough, a 2 years post-qualification solicitor, and was subsequently provided with a draft will and a will summary. The draft will provided for the establishment of a ‘nil rate band discretionary trust’, which is commonly used in conjunction with the spousal exemption from inheritance tax, the aim being to gift to a surviving spouse assets exceeding the top of the band, so that as many assets as possible pass tax-free to a donee other than the spouse, commonly the deceased’s children. Ms Greenhough failed to appreciate that, in this case, in the absence of a spouse, the firm’s precedent would be unsuitable. His Honour found that a literal reading of the relevant clause of the will “could not plausibly represent [the testator’s] intentions” because it would preclude the inclusion of any assets in the trust. It was held that the relevant clause of the will was to be construed as if a particular sub-clause were omitted, so that business assets (which attracted a 100% relief from inheritance tax) would pass to the trust, together with a top-up of other assets to the nil rate band ceiling. His Honour reached this conclusion without reference to s 21, but observed that s 21 would “go in reinforcement of that conclusion”, stating:

“This is a case where, after considering “armchair” evidence, of matters known to or in contemplation of the testator, one is left with uncertainty as to what was intended by the wording of the will. Though that might not be accepted as ambiguity in linguistic philosophy or analysis, I can see no reason why the concept in section 21 should be so constrained. On the contrary, it is in my view both desirable and appropriate that the concept of ambiguity in section 21 of the 1982 Act should be broadly interpreted. Section 21(1)(c) is therefore in my view both engaged and satisfied, opening the door to extrinsic evidence of intention … such evidence is both available and strong, and – as I am in no doubt – establishes the intention in the terms clearly recorded in the will summary.”

It was found, obiter, that the defect could also be cured by rectification, by deleting the offending sub-clause.

In 

**Royal Society v Zoe Ruth Robinson**, Nugee J found that a clause in the deceased’s last will, made in 2009, which provided that the will “should only extend to property which is situated

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12 [2014] EWHC 547 (Ch).
13 At [16].
at my death in the United Kingdom”, which had also appeared in the deceased’s previous will made in 2006, should be interpreted, in the light of admissible extrinsic evidence of the deceased’s intention, as not cutting off bank accounts in the Isle of Man and Jersey. The extrinsic evidence that was taken into account, in reaching this conclusion, included an undated note apparently made between August 2005 and February 2009, in which the deceased referred to the bank accounts in the Isle of Man and Jersey under the heading “Assets in England”. Again, it was found to be unnecessary for the Court to have recourse to rectification.

Some further significant changes are likely to flow from Marley v Rawlings. The learned authors of Theobald on Wills15 have observed that the adoption of a contextual approach to the construction of wills, coupled with the wider admissibility of extrinsic evidence of a testator’s intentions (s 21), means that the range of possible interpretations that can be adopted to give effect to a testator’s intention is broader than ever, and that there is now a degree of uncertainty as to the continued relevance of well-established common law principles of construction of wills.16 Furthermore, it may potentially be the case that evidence of conduct subsequent to the execution of the will could be admissible to assist in its interpretation.17

III: MARLEY V RAWLINGS EMBRACED IN NEW ZEALAND AND AUSTRALIA

Marley v Rawlings has been cited in various cases in New Zealand,18 and was applied by the Court of Appeal in Bethell v Bethell19 (construction of a deed of family arrangement) and in Powell v Powell20 (construction of a trust deed).

In Australia, it has been cited in a number of single judge decisions,21 and has been followed by the South Australian Full Court in Farrelly v Phillips.22

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16 At [13-002] and [13-006].
17 At [13-039].
IV: FARELLY v PHILLIPS

Monica Farrelly died a spinster in 2012, aged 98 years, leaving an estate valued in excess of $7 million. Her last will was dated 4 April 2003.

Her father had died in 1965, and her mother in 1983. Her only sibling, Mary, died a widow without issue, in 1993.

The deceased had a large extended family: her father had six siblings (five of whom had issue) and her mother had 11 siblings (four of whom had issue). At the time she made her will, all of her uncles and aunts were deceased and her closest relatives were her first cousins (not all of whom were alive – some had died, leaving issue). At her death, there were 55 surviving children of those of her first cousins who had predeceased her.

The dispositive provisions of her will provided for 13 pecuniary legacies, totalling $2,923,500 (sub-clauses 3(a) to (m)). There then followed a further sub-clause 3(n), and clause 4:

“(n) all the rest and residue in equal shares as tenants in common per capita for those of the children of the deceased brothers and sisters of both my late mother and father who survive me.

4. IF any beneficiary under my will does not survive me or if it should be uncertain as to whether such beneficiary did survive me but leaves surviving a child or children who shall be living at the date of my death and attain majority I DIRECT that such child or children shall take and if more than one in equal shares as tenants in common the share under this my will which his her or their parent otherwise would have taken.”

Decision at first instance

The executor brought an application for determination of questions arising in relation to the administration of the estate. The first question posed in the summons was whether the substitution of beneficiary provisions contained in clause 4 operated in respect of the gift made by clause 3(n).

Gray J noted the variety of different characteristics apparent in the clause 3 gifts:

“… A number of subclauses require the intended recipients to survive the deceased. Other subclauses do not require the intended recipients to survive the deceased. One subclause requires the intended recipient to attain the age of 25 years prior to receiving a legacy.

23 Further questions were posed in the summons, including in respect of the clause 3(h) gift of $200,000 “to be invested by my trustees for the purpose of applying both the capital and income at the discretion of my trustees for the upkeep and maintenance of the family graves at Pinkerton Plains”. Gray J found that clause 3(h) did not create a charitable purpose trust, since there was no element of public benefit, and that it was void, being in the nature of a non-charitable trust of perpetual duration.

24 Phillips v McCabe [2016] SASC 27 at [7]-[9].
Seven subclauses provide for a specific gift to a person or persons. Two of those subclauses provide for the vesting of the gift in another person in the event that the named recipient does not survive the deceased. Four subclauses provide gifts to institutions. Another subclause provides a sum for funeral expenses for a named friend should the friend survive the deceased.

Clause 3(h) provides for the upkeep and maintenance of the family graves. …”

His Honour also observed that there was limited evidence of the deceased’s state of knowledge of her extended family at the time of making her will, including whether she was aware of how many first cousins she had, their ages, whether they were still alive and, of those who had died, whether they had left issue.25

In construing the will, his Honour found that:

(i) clause 3(n) was expressed to provide a gift to a class of persons by reference to their relationship with the deceased; accordingly, it was a class gift;

(ii) it was clear that the membership of the class provided for by that sub-clause was to be ascertained at the date of the deceased’s death;

(iii) clause 4 operated as a substitutional clause, rather than an independent or original gift;

(iv) the words “who survive me” in clause 3(n) could only refer to the children of the deceased brothers and sisters, therefore only those children who survived the deceased fell within the class for the purposes of clause 3(n) and the term “beneficiaries” in clause 4;

(v) the first cousins who predeceased did not take a share of the class gift and, as such, were not beneficiaries under the will; and

(vi) the substitution of beneficiary provisions in clause 4 did not operate in respect of the clause 3(n) gift.

As a result, the persons entitled to the residuary estate, which was in excess of $4 million, were the ten first cousins of the testatrix who were living at her death.

The appeal

The issue on appeal was whether children of those cousins of the testatrix who predeceased her took under her will. The appellant was a child of one of those cousins, representing that class of descendants excluded from benefit under the construction adopted at first instance. The appellant’s argument was that:

25 Phillips v McCabe, at [6].
there was no grammatical reason why clause 4 could not apply to clause 3(n);

(ii) clause 4 should be interpreted as applying to every first cousin, whether alive or not at the date of the will or at the date of the testatrix’s death;

(iii) the reference in that clause to “beneficiary” meant any natural person named or described in the will as the intended recipient of a bequest, including the persons described in clause 3(n);

(iv) on that basis, clause 4 applied to first cousins who had died before the date of the will, and to first cousins who had died between the date of the will and the date of the testatrix’s death; and

(v) the words “the share … which his her or their parent would have taken”, in clause 4, indicated that that clause was an independent gift, not a substitutionary provision.

This argument relied, in part, on the history of the making of the will. In the initial draft, the residue was gifted to such of the testatrix’s uncles and aunts as survived her, which appeared to be an error because by 2003, they had all died. In subsequent drafts, the residuary gift was in favour of “those of the children of the deceased brothers and sisters of both my late mother and father who survive me” (the same wording that appeared in the executed will). It was argued that, having regard to the drafting scheme employed in the initial draft, the testatrix must have intended the words “any beneficiary” in clause 4 to refer to each and every person who was the primary object of the testatrix’s bounty under the various sub-clauses of clause 3, and that clause 4 should therefore be construed as extending the beneficiaries of the residuary gift to include the children of those first cousins who did not survive the testatrix.

Stanley J summarised the essential principles of the construction of wills, and then referred to what had been said in Marley v Rawlings by Lord Neuberger, regarding the approach to the interpretation of contracts being just appropriate for wills. His Honour observed that Marley v Rawlings had been applied in a number of single judge decisions in Australia26 and that the approach outlined by Lord Neuberger was conducive to coherence in the law of construction of instruments, consistent with the approach taken in the joint reasons of Heydon and Crennan JJ in Byrnes v Kendle.27

The question of construction that required determination was whether the testatrix’s objective intention was to give her residue to such of her first cousins who might happen to survive her;

26 At [29]-[30].
or to distribute the residue to those first cousins who survived her and to the children of those first cousins who did not.

Stanley J found that, in addressing this question, it was open to the Court to consider evidence of earlier drafts of the will, in order to assist in ascertaining the testatrix’s expressed intentions. In Marley v Rawlings, Lord Neuberger had said that, by reason of the statutory provision that enables the court to receive extrinsic evidence of a testator’s intention, it was open to the court to consider evidence of drafts of a will which the testator may have approved or caused to be prepared, for the purposes of interpreting the will or a provision of the will. Whilst there was no equivalent statutory provision in the Wills Act 1936 (SA), it was permissible to receive draft wills as evidence of surrounding circumstances under the armchair principle, for the purpose of ascertaining a testator’s intention. However, such evidence, as with evidence of pre-contractual negotiations, is only admissible where it demonstrates knowledge of surrounding circumstances.

There was, nevertheless, in this case no extrinsic evidence available which could assist in ascertaining which of the two constructional choices the testatrix intended to make. Neither the evidence of the testatrix’s knowledge of her family (which was not extensive) nor the evidence of the draft wills assisted in the constructional choice.

His Honour concluded that clause 3(n) of the will was a gift to a class of persons living at the testatrix’s death, and that the substitution provided for in clause 4 had no effect with regard to anyone who did not ever become a member of the original class; membership was conditional on survivorship.

Kourakis CJ agreed with Stanley J’s reasons, adding, in respect of the evidence of the first draft will:

“I would disregard the first draft will. It does not demonstrate knowledge of any relevant surrounding circumstance. The appellant relied on it to contend that the testatrix must have intended the substitutional gift clause in that draft to make an addition to the class of beneficiaries and that she must therefore have intended it to have the same meaning in the final will. That reasoning is not permissible.”

Nicholson J, in dissent, observed that, applying the analysis preferred by the majority, clause 4 could only have potential operation in respect of three of the gifts in clause 3, which was a surprising, although not necessarily absurd, result. Given the very advanced age of the testatrix at the time she made her will, it could be inferred that most, if not all, of her first

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29 At [33]-[34].
30 At [2].
cousins would have been beyond child bearing age. Accordingly, there would be a closed cohort of children of her first cousins living at the time the will was made. It could be assumed that a number of the first cousins’ children would benefit within a short space of time from the estate of any first cousin who inherited from, but died after, the testatrix. As such, it would be a matter of happenstance if the range of children of those first cousins ultimately to benefit were to depend on which of those first cousins survived the testatrix. To draw a will in terms that would restrict the benefit to that next generation on the basis of the survivorship of their parent suggested, his Honour found, a construction that would result in an outcome not intended by the testatrix. Furthermore, clause 4 was a relatively standard provision to be found in many wills, used to ensure that where a primary gift fails, the children of the proposed recipient stand in his or her shoes. His Honour concluded:

“I take the view that clause 4 is intended to operate in that general way because it identified as its primary subject any beneficiary who does not survive the testatrix. It is artificial, in my view, to characterise some of the proposed recipients in the various subclause of clause 3 as beneficiaries and other as not being beneficiaries on the basis of whether or not an initially proposed recipient has survived the testatrix.”

Impact of Farrelly v Phillips

The fact that Marley v Rawlings has now been applied by an intermediate court of appeal, in Farrelly v Phillips, leaves little doubt that, in Australia, the interpretation of wills is to be approached in the same way as the interpretation of contacts. This is consistent with the Court adopting an intentionalist, rather than a literalist, approach to ascertaining what a testator intended by the words used, and with the Court having recourse to ‘armchair’ evidence. The extent to which the adoption of this approach will impact on established common law principles of construction of wills remains to be seen.

V: THE AUSTRALIAN STATUTORY PROVISIONS DERIVED FROM S 21

The National Committee for Uniform Succession Laws, in its Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills presented in December 1997, recommended the introduction, across the States and Territories, of a uniform provision in respect of the admissibility of extrinsic evidence to assist in the construction of wills. At the time of that report, statutory provisions to that effect had already been introduced in Victoria.

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31 At [73].
Tasmania and the Australian Capital Territory. The Committee noted that at common law, evidence of a testator’s actual intention is only admissible where the wording of the will is found to be equivocal, or to fortify or rebut certain equitable presumptions of intention. It was observed that the object of the UK’s 21, and the existing provisions in Victoria, Tasmania and the ACT, was to extend the admissibility of such evidence to cases where the wording is found to be merely ambiguous, and that the ACT provision went further, by making such evidence admissible not only where the wording of the will is ambiguous but also where it is ‘uncertain’; that was a ‘not insignificant’ extension. A cautionary note was sounded, however, that:

“The introduction of a statutory provision that permits a court to admit extrinsic evidence in the construction of a will is a matter that requires careful consideration. What is at stake is the fundamental principle that a will must be in writing; and the extent to which it is appropriate to compromise that principle where there is extrinsic evidence that the writing does not embody the testator’s intention.”

The Committee recommended the introduction of a provision based on the ACT provision (which, in turn, was derived from the UK’s 21). The model provision was as follows:

“31 Use of extrinsic evidence to clarify a will
(1) In proceedings to construe a will, evidence, including evidence of the testator’s intention, is admissible to the extent that the language used in the will renders the will, or any part of the will:
   (a) meaningless, or
   (b) ambiguous on the face of the will, or
   (c) ambiguous in the light of the surrounding circumstances.
(2) Evidence of a testator’s intention is not admissible to establish any of the circumstances referred to in subsection (1)(c).
(3) Nothing in this section prevents evidence that is otherwise admissible at law from being admissible in proceedings to construe a will.”

Sub-section (3), which did not appear in the ACT provision, was added “for certainty”, to foreclose a possible argument that the provision is a comprehensive code.

34 Wills Act 1958 (Vic) s 22A(1); Wills Act 1992 (Tas) s 43; Wills Act 1968 (ACT) s 12B.
35 Satisfaction, ademption and election; see G E Dal Pont and K F Mackie, Law of Succession (LexisNexis Butterworths Australia, 2nd ed, 2017) at [7.17]-[7.93].
36 Report, p.68.
37 Report, p.72.
38 Report, p.72.
As with many aspects of the wills legislation across Australia, however, the Committee’s vision of uniformity was not achieved. The current legislative provisions are similar but not uniform. A further complication in the construction of wills in Australia is that the wills legislation in each State and Territory contains various statutory rules of construction, derived from the Wills Act 1837 (UK), but which lack uniformity.

The outcome in *Farrelly v Phillips* may have been different, had the gift (clause 3(n)) been to children or issue of the testatrix; in that event, the Court would have needed to consider whether the will evinced a ‘contrary intention’ for the purposes of s 36 of the Wills Act 1936 (SA):

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36 Gifts to children or other issue who leave issue living at the testator’s death do not lapse
Where any person being a child or other issue of the testator to whom any real or personal estate is devised or bequeathed for any estate or interest not determinable at or before the death of that person dies in the lifetime of the testator leaving issue and any such issue of that person is living at the time of the death of the testator, the devise or bequest does not lapse, but takes effect as if the death of that person had happened immediately after the death of the testator unless a contrary intention appears by the will.” [emphasis added]
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This issue arose, in respect of the corresponding provision of the Wills Act 1968 (ACT), in *In the Estate of Koppie*.

**VI: IN THE ESTATE OF KOPPIE**

Kathleen Koppie died in 2016, aged 88 years. Her husband, Francis had predeceased her, in 2008. She was survived by three of the four children of their marriage: Michael, John and Catherine. Their eldest daughter, Margaret, had died in 2014, leaving three adult children.

By her last Will, made in 1982, Mrs Koppie left her estate to her husband or, in the event that he did not survive her for 30 days, to her children. The clause containing the residuary gift was expressed in a common form:

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39 *Wills Act 1968* (ACT), s 12B; *Succession Act 2006* (NSW), s 32; *Wills Act 2000* (NT), s 31; *Succession Act 1981* (Qld), s 33C; *Wills Act 2008* (Tas), s 46; *Wills Act 1997* (Vic), s 36; *Wills Act 1970* (WA), s 28A.
40 See see G E Dal Pont and K F Mackie, *Law of Succession* supra at [8.44]-[8.45].
41 *Wills Act 1968* (ACT), Pt 4; *Succession Act 2006* (NSW), Pt 2.3; *Wills Act 2000* (NT), Pt 4; *Succession Act 1981* (Qld), Pt 2 div 5; *Wills Act 1936* (SA) Pt 4, *Wills Act 2008* (Tas), Pt 4; *Wills Act 1997* (Vic), Pt 4; *Wills Act 1970* (WA), Pt VIII.
“for such of my children as shall survive me and attain the age of eighteen (18) years and if more than one in equal shares as tenants in common”

Mr Koppie’s Will, made at the same time, was in similar form. At the time they made those Wills, Catherine was not quite 18 years old.

Some years later, in 2001, Mrs Koppie executed a Codicil, by which she amended her Will, to provide for Michael to act as co-executor, together with Margaret. The Codicil otherwise confirmed the provisions of the Will.

The dispute

A dispute arose following Mrs Koppie’s death, as to whether Margaret’s three children were entitled to what would have been her share, by way of the statutory substitution provided for in s 31 of the Wills Act 1968 (ACT).

The effect of s 31 is that, where a testator leaves property to his or her children under a will, and one dies before the testator but is survived by his or her own issue, the share that the original beneficiary would have received is given instead, in equal parts, to those surviving issue. By s 31(1)(c), this statutory substitutional gift applies “unless a contrary intention appears from the will or from evidence admitted under s 12B”.

The executor brought an application for construction of the will. The issue that required determination was whether a contrary intention was apparent, either on the face of the will or from extrinsic evidence, so as to disapply the statutory substitutional gift.

The extrinsic evidence

The extrinsic evidence on which the plaintiff sought to rely was contained in an affidavit of Catherine, in which she deposed to her father telling her that he and the testatrix had been to the solicitors to “get our wills done”, and that upon asking her father about the grandchildren, she was told by him: “I will look after my children – it is up to the parents of my grandchildren to look after them.” Catherine further stated that she recalled her mother being present during that conversation, and that her mother did not appear to oppose or disagree with that statement.43

McWilliam AsJ found that that evidence did not really assist44 because the conversation was not with the testatrix, even though she was present, and the topic was really addressing whether separate provision had been made for the testatrix’s grandchildren in Francis’s will, which was

43 At [21]-[22].
44 At [23]-[26].
not the issue in this proceeding. Her Honour also expressed ‘serious doubts’ as to whether Francis was voicing the view of his wife. Furthermore, the conversation occurred before Margaret died, and there was nothing to suggest that the testatrix had at that time turned her mind to the possibility that a child of theirs would predecease either her or her husband. If anything, the comments of Francis suggested that he expected to look after his children and for that benefit to then flow on to his grandchildren in due course, and that he did not expect his grandchildren would not be ‘looked after’ at all, which would be the result of the plaintiff’s favoured construction. To the extent that the sentiments expressed by Francis also represented the view of the testatrix at the time she executed the will, they accorded more with a construction of the will that favoured there being a gift to Margaret’s children.

Was a contrary intention apparent from the words of the will?

The executor pointed to the words of the residuary gift in clause 5 (see above), as an expression of contrary intention. However, section 31(4) of the Wills Act provided:

“(4) A general requirement or condition that an original beneficiary survive the testator or attain a specified age shall not be taken to be an expression of a contrary intention for this section.”

The key issue was therefore whether those words of clause 5 fell within s 31(4), or expressed a contrary intention.

Her Honour found that the words “to such of my children as survive me and attain the age of eighteen (18) years” were plainly a general requirement, and were not to be taken as words of contrary intention, so as to defeat the operation of s 31(1), for several reasons:

(i) the terms of the Codicil were of contextual importance because the Will and Codicil together formed the deceased’s last testament;

(ii) by the time the Codicil was executed, Catherine was over 18 and there was no longer a need for the words “to such of my children as … attain the age of eighteen (18) years”; this suggested that at least part of the critical sentence under consideration was a general requirement, as the condition of attaining age 18 was otiose at that time;

(iii) those words did not evince any conscious decision to express a contrary intention so as to defeat the operation of s 31 because, having regard to s 31, something more was required than a mere statement of a condition of attainment of a certain age, in order for there to be a finding of a contrary intention;

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45 At [30]-[39].
(iv) an express provision, in the Will, for a different substitution (or none) in the event of
death would be sufficient to demonstrate a contrary intention, but the mere fact that the
Will would otherwise have a different effect would not suffice; and

(v) the relevant sentence in clause 5 needed to be read as a whole and, so read, the phrase
“to such of my children as shall survive me” should be construed as part of the same
general requirement, rather than as signifying a specific expression of contrary intention
by the testatrix.

Nor could a contrary intention be discerned from the words “and if more than one in equal
shares as tenants in common” because:

(i) such general words did not affect the deemed construction of the general condition of
survivorship and attaining 18 years; rather, they indicated how the estate was to be
apportioned if the general condition was satisfied, and did not say anything from which
the Court could infer an intention that the bequest not take effect as a bequest including
the living issue of the beneficiary;

(ii) those words were not “mere surplusage” on a construction of the will that favoured
statutory substitution of living issue; and

(iii) alternatively, if those words were considered to be relevant to the specific intention of
the testatrix as to the condition that a child of hers also reach the age of 18, then the words
would confirm the operation of s 31, rather than giving any indication of a contrary
intention.

Further support for applying s 31(4) was found in the explanatory memorandum to the Wills
Act, which described, by reference to the previous version of s 31, the mischief that the
Legislative Assembly was attempting to address in enacting the section:

“New subsection 31(4) provides for two matters which are not to be considered to be an
expression of a contrary intention as would oust the operation of the rule contained in the
section. They are statements made in a will to the effect that the original beneficiary must
survive the testator, or attain a specified age, before being entitled to take under the will.”

Her Honour found that it was difficult to imagine what the Legislative Assembly was intending
when enacting s 31(4), if not the language used by the testatrix in clause 5 of the will. On the

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46 At [40]-[46].
48 Explanatory memorandum to the Wills (Amendment) Bill 1991, p. 11.
plain and ordinary meaning of the phrase, the language was such as to attract the operation of s 31(4).

Consideration was then given to whether any authorities in other jurisdictions affected or disturbed that finding. The relevant statutory provisions in the wills legislation in each the other Australian jurisdictions contained a substitutionary provision, expressed as being subject to a contrary intention in the will, and the words of s 31(4) appeared in some of those provisions, in Queensland, Tasmania, Victoria and the Northern Territory. Her Honour considered, in particular, the Victorian authorities In re King, dec’d,49 Bassett v Half50 and Kavanagh v Reardon;51 the Queensland authorities Burman v Burman,52 Public Trustee of Queensland v Jacob,53 and Re the Will of Macaudo;54 and the NSW authorities Estate of Elizabeth Jenkinson55 and Longmore v Longmore.56 All of those authorities were, however, found to be distinguishable from the present case, principally because the relevant statutory substitutional provision did not contain wording directly equivalent to that of the ACT s 31(4), or the facts of the case were materially different, due to the particular wording of the will in question.57

Her Honour observed, in the course of examining those authorities, that it was not necessary, in order for a contrary intention to be found in the language of a will, that the testator spell out, in the will, how the relevant property is to be distributed in the event that issue predecease. But there did need to be something, either in the language used or in the admissible extrinsic evidence, that demonstrated an intention to the contrary.58

In Public Trustee of Queensland v Jacob, the residuary gift was framed as follows:

“I DEVISE AND BEQUEATH the rest and residue of my estate both real and personal UNTO such of them LESLIE RAY WALKER WILLIAM HUGH ARTHUR WALKER the said MARGARET ADA JACOB LEONARD GOUGH WALKER the said ROBERT JOHN WALKER as shall survive me for a period of thirty (30) days and if more than one in equal shares.”

54 [1993] 2 Qd R 269.
55 [2000] NSWSC 495.
56 [2018] NSWSC 90.
57 Burman v Burman was distinguished on the basis that there was no detailed consideration of the precise point that her Honour needed to determine in this case.
58 At [69]-[70]; see also [98].
The relevant section of the *Succession Act 1981* (Qld) was s 33, as it then stood:

**“33 Statutory substitutional provisions in the event of lapse**

(1) Unless a contrary intention appears by the will, where any beneficial disposition of property is made to any issue of the testator (whether as an individual or as a member of a class) for an estate or interest not determinable at or before the death of that issue and that issue is dead at the time of the execution of the will or does not survive the testator for a period of thirty days, the nearest issue of that issue who survive the testator for a period of thirty days shall take in the place of that issue and if more than one nearest issue so survive, shall take in equal shares and the more remote issue of that issue who survive the testator for a period of thirty days shall take by representation.

(2) A general requirement or condition that such issue survive the testator or attain a specified age is not a contrary intention for the purpose of this section.

..."

White J held:

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

McWilliam AsJ distinguished and disagreed with White J’s reasoning, in three respects:

(i) At least in the ACT, the intention of the legislature, having regard to the plain words of s 31(4), its context and purpose, aided by reference to the explanatory memorandum, did bring about a relevant change to the legislation under consideration in *Bassett v Hall*, insofar as it applies to interpreting a bare statement in a will such as “to such of my children as shall survive me”.

(ii) A will is not drafted as a statute, and is not to be construed as such. Whilst a court may construe words as surplusage or, more relevantly, as not speaking to the intention of the testator, the words “if more than one in equal shares” did not evince an intention only to

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59 The present statutory substitutional provision is *Succession Act 1981* (Qld) s 33N.
60 At [48], having considered *Re the Will of Macaudo; Public Trustee of Queensland v Robertson [2005] 2 Qd R 444; [2004] QSC 331* (in which reference was made to *Bassett v Hall*; *Re Trenfield* (unreported, SC(Qld), No 52 of 1986, Kneipp J, 10 October 1986); *Re Paton* (unreported, SC(Qld), No 837 of 1994, Byrne J, 15 December 1994); *Burman v Burman* [1998] QCA 250 (in which reference was made to *Re King [1953] VLR 648*); and *Estate of Jenkinson* [2000] NSWSC 495.
61 At [83]-[87].
benefit survivors to the exclusion of the living issue of a child. It did not follow, from a construction favouring statutory substitution of the living issue, that such words would be mere surplusage. Where an intention is not expressed explicitly or plainly implied, the Court must not speculate on that intention. In her Honour’s view, it was not to be plainly implied from those words that the testatrix had a contrary intention that, in the event of Margaret’s death, her living issue were not to benefit.

(iii) The authorities reviewed did not amply support a construction of the words in question as evincing a contrary intention. In some cases, the legislation was different and did not contain a deeming provision of the kind found in the Queensland legislation. In other cases, there were additional words in the will from which an implied contrary intention was inferred.

Accordingly, her Honour found that there was no directly binding authority which affected or disturbed her initial finding as to the application of s 31 to the particular facts of this case. A declaration was made that, upon the proper construction of the will and codicil, the persons entitled to the gift made by clause 5 were the three children of Margaret (each as to a one-twelfth share) and Michael, John and Catherine (each as to a one-quarter share), and it was ordered that the costs of the parties be paid out of the estate on the indemnity basis.

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17 May 2019