

SUPREME COURT OF QUEENSLAND

CITATION: *Desmarchelier v Stone & Ors* [2004] QSC 458

PARTIES: **JANE DENISE DESMARCHELIER**
(applicant)
v
DOROTHY MARGARET STONE
(first respondent)
BRUCE KINGSLEY WEBSTER
(second respondent)
GEOFFREY BURSTON WEBSTER
(third respondent)
DAVID JAMES WEBSTER
(forth respondent)
LINDSAY ANN HAMON
(fifth respondent)
ALEXANDER BRAND WEBSTER
(sixth respondent)
SUSAN ELIZABETH PURNELL
(seventh respondent)
RICHARD ANDREW CHERRY WILLIS
(eighth respondent)
KEITH CHERRY WILLIS
(ninth respondent)
IAN CHERRY WILLIS
(tenth respondent)

FILE NO/S: BS9032 of 2004

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 17 December 2004

DELIVERED AT: Brisbane

HEARING DATE: 1 December 2004

JUDGE: Moynihan J

ORDER: **1. On the true construction of the last will of the late Alexander Richard Kingsley Webster (*the testator*), and in the events which have happened namely the testator's death on 21 February 2002 and the death of his brother, the late Alison Brand Webster (known as *Brand*) on 10 March 2002:-**

- a. **the gift to Brand of a one half share of the property referred to in the will as “Blue Anchor” being land more particularly described as 21 Knoll Road, North Tamborine, being lot 1 on Registered Plan No 32149 and Lot 1 on Registered Plan No 32155, each in the County of Ward, Parish of Tamborine, lapsed on Brand’s death in accordance with section 32 of the *Succession Act 1981 (Qld)*, with the consequence that:**
- i. **this one half share in “Blue Anchor” fell to be dealt with as part of the residue of the estate in accordance with section 28(b) of that Act; and**
 - ii. **the executors were correct to allow the second respondent to exercise the testamentary option for the purchase of that one half share in “Blue Anchor”; and**
 - iii. **the executors were correct to account for the proceeds of sale of this one half share in “Blue anchor” as an amount falling into the residue of the estate.**

CATCHWORDS: SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTIMONY – GENERALLY – whether construction of the will is correct

Succession Act 1981 (Qld), s 32

Report of the Law Reform Commission on the Law Relating to Succession QLRC 24 February 1978, p 20, para 32, The Law of Succession (Butterworths) 1027

COUNSEL: D Marks for the applicant

S W Sheaffe for the second respondent

M Wilson for the first, third, fourth, eighth, ninth and tenth respondents

SOLICITORS: Cartwrights Tebbett & Ostwald for the applicant

Mitchells Solicitors & Business Advisors for the second respondent

de Groot for the first, third, fourth, eighth, ninth and tenth respondents

[1] Alexander Richard Kingsley (the Testator) died on 21 February 2002. His last will and testament appointed the Applicant (Jane Denise Desmarchelier), the First Respondent (Dorothy Margaret Stone) and the Second Respondent (Bruce Kingsley Webster) executors. Probate of the will was granted on 17 June 2002.

- [2] The will relevantly provided:

“I give Devise and Bequeath in equal shares to my brothers, James Burston Webster and Alison Brand Webster, my property at Tamborine known as “Blue Anchor”...together with all improvements thereon for their sole use and benefit absolutely. If one or more of my brothers precedes me in death then their respective shares be passed to their respective children in equal shares.

If “Blue Anchor” is to be sold, I give first option of purchase to Bruce Kingsley Webster where the purchase price for the property or assets shall be the true market value thereof as at the date of the exercise of such option. Such true market value is to be determined by an approved valuer to be appointed by my executors.

I give the rest and residue of my estate....to all my eleven nieces and nephews.....”.

- [3] Alison Brand Webster (he is referred to as Brand) died on 10 March 2002. That means that he died within the 30 day period provided for by s 32 of the *Succession Act* 1981 (Qld). Section 32(1) provides:-

‘Unless a contrary intention appears by the will, where any beneficial disposition of property is made to a person who does not survive a testator for a period of 30 days the disposition shall be treated as if that person had died before the testator, and, subject to this *Act*, shall lapse.’

- [4] The executors, having retained a solicitor and acting on an opinion by a barrister experienced in the field, treated the disposition as having lapsed and Brand Webster’s interest as part of the residuary estate. They allowed Bruce Kingsley Webster to acquire Brand Webster’s interest in “Blue Anchor” in accordance with the provisions in the second paragraph of the clause of the will set out above and distributed the proceeds as part of the residuary estate.

- [5] The Land Titles Office refused to register the transfer raising whether the gift of “Blue Anchor” had lapsed in the events which occurred and whether the beneficiaries of the will in respect of that asset were Brand’s children; they are among the respondents.

- [6] In those circumstances the application seeks:

“1. The court determine, on the true construction of the last will of the late Alexander Richard Kingsley Webster (the testator), and in the events which have happened namely the testator’s death on 21 February 2002 and the death of his brother, the late Alison Brand Webster (known as Brand) on 10 March 2002

- (a) Whether the gift to Brand of a one half share of the property referred to in the will as “Blue Anchor”, being land more particularly described as 21 Knoll Road, North Tamborine, being Lot 1 on Registered Plan No 32149 and Lot 1 on Registered Plan No 32155, each in the country of Ward, Parish of Tamborine,

lapsed on Brand's death in accordance with section 32 of the *Succession Act 1981 (Qld)*, with the consequences that:

- (i) this one half share in "Blue Anchor" fell to be dealt with as part of the residue of the estate in accordance with section 28(b) of that *Act*; and
- (ii) the executors were correct to allow the second respondent to exercise the testamentary option for the purchase of that one half share in "Blue anchor"; and
- (iii) the executors were correct to account for the proceeds of sale of this one half share in "Blue Anchor" as an amount falling into the residue of the estate; or

- (b) Whether Brand's children (namely the applicant, and the fifth, sixth and seventh respondents) were entitled to a gift to them, in equal shares as amongst those children, of a one half share of the property referred to in the will as "Blue Anchor"

- [7] The application went on to seek orders and directions to deal with the construction in the event that it was determined the will was to be construed as in (b). As will emerge it is unnecessary to consider them.
- [8] Prior to the enactment of s 32 if a beneficiary died before the testator the gift lapsed. The purpose of the 30 day survivorship rule is to avoid the multiplicity of administration of the same property through several estates which might otherwise occur without unduly delaying the distribution to beneficiaries; see *Report of the Law Reform Commission on the Law Relating to Succession QLRC 24 February 1978*, p 20, para 32, *The Law of Succession* (Butterworths) 1027.
- [9] Section 32, is in my view, unambiguous. The outcome of the application turns on the operation of the section in the circumstances which have, in fact, occurred.
- [10] There was a beneficial disposition to a person who did not survive the testator by 30 days. Section 32 provides in that circumstance "the disposition is to be treated as if the beneficiary died before the testator and shall lapse" subject to the Act. The conditions provided for the section for the lapsing of the disposition are therefore satisfied.
- [11] There is no expression contrary to the 30 day survivor provision expressed in the will. Moreover, the disposition was to identified individuals and hence is not a class gift to be shared by the surviving members of the class.
- [12] Section 32, given its express terms, cannot be construed to the effect that Brand predeceased his brother, save for the limited purpose of s 32. It cannot therefore be said that there is a subsidiary provision in favour of his children.
- [13] The will is not apt to give Brand's children an interest in "Blue Anchor" in the event of his not having survived the testator for the 30 days provided for by s 32. He is therefore treated as having died before the testator and the gift has lapsed. Section 32, in my view, does not allow for any other outcome.

- [14] Any perceived intentions to benefit Brand Webster's children does not justify construing the operation of s 32 to the benefit of those children, other than as residuary beneficiaries.
- [15] In that case, the executors acted properly in allowing Bruce Kingsley Webster to exercise his option to purchase the remaining interest in "Blue Anchor" and in distributing the proceeds as part of the residuary estate.
- [16] I therefore determine in terms of paragraph 1(a) of the application. It is unnecessary to consider it further other than to say I will hear submissions on costs.