Recent cases relating to wills and grants - as at June 2025

1. This paper considers the following recent decisions relating to wills and grants:

Lewis v Watson [2025] QSC 35 (28 February 2025) – s.18 Succession Act 1981 (Qld).

Re Negrean; Borbil v Borbil [2025] QSC 66 (3 April 2025) – life interest v right to reside.

In the Will of Peter John Hammond; Ex parte Powers [2025] QSC 94 (8 May 2025) – did a civil partnership revoke a will?

Re Saunders [2025] QSC 112 (20 May 2025) – estate monies paid to PTQ as administrator in circumstances where the beneficiary had been charged with the murder of the deceased.

Re Last (deceased) [2025] QSC 116 (22 May 2023) – had the presumption of revocation been rebutted in circumstances where the deceased had collected the original will and it could not be found?

Peek v Wheatley [2025] NSWSC 554 (30 May 2025) – s.18 (NSW equivalent) - did notes on a mobile phone constitute a will, acting for applicant when a material witness and issues with integrity of electronic evidence.

WXW v KZY [2025] QSC 138 (12 June 2025) – did a right to reside arise by the will?

2. **Lewis v Watson** [2025] QSC 35 involved an application under s.18 of the *Succession Act* 1981 in respect of an informal will.

3. Relevantly, s.18 provides that the court may dispense with execution requirements for a will, and s.18(1) states:

> (1) This section applies to a document, or a part of a document, that—
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> (a) purports to state the testamentary intentions of a deceased person; and
> (b) has not been executed under this part.

4. The deceased died on 18 May 2024, aged. 62. He had no children or partner and was survived by his father, Leslie, aged 94 years of age and his only sibling, being his sister - the respondent, Robyn.

5. When he was 27 years of age the deceased had made a formal will that he typed himself and was dated 22 September 1989. Just under two years later he prepared a seven-page handwritten document dated 10 July 1991.

6. A grant of letter of administration with the will were issued by the Supreme Court in Townsville on 29 August 2024. The will gifted the deceased's estate entirely to his father, Leslie.

7. The will appointed Leslie as the executor however because of his age but not infirmity, he did not wish to accept the grant. The deceased's sister, Robyn, as attorney for her father - sought and obtained a grant of the deceased's will.

8. During his lifetime the deceased suffered from significant ill health.

9. The applicant is not related to the deceased by birth or marriage. The applicant's mother Sharon and the deceased however were very close friends throughout the deceased's lifetime. They had worked together for a long time and by the deceased's death, Sharon and the deceased had been friends for some 42 years.

10. On 7 January 2025, the applicant discovered the handwritten letter and sought a grant of it under s.18 in order to dispense with the execution requirements and the revocation of the grant of the 1989 will.

11. The alleged informal will was sent to Sharon by mail sometime after the date it bears of 10 July 1991. The original of that document and the envelope addressed to Sharon and stamped at Stafford mail centre were tendered in evidence.

12. The respondent accepts that it is likely that the document had been written by the deceased and posted to Sharon at her then address at Mango Hill. A full copy of the document is annexed to the judgment.

13. The handwritten document deals with a range of different issues, including setting out at some length the deceased's affection for Sharon. Primarily the applicant relied upon the following parts of the handwritten document as those which the court would construe as an informal will:

> "My sole ambition in life now is to love you forever and to accumulate as much wealth as I can to one day give to you and your son. If I were to die tomorrow then you and your little boy would inherit almost a half a million dollars. I didn't ever want to tell you this because I know how angry you'll be with me. But I

> want you to have it Sharon, I have to leave it to somebody and I know I will never have children of my own. So please just accept it. ….."[1]

14. In the decision of Justice Treston, focus was had to the three elements that needed to be satisfied in order for a document to be admitted to probate, being:

    (a) First, whether there was a document;

    (b) Second, if yes, did the document purport to embody the testamentary intentions of the deceased?; and

    (c) Third, did the deceased intend the document would operate as his last will? [see Lindsay v McGarth [2016] 2 Qd R 160 at [55]].

15. The judgment refers to a variety of documents that have previously been found to satisfy the requirements of s.18, including handwritten notes drafted shortly prior to death, unsent text messages, video recordings on mobile phones, audio recorded voice memos, documents created on an iPhone, and a DVD. Equally, however the Court has rejected other documents such as unsigned documents saved on a computer.[2]

16. Her Honour then said:[3]

> "What can be gleaned from the array of cases to which I have referred above is that the Court will carefully scrutinise the document in question for the purpose of drawing a conclusion as to whether or not it satisfies the requirements of s.18. Further, while the remedial nature of the legalisation has meant that a liberal approach has been taken to the construction of s.18, [Sadleir v Kahler [2019] 1 Qd R 52], the Court must still be satisfied to the requisite standard as demonstrated in *Linsday's* case.[4]

17. In looking at the second element as to whether the document purported to embody the testamentary intentions of the deceased, it was noted that the applicant sought the Court to have particular regard to the following comment contained in the handwritten document:

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[11] At [21]
[2] At [29]
[3] At
[4] At [30]

> "…to accumulate as much wealth as I can to one day give to you and your son".

18. Her Honour did not accept that these words were sufficient to demonstrate a dispositive intention.

19. Treston J said:

> "The language is crafted as an "ambition" to "one day" make such a gift to Sharon and her son. At best, the words might suggest a future intention to "one day" make a will in Sharon's favour, but the words do not record the present dispositive intention that the document be that gift.[5]

20. Further, Her Honour referred to the words:

> "If I were to die tomorrow then you and your little boy would inherit almost half a million dollars".

21. As to this Her Honour said:

> "I accept the applicant's submission that the sentence, but particularly the words "would inherit" might be capable of suggesting that the deceased had *already* made a will in favour of Sharon and her son, but there is no evidence that that in fact had occurred; and that is not the applicant's case in any event. In fact, the evidence is to the contrary that only two years before this document was written, the deceased had in fact made a will in favour of his father."[6]

22. Her Honour pointed out that the handwritten document did not use wording to indicate that the deceased had already written a will gifting his estate to Sharon and her son, and which may have attached a copy of the same to it.

23. The applicant also relied upon the words in the handwritten document:

> "But I want you to have it Sharon, I have to leave it to some body, and I know I will never have children of my own. So please just accept it."[7]

24. Her Honour said that while she accepted that the phrase demonstrated an expression of the deceased's wishes, it was more consistent with the deceased imploring Sharon to accept a gift which he wishes to make, but which the document itself is not effective

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[5] At [39]
[6] At [41]
[7] At [45]

to make, and even read together with the earlier words that Her Honour had considered.

25. It was also found that if the handwritten document was to imbody the testamentary intentions of the deceased then it would have used words like had been used in the will of 1989 that are likely to have been clearly dispositive as they were in that document - which:

(a) revoked formal wills;

(b) appointed an executor; and

(c) made gifts of property and residue.

26. It was noted that the handwritten document did none of those things.[8]

27. Her Honour noted that such words cannot be seen in isolation from the balance of the document. Treston J said:

> "The document has the hallmarks of a letter from a love-struck man to a woman who was in a relationship with someone else. The relied upon words are part of a much broader piece of correspondence professing the deceased's love for Sharon and seeking to describe that love in a variety of different ways".[9]

28. In the judgment, Treston J later said:

> "Had the deceased intended to make a will in favour of Sharon, and/ or her son, he well knew and understood what the requirements were because he had made such a document himself previously. The document the applicant seeks to provide is an entirely different one".[10]

29. Treston J also noted that the respondent submitted evidence that after the amputation of the deceased's toe in 2020 or 2021, when he was critically ill, the deceased took his 1989 will to his father and asked him to keep it. Her Honour noted "this fact is inconsistent with the applicant demonstrating, by act or words, that the document the applicant seeks to propound was intended by the deceased to be his last will. In fact, the contrary is true. The deceased's actions in providing the 1989 will to his father in

[8] At [47] – [48]
[9] At [49]
[10] At [63]

around 2020 or 2021 in fact strongly supports the conclusion that the deceased intended *that* document to be his last will, and not the 1991 document.[11]

30. The application was dismissed.

31. This case focuses on the importance of the wording used by the deceased in the document, and particularly in circumstances where a formal will then exists. The intention to revocate earlier Wills and to express a dispositive intention need to be clear.

32. Simply expressing an intention to gift certain assets in the future to someone is not sufficient to meet the relevant test.

33. **Re Negrean; Borbil v Borbil** [2025] QSC 66 (3 April 2025) - the construction of a homemade will was considered, and in particular, whether a clause provided for a life interest or a right to reside.

34. Hindman J summarised[12] the principles in respect of the construction of a will briefly as follows:

> "The Court's function is to ascertain the deceased's intention when interpreting a will. This is done by construing the words of the will accordingly to their ordinary meaning bearing in mind the facts existing at the time the will was made. The will is to be considered as a whole and ordinarily the Court will strive to give effect to all the words of the will. It is better to give effect to a gift then for a gift to be nullified..
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> The language used in the will should be read in the sense the maker appears to have used the language. Regard can be had to speech habits of the maker – for example, that English was her second language. But the plain meaning of the words used should not be ignored and nor should words be implied to give effect to an intention that is not expressed.
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> The Court should not speculate or guess about what the maker intended – the Court must adopt what seems the most probable interpretation of the will.

[11] At [70]
[12] At [13] – [17]

> In a case such as this where the will is obviously homemade, words and form (including punctuation) might be looked at less strictly.
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> Whether there are apparent inconsistencies in the will, an attempt to reconcile the differences should be made. Otherwise, the general rule is that the later part of the will prevails, but that general rule is rebuttable on the reading of the will as a whole."

35. The principles applied regarding life interests and rights to reside were then summarised as follows:

> "It is a matter of construction (of the whole will) as to whether an interest or rights given to a beneficiary to live in a property is a life interest or merely a licence giving a right to reside[13]. The key difference is that a life interest allows the interested person to tenant the Property and collect rent from same (a right to profits); that is, that is a right to use the property, rather than just reside in it. That is not the position in respect of a right to reside.[14]
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> No interest in land is conferred by a licence giving a right to reside unless expressly conferred.[15]

36. The deceased was 65 years old at the time the will was made. She was born in Romania and lived in Australia for 36 years and was not capable of drafting a document of this kind – she was unable to type and had limited written English ability. She was assisted with the preparation of the will by an unknown person. Grammar and punctuation errors were frequent in the will however it was quite personalised in parts, indicating the deceased had some close involvement in its preparation.[16]

37. The fourth paragraph of the will contained words that a son John contends provided him with a life interest, the wording of which was as follows:

> "I would ask that any money in my bank account to use for bills, funeral costs and repairs to house at 3 Falstaff Street Sunnybank Hills, Qld 4109. Which is my son John Negrean (Ioan Borbil) principal place of residence and I wish it to continue being his home for as long as he wanted to be."[17]

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[13] At [18]
[14] At [19]
[15] At [20]
[16] At [21]
[17] At [28]

38. Hindman J found that these words, in the context of the will as a whole, were not sufficient to create a life interest in the property in favour of John. In particular it was found that the reference to the Property being "his home for as long as he wanted to be" strongly pointed against any interest created including a right of profits. Her Honour said "at the most, there is a personal right to live in the property which may or may not be exercised",[18] and referencing *Re the Will of Mayer* [1995] 2 Qd R 150; *Re Hoppe* [1961] VR 381 and *Hurley v Hurley* (1947) 75 CLR 289.

39. Further, Hindman J concluded that the fourth paragraph in the will was not sufficient to create even a right to reside, when Her Honour said:

> "…On the proper construction of the will that what [the deceased] here intended was not the creation of any rights (as appears under the next heading of "specific gifts and legacies") but mere wishes which may or may not come to pass. In this case, with the Property left to John and Elisei, what [the deceased] was expressing here was simply a wish that John might continue to live in the Property if he wanted to. The effect of the words is not dipositive".[19]

40. Her Honour continued:

> "Even if I am wrong in that conclusion and a right to reside was granted to John, such a right came to end when John vacated the Property for a period of time and/or when he commenced renting out rooms in the Property (which rent he has not remitted to the estate)"[20]

41. **In the Will of Peter John Hammond; Ex parte Powers** [2025] QSC 94 (8 May 2025) - the deceased executed his last will on 22 June 2024 and subsequently entered into a civil partnership on 5 August 2024. The deceased died on 1 December 2024. The question arose whether the will was revoked by the deceased entering into a civil partnership or whether the will was made by the deceased in contemplation of entering into the civil partnership.

42. By the will the deceased appointed his sister, being the applicant – Ms Powers – as his executor. Ms Powers contends that the will was made in contemplation of the deceased entering into a civil partnership with Ms Vu. If such a finding was made then

[18] At [29]
[19] At [30]
[20] At [31]

Ms Powers seeks an order that she be granted probate. If it was not, then Ms Powers seeks an order that letters of administration upon intestacy issue to her.

43. The will gifted the deceased's superannuation fund to Ms Vu and his pension fund to his children from his second marriage, Ms Vu and the estate in equal shares. The deceased then provided for his residuary estate to be provided to 20% to Ms Vu, 30% to each child from his second marriage and 20% to Ms Powers. Further, his unit was provided on trust for Ms Vu to reside rent free for 5 years after his death and upon sale the proceeds to be divided equally between his children from his second marriage and Ms Vu. The will contained no reference to a civil partnership with Ms Vu.

44. Section 14A(1) of the Succession Act provides that a will is revoked by the testator entering into a civil partnership. However, s.14A(2) provides exceptions to that, and s.14A(3) provides that a will made in contemplation of a civil partnership, whether or not that contemplation is stated in the will, is not revoked by the registration of the civil partnership contemplated.

45. Martin SJA said:

> "Section 14A of the Act makes identical provision for the effect of entering into a civil partnership as s.14 makes for the effect of a marriage. It appears that neither section has been the subject of consideration by this court. There has, though, been consideration of similar statutory provisions in other jurisdictions which provides assistance."[21]

46. His Honour then refers to the decisions of *Hoobin v Hoobin* [2004] NSWSC 705 and *Steele v Ifrah* (2013) 38 VR 186.

47. Martin SJA referred to, with approval, to the comments of Dickson J in *Steele v Ifrah* where it was said:

> "[12]… what is important is that there be contemplation of a marriage when determining how, and to whom, one's estate is to be distributed, because it is the making of a will without contemplation of the relevant circumstances that may apply when it comes into effect that is the mischief.
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> [13] It must appear probable that the testator gave thoughtful observation or consideration of a prospect, or an expectation, of a marriage in the process of

[21] At [9]

making the will. A mere consciousness of a possibility of marriage in the future will not suffice but all that need be contemplated is a marriage, which must involve a particular person. The testator will not have any particular intention or contemplation about the future validity of the will, or the relation between the marriage and the validity of the will."[22]

48. Martin SJA then said:

> [16] I adopt, with respect, some of Dixon J's conclusions and have adapted them for the circumstances of this case:
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> > (a) The words "made in" in s 14(3)(a) of the Act should not be construed narrowly. In the relevant statutory context, they referred to the entire process of making a will rather than a specific event in that process.
> >
> > (b) The words "in contemplation of entering into a civil partnership" do not require that the intention or contemplation of the testator be that the will should continue to have effect after and notwithstanding the civil partnership.
> >
> > (c) In the absence of direct evidence of the deceased's intention, it has to be inferred from other established facts on the basis of the evidence as whole.[23]
>
> [17] So far as there is a difference between the reasoning of White J and Dixon J I respectfully agree with Lindsay J's formulation of a reconciliation of the tests in *Hoobin v Hoobin* and *Steel v Ifrah*. He said:
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> > "[134] An application of the concept of "a will made in contemplation of marriage" is fact-sensitive.
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> > [135] The facts of the current case can be dealt with within the treatment of the law found in *Hoobin v Hoobin* and (shorn of observations in *In Re O'Brien (dec'd)) Steel v Ifrah* , but with a different nuance. White J's language ("there must be a more definite state of mind than a mere consciousness of the possibility of a particular marriage" and "having a marriage in mind as a contingency to be provided for or as an end to be

[22] At [15]
[23] At [16]

> aimed at") comes to mind. So too does Dixon J's requirement that there be something more than "a mere consciousness of a possibility of marriage in the future": a "thoughtful observation or consideration of a prospect, or an expectation, of a marriage in the process of making [a] will".[24]

49. Applying such principles, Martin SJA found that the deceased made his will in contemplation of entering into a civil partnership with Ms Vu and that his conduct was consistent with more than a mere consciousness of a possibility of entering into a civil partnership. "He expressed a determination to enter into that relationship and to ensure that Ms Vu would be looked after. That conclusion is supported by:

    (a) the evidence of the relationship between the deceased and Ms Vu,

    (b) the deceased's statements with respect to the visa application about his relationship,

    (c) the deceased's statements to Mr Tong that he wanted to enter into a civil partnership and to make sure that Ms Vu was "looked after should anything happen to him", and

    (d) the arrangements made for Ms Vu in the deceased's will."[25]

50. The decision is notable for being the first such decision relating to s.14A of the Succession Act in Queensland and the process of examination of the relationship between the deceased and the person that was the subject of the civil partnership and the historical nature of the same.

51. **Re Saunders** [2025] QSC 112 (20 May 2025) - the deceased made a will on 24 October 2017. The will appointed the executor and sole beneficiary who was later convicted of the deceased's murder. The Public Trustee of Queensland was appointed to administer the deceased's estate. The deceased had mortgaged his bequeathed property in circumstances where the mortgage had fallen into default. The administrator sold the property, and the surplus funds were paid into Court. The question arose whether the surplus funds should be paid to the Public Trustee as administrator of the deceased's estate.

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[24] At [17]
[25] At [21]

52. The deceased died on 12 November 2017 and at that time he owned a property in Nambour that was mortgaged to Perpetual Trustee. By his last will made 19 days before, the deceased left his entire estate to Ms Graham. Ms Graham was later charged with the murder of the deceased. As Ms Graham would be ineligible to administer the estate and would not be entitled to the bequest if she murdered the deceased, the mortgagee paid the surplus funds from the sale of the property into Court (at [7] with reference to *Re Crippen* [1911] P 108; *Helton v Alan* (1940) 63 CLR 691).

53. Ms Graham asserted that she held an equitable interest in the property as a result of contributions that she made. It was held that the Public Trustee is the administrator of the estate and therefore has a right to possession of the funds. The obligation of the Public Trustee is to administer the estate and that will require dealing with any issues raised by Ms Graham's claim. The payment of the money to the Public Trustee does not prejudice any claim that Ms Graham may have to an equitable interest. In the circumstances it was found by Davis J to be appropriate to make orders for payment of the money out of Court to the Public Trustee.

54. **Re Last (deceased)** [2025] QSC 116 (22 May 2023) - the deceased made a valid will the original of which he subsequently collected from the office of the solicitors that had given notice of moving address. The principal of that firm was one of the joint executors. After collecting the original the deceased gave a copy of the Will to the other named joint executor (Malcolm) in circumstances where the original will could not then later be located.

55. The question arose whether the presumption of revocation had been rebutted and whether probate should be granted on the copy of the will. By the will dated 13 May 2016, the deceased gave the estate in 1/3rd shares to each of his daughter Linda, his son Malcolm and the children of his son Michael (who had predeceased the deceased and had died prior to the making of the will).

56. Around 16 May 2023 Malcolm had a conversation with the deceased and the deceased provided him with a copy of the will and there was a conversation about its terms and about the deceased's testamentary intentions. None of that conversation was inconsistent with the terms of the copy of the will that was produced. The deceased

told Malcolm that his sister had been provided with a copy of the will and that he had also retained a copy.[26]

57. The deceased died on 20 September 2024 at the age of 82. In the period between 16 May 2023 and the deceased's death Malcolm was not advised by the deceased that he had made a new will, or that he had decided to revoke the will that he had made in May 2016.

58. After the deceased's death, Malcolm contacted the solicitors and learned that the original will had been collected by the deceased on 18 May 2019. Malcolm then thought that the copy of the will that he had been given by the deceased was the original. A staff member of the firm inspected the document in the possession of Malcolm and ascertained that it was only a copy of the will.

59. After inspection of the deceased's last residence the copy of the will was located, but not the original. Malcolm's sister had received a copy of the will from the deceased and that was held by her in her safe. That document was recovered by Malcolm but is not the original. The deceased had not asked his solicitors to prepare a new will.

60. Davis J referred to the relevant principles in relation to copies of wills as stated by Applegarth J in *Frizzo v Frizzo* [2011] QSC 107.

61. The primary issue for consideration was the applicant having to overcome the presumption that the will was destroyed by the deceased, with the intention of revoking it.

62. Davis J said in this respect:

> "While there is mystery as to the fate of the original will, in my view, the evidence quite strongly points to the inference that (the deceased) did not destroy the will with a view to revoking it".[27]

63. Although the motivation for the deceased collecting the will from his solicitors' office on 18 February 2019 was unclear, after so collecting the original he delivered a copy to his two surviving children … and "that was a pointless and illogical exercise if his intention was that the will was to have no effect".[28]

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[26] At [9]
[27] At [23]
[28] At [24]

64. Further, the deceased "went to the trouble of meeting with Malcolm and discussing the terms of the copy of the will. Again, that is pointless if he did not intend the will to continue to have effect".[29]

65. In these circumstances it was found that as at 16 May 2023, which is about the day the deceased met with Malcolm, he had not revoked the will.

66. Davis J said then that "it is highly unlikely that (the deceased) revoked the will between May 2023 and the time of his death about 16 months later on 20 September 2024".[30]

67. There was no evidence of an alternative will that was made by the deceased as at May 2023 and advertising did not reveal a later will. Further, no solicitors in the deceased's local area have any record of taking instructions from the deceased to draw a new will. Also, there was no will made after May 2016 found in the deceased's possession after his death.

68. Davis J said:

> "The meeting with Malcolm in May 2023 shows [the deceased's] inclination to discuss his testamentary intentions with his son. There were no discussions about any new will made after May 2023."[31]
>
> "The will evidences [the deceased's] intention to distribute his estate in what almost be considered the logical way. The will splits his estate between his three children, but recognises that one has predeceased him and that the share of that child should be distributed to that child's children. There is no evidence of any change in circumstances after May 2023 which might suggest why the deceased would change that plan.".[32]
>
> "The deceased retained a copy of the will. It is illogical to think that he would have destroyed the original will with the intention of revoking it, yet retained a copy right up to the time of his death."[33]

69. In these circumstances the grant of probate was made in respect of the copy of the will of the deceased subject to the formal requirements of the registrar.

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[29] At [24]
[30] At [26]
[31] At [29]
[32] At [30]
[33] At [31]

70. In the case of ***Peek v Wheatley*** [2025] NSWSC 554 (30 May 2025), Richmond J considered an application for a grant of probate in respect of an informal document that was found in the 'Notes' application on the iPhone of the late Colin Laurence Peek (**the Note**), who died on 16 August 2022, aged 79 years.

71. By statement of claim, the plaintiff (the deceased's brother, Ronald) contended that the deceased did not intend the Note to operate as his will and absent any other document purporting to be testamentary in nature, he died in testate.[34]

72. The Note was discovered on 19 August 2022 by the deceased's solicitor, Mr Dawson at the deceased's home when he and the defendant, Mr Wheatley were looking for any original wills. No will executed in accordance with the formal requirements for wills was located.

73. Mr Dawson found the note on the 'Notes' application on the deceased's iPhone. Under the terms of the Note, the bulk of the deceased's estate (approximately $10.3m) will pass to Mr Wheatley, and a smaller gift (approximately $990,000) to the deceased's brother who is the plaintiff in this proceedings, Ronald Peek. The rest of the deceased's estate is divided up through gifts to friends, including 5% to Mr Dawson, (which amounts to approximately $308,495).

74. On or about 9 February 2023, Mr Wheatley, who was named as the executor in the Note, applied for probate of the Note. The issue for determination was whether the defendant has discharged his onus in propounding the Note as the deceased's wil;.[35]

75. Although it was not in dispute that the Note states the testamentary intentions of the deceased, the plaintiff submitted that the Court cannot be satisfied that the deceased intended the Note without more, to have immediate legal effect having regard to:

    (a) the circumstances in which the Note was created and subsequently found;

    (b) the evidence as to what Colin did (and did not say about his testamentary intentions and the Note); and

    (c) the wider context of the evidence of Colin's intentions and the manner in which he engaged in formal legal transactions.[36]

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[34] At [3]
[35] At [6]
[36] At [7]

76. Mr Dawson acted for the deceased on hundreds of occasions, and it became their ongoing joke that there would be no 'fuck ups'. In 2001, the deceased appointed Mr Dawson as his attorney pursuant to a power of attorney.

77. Mr Wheatley deposed that on or about the deceased's birthday on 1 May 2022, he had a conversation with the deceased, when he asked Mr Wheatley to be the executor of his will and Mr Wheately agreed to do so. Mr Wheatley deposed that he then said to the deceased that he needed to organise his will as 'I can't be the executor of nothing', which led to a discussion which the deceased said he would not leave his estate to is brother and his family because while he loved his brother, 'I do not want his son … or his wife ….. and her first family getting any part of my wealth when I'm gone. I have had nothing to do with any of them and they're not my family as far as I am concerned'. The deceased also said he regarded Mr Wheatley as 'not only a mate but in so many ways you're the son I lost'. Mr Wheatley deposed that in this discussion he encouraged the deceased to be generous to his brother, and 'at least make him financially comfortable and give him the car'.[37]

78. At a meeting that the deceased had with his solicitor, Mr Dawson, at his office on 21 July 2022, the solicitor was shocked at the appearance of the deceased due to his ongoing ill health. The deceased told Mr Dawson that he had difficulty walking more than 20 metres. At this meeting Mr Dawson raised with the deceased the importance of making a will, and the deceased acknowledged that and said words to the effect that 'I'll write it down and send it through in the next week or so'. When Mr Dawson told him to write it down now please mate, the deceased then said that 'I am not going to die yet. I told you – I will send it through in the next week or so'.[38]

79. This conversation is reflected in a contemporaneous file note Mr Dawson recorded of the meeting. It was noted by Richmond J that the deceased has twice said he would send through his instructions to Mr Dawson (which is confirmed by the file note).

80. Between 21 July and 1 August 2022, the deceased and Mr Dawson exchanged emails in relation to an insurance claim. On or about the early morning of 4 August 2022 the deceased called an ambulance and "he thought he would die". Mr Wheatley drove over to the deceased's house and helped him down the stairs. The paramedics arrived after 2am and by that time the deceased had recovered somewhat after having

[37] At [22]
[38] At [24] – [25]

something to drink and eat. Mr Wheatley said that morning you need to put in writing what his intentions were with his property.[39]

81. The Note was created on the deceased's iPhone on 4 August 2022 at 4:25pm. it is entitled 'Last Will of Colin L Peek' and is set out in the decision. It refers to Mr Wheatley being the executor and various gifts being provided to people including Mr Wheatley receiving the house and residue of the bank accounts.[40]

82. The parties accept that at 1:35am on 5 August 2022, that the deceased closed the Note (as indicated by the date and time at the time of the screen shot). The evidence establishes that it was not reopened until 19 August 2022 when Mr Dawson discovered it when looking through the deceased's iPhone.[41]

83. Following the drafting of the Note the deceased spoke with Mr Wheatley on 5 August and the deceased's brother Ronald deposed that the last time that he saw the deceased before he died was on 9 August 2022.

84. On 12 August Mr Wheatley asked the deceased to chase up on the results of his chest scan. On 13 August 2022 Mr Wheatley inspected an apartment at Milsons Point which was for sale and later had a conversation with the deceased about. In that conversation the deceased discouraged Mr Wheatley from purchasing the apartment but did not say he had finalised his will although he had the opportunity to do so.[42]

85. On 15 August at around midday the deceased rang Mr Wheatley to tell him about the results of the scan that had been received. The deceased was told by Norwest Hospital that he needed to attend hospital so they could drain the fluid on his lungs and abdomen and then retake the scan. Mr Wheatley offered to take him immediately, but the deceased told him that the hospital had no beds. Mr Wheatley again spoke with the deceased at 6:30pm that night and in none of those conversations did the deceased mention that he had made a will.[43]

86. Early on 16 August, the deceased passed away in his sleep.

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[39] At [30] – [32]
[40] At [34]
[41] At [35]
[42] At [40] - [41]
[43] At [42]

87. Greg Jones a friend of the deceased, deposed that he was the last person to speak with the deceased on 15 August and the first person contacted by New South Wales police on 16 August to inform him of the deceased's death.[44]

88. Mr Dawson also received a telephone call from New South Wales police on 16 August advising him of the deceased's death, and he deposed that as he was aware that Mr Wheatley had palm identification access to the deceased's home, he rang him and asked him not to enter the home until Mr Dawson could accompany him.

89. It was noted in the decision that this was an area where Mr Dawson and Mr Wheatley's evidence diverge as Mr Wheatley could not recall having a conversation with Mr Dawson in which he said that.[45]

90. On 19 August Mr Dawson and Mr Wheatley met at the deceased's home and Mr Wheatley used his fingerprint recognition to access the house. Mr Dawson asked Mr Wheatley to look for a will or any other legal documents and they proceeded to the study and searched the desk, filing cabinets, cupboards and computer. Mr Dawson picked up the deceased's iPhone and began looking through it and found the Note. After the showing the Note on the screen of the phone to Mr Wheatley, Mr Dawson then took a screenshot of it and forwarded a copy of it by email to his office email address to ensure that it would not be lost.[46]

91. As to the evidence of Mr Dawson and Mr Wheatley in relation to the iPhone, Richmond J said initially:

> "It was not until Mr Wheatley's affidavit sworn and served on the first day of the hearing that he disclosed details of his visits to [the deceased's] house between 16 August and 19 August, and the manner in which Colin's iPhone was handled by him and Mr Dawson after 19 August. Similarly, Mr Dawson did not include in his affidavit any evidence or explain how it came to be that many of the text messages and emails on Colin's iPhone came to be deleted…"[47]

92. The net value of the estate was found to be around $13.6m.[48]

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[44] At [44]
[45] At [45]
[46] At [46]
[47] At [47]
[48] At [49]

93. In the consideration of the evidence it was noted that the deceased's brother, Ronald deposed that he and the deceased had always been close, and that Ronald would refer to the deceased as his 'best mate' starting from when he was young and continuing through his adult life. In 2006, the deceased made a gift to Ronald of $8,000 for his birthday to enable him to go to France to watch the Tour de France. The deceased did this because of Ronald's love of cycling.[49]

94. Ronald deposed that shortly before he left for France he had a conversation with the deceased about wills as follows:

> Ronald: I should make a will in case the plane crashes.
>
> Colin: Yes, we both should do our wills. I have a solicitor in Dural, Peter Dawson. He does wills. We can both go there and do it.[50]

95. Ronald deposed that was the last time that they spoke about wills, and that he did not do his will at that time. He deposed that this was the first time that he had heard the deceased mention Mr Dawson.[51]

96. In the decision it was noted that "Mr Dawson acted in the proceedings despite being a primary witness and having a financial interest in the outcome of the same, putting him in a position of conflict between his personal interest and his duty to the Court".[52]

97. In his evidence Mr Dawson admitted that he did not have any conversations with the deceased about his will.[53]

98. Richmond J found that Mr Dawson acted in conflict between his personal interest and his overriding duty to the Court and the administration of justice. Hi Honour said: "He had a personal interest in the outcome of these proceedings (he stands to benefit under the informal will his client propounds), he was a material witness in the proceedings (having been the deceased's lawyer and friend and in contact with him around the time that the informal will was drafted and was in the deceased's house several times after his death with possession and control of critical evidence, including the iPhone after

[49] At [52]
[50] At [53]
[51] At [54]
[52] At [58]
[53] At [60]

the deceased's death) and he was the solicitor on the record for the defendant (preparing evidence in support of the informal will)".[54]

99. Richmond J further said that Mr Dawson's "conflict of interest and duty affects the probative value of the evidence of all the witnesses for the defendant, as Mr Dawson was responsible for the preparation of all that evidence".[55]

100. Richmond J also said:

> "The fact that Mr Dawson discussed with Mr Wheatley the evidence he would give on matters on which there was overlap with Mr Dawson's own evidence was improper and seriously undermines the probative value of the evidence of both of them because the Court cannot be certain as to the extent to which their recollection of events is truly independent, or rather has been influenced by the version of the events given by the other."[56]

101. In that regard Richmond J then referred to the decision of *Day v Perisher Blue Pty Ltd* (2005) 62 NSWLR 371 at [30] by Shellr JA (McColl JA and Winder J agreeing).

102. When further considering the evidence of the defendant Richmond J noted that a number of witnesses included a paragraph in their affidavit stating: 'I have seen the document recorded on Col's mobile phone and entitled "Last Will of Colin L Peek". I say that such document is not inconsistent with the general instructions Col gave me regarding his testamentary intentions'. Richmond J noted that Mr Dawson said in cross examination that this was his phraseology.[57]

103. A joint court appointed expert gave evidence following a forensic examination of the deceased's iPhone. That evidence included that the note was created on 4 August 2022 at 6:25am and the Note was the only document in the notes application found on the iPhone.[58]

104. The expert opined in his supplementary report that the minimal data on the device that "unless the user of the device did not use the device regularly, it appears that data may have been deleted over time".[59]

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[54] At [67]
[55] At [68]
[56] At [70]
[57] At [97]
[58] At [118]
[59] At [119]

105. The decision then refers to the principles on informal wills, which includes a reference to s.8 of the *Succession Act* 2006 (NSW) which is the corresponding provision to s.18 in the Succession Act 1981 (Qld). His Honour refrs to the three requirements to satisfy s.8 as set out in *Hatsatouris v Hatsatouris* [2001] NSWCA 408 at [56] per Powell JA being, first, there must be a document within the meaning of s.3(1) of the Succession Act, second that the document must purport to state the testamentary intentions of the deceased: s.8(1)(a) and third that the deceased must have intended the document to form his will: s.8(2)(a).

106. Examining this question the Court may, in addition to the document itself, have regard to evidence of the manner in which the document was executed, the testamentary intentions of the deceased, including evidence of statements made by the deceased as well as any other matters relevant to that question: s.8(3) and (4). The relevant intention need not exist at the time of the document's creation so long as the document was subsequently adopted by the deceased as his or her final will through words or conduct: *Kemp v Findlay* [2025] NSWCA 46 at [188].[60]

107. As to the burden of proof, Richmond J said:

> "In the present case, the defendant has the burden of establishing that the third element in s.8 is satisfied on the civil standard of proof, that is, on the balance of probabilities: Evidence Act 1995 (NSW), s.140(1). Under s.140(2) of the Evidence Act in deciding whether it is so satisfied, the Court must take into account the nature of the subject matter of the proceeding and the gravity of the matters alleged. The 'Briginshaw principle' is a reference to the observations of Dickson J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 … as to how the civil standard operates which involves two elements. The first is that when the law requires the proof of any fact the Court must feel an actual persuasion of its occurrence or existence before it can be found, and 'it cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. It is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the Tribunal'. The second element is that reasonable satisfaction is not a state of mind that is obtained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, inherent unlikelihood of an occurrence of a given description, or the gravity of the

[60] At [124]

> consequences flowing from a particular finding are considerations which must effect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal' (at 362).[61]

108. Richmond J notes that the first element is an explanation of the civil standard of proof and the second refers to the strength of the evidence necessary to establish a fact or facts on the balance of probabilities, which reflects what is now found in s.140(2) of the Evidence Act. It is generally accepted that the second element in *Briginshaw* applies to the determination of whether an informal will should be admitted under s.8 for the reasons given by Habersberger J in *Fast v Rockman* in the passage set out above."[62]

109. Richmond J noted that the document in question needs to be considered in context and that the Court should have regard to the totality of events in order to determine what was the party's intention (see *Public Trustee v Commins; the Estate of Gwendolyn Myrtle Wray* NSWSC 19 June 1992).[63]

110. Richmond J found that it was particularly significant that the deceased "failed to inform Mr Dawson or Wheatley of the existence of the Note, which is consistent with it being a draft of his testamentary intentions that he proposed to send to Mr Dawson but for one reason or another (possibly because he had not finalised his views or was too ill to summon the energy to do so) he failed to do before his unexpected death".[64]

111. Richmond J noted that there was evidence that the deceased intended to see his solicitor, Mr Dawson for the purpose of making his will.[65]

112. As to the second matter relied upon by the defendant from the wider context is the statement the deceased made on 11 August 2022 that 'I have finalised my will'. Richmond J found that this was ambiguous and was not sufficiently definite that the Note was intended to constitute, without more, the deceased's will.[66]

113. Richmond J then said:

> "Had Colin really meant that he had made his will, it would be expected that he would have told Mr Dawson and Mr Wheatley, ….. given his previous discussions with both about the will (including that he said to Mr Dawson at the

[61] At [130]
[62] At [131]
[63] At [133] – [135]
[64] At [156]
[65] At [157]
[66] At [158]

> meeting on 21 July that he would send through his instructions on the will 'in the next week or so') and that each is to benefit under it. Significantly, he does not, despite having every opportunity to do so by telephone, email or text after 5 August".[67]

114. Richmond J also noted that the deceased had a practise of using lawyers to prepare agreements, including financial agreements with his partners, as well as conveyancing transactions and that he infers from this that the deceased understood the need for important legal documents to be drafted by lawyers.[68]

115. It was further noted that the deceased called Mr Dawson 5 August after the creation of the Note and they did speak briefly but, on Mr Dawson's account, the deceased did not tell him about the Note or where it could be found.[69]

116. Richmond J also noted:

> "The lack of an explanation for why Colin did not tell Mr Dawson or Mr Wheatley about the Note makes it significant that there is no evidence regarding the text message sent by Colin to Mr Wheatley on 5 August or the calls made by Colin to Mr Dawson's office on that day."[70]

117. *Jones v Dunkel* is then referred to, and in accordance with that principle Richmond J said:

> "…the failure by a party to call or give evidence that could cast light on a matter in dispute can be taken into account in determining whether that party has discharged its onus, in circumstances where such evidence as has been called has not itself clearly discharged the onus". (see *Koschott v Prentice* (2014) 221 FCR 450)[71]

118. Richmond J further said:

> "Highly relevant to that question are two matters raised by the evidence: First, that Colin sent an SMS text to Mr Wheatley on 5 August, but Mr Wheatley failed to give evidence as to what was in that SMS text either in chief or in re-examination; Second, Colin made several telephone calls to Mr Dawson's

[67] At [159]
[68] At [159]
[69] At [159]
[70] At [160]
[71] At [162]

> office on 5 August including one at 3:37pm lasting for 4 minutes but the person in Mr Dawson's office who received the call did not give evidence about it…"[72]

119. Richmond J also said that there were three further matters that raised concern as to whether the Court has the full picture as to the contents of the deceased's iPhone, being:

> "First, while Colin's iPhone was in the possession of either Mr Dawson or Mr Wheatley, from 19 August, text messages and emails have been deleted from it which raise a concern about the integrity of main piece of evidence.
>
> Second, the way the evidence came out at the hearing (the conversation between Colin and Mr Wheatley in the early hours of 4 August; the visits to Colin's house on 16, 17 and 18 August; Mr Wheatley taking possession of the phone and deleting SMS texts) suggests the Court cannot be confident that it has all the relevant communications by the Deceased with Mr Dawson and Mr Wheatley regarding the purpose of the Note". [73]
>
> "Further, there is a difficulty in Court accepting the reliability of the evidence of Mr Dawson when he acted as a solicitor in the proceedings and prepared all the evidence for the defendant despite his conflict of interest and duty to the Court".[74]

120. In conclusion Richmond J said:

> "While I accept (and it is not in dispute) that the Note records Colin's testamentary intentions, I am not satisfied on the balance of probabilities that Colin intended the Note without more on his part to have present operation as his will, in particular because (a) the Note has elements which point against that conclusion, (b) there is evidence in the wider context in which the Note was created that cast doubt on whether Colin had that intention and (c) the failure to call two important pieces of evidence regarding communications (or attempted communications) by Colin with Mr Wheatley and Mr Dawson in the period from 5 August to 16 August."[75]

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[72] At [164]
[73] At [165]
[74] At [166]
[75] At [167]

121. This case considers a number of important issues including:

(a) the importance of the integrity of the content of the device that holds any potential informal will on it. Any alteration of the content of that device may, not surprisingly, result in adverse consequences;

(b) have the device assessed by an expert as soon as possible;

(c) the independence of the legal representatives in acting for the parties, and in particular circumstances where a legal representative has to provide material evidence at trial that is likely to be in issue;

(d) a conflict of interest may affect the probative value of the evidence given, as it did here, when the circumstances included the solicitor being a beneficiary under the Note, and discussing evidence with other lay witnesses,

(e) the importance of disclosing all evidence, whether materially relevant or not around the making of the relevant informal will that is the subject of a s.18 application;

(f) the critical importance of the wording of the document itself;

(g) the second element in *Briginshaw* applies to the determination of whether an informal will should be admitted;

(h) a *Jones v Dunkel* inference might be drawn if relevant evidence is not called.

122. In ***WXW v KZY*** [2025] QSC 138 (12 June 2025) one of the issues to arise was the interpretation of the relevant will and whether or not a right to reside arose pursuant to the wording in clause 6 of the same. Interestingly the parties proceeded on the basis that a right to reside did so arise however they disputed as to whether certain terms were implied to the same.

123. Muir J said that the task for the Court was to give effect to the intention of the testator as is expressed in the will and that it is an artificial and almost impossible approach to undertake if the Court is to assume a certain construction of the will. Muir J said that "the existence of such a right is a question of law for the Court to determine as a matter of construction". [76]

[76] At [25]

124. Her Honour further said that “in my view, it is in the interests of justice that the proper construction of clause 6 of the Will be considered and applied in this case”.[77]

125. The parties were both given the opportunity to make further submissions at the hearing with respect to the proper construction of the will. It was noted that neither party applied for an adjournment. As to the background facts, the applicant and the first respondent resided with the deceased at the Property from 1981 until around 2007, when their father was moved into a nursing home. Those parties and the deceased repaid the loan secured over the Property and contributed towards outgoings in relation to the Property. They shared these expenses until the applicant moved out in November 2021. The first respondent has paid the full cost of these outlays since.[78]

126. On 2 November 2021 there was a fight between the applicant and the first respondent on the Property, which involved the first respondent striking the applicant with a metal baseball bat in the ground floor kitchen, and again in the applicant’s bedroom. The first respondent was subsequently arrested and charged with assault occasioning bodily harm whilst armed in company (domestic violence offence) with the applicant having suffered substantial injuries that required hospitalisation.[79]

127. Following the incident a Protection Order was obtained against the first respondent which prevented the first respondent from accessing the downstairs part of the house on the Property and prohibited the first respondent from coming within 100m of the applicant and the second respondent. The applicant however has not returned to reside at the Property since the assault and expert evidence was provided that the applicant has post-traumatic stress disorder as a result of the assault.[80]

128. Clause 6 of the will provides:

> 6. I EXPRESS the wish and I DIRECT that my sons [WXW] and [KZY] be permitted to be reside in the house property situated at [redacted] until they express a desire to move from the house property. During the period of the tenancy it is intended my sons be responsible for the local authority rates, maintenance and insurance on the said property.[81]

[77] At [26]
[78] At [41]
[79] At [43]
[80] At [45] – [50]
[81] At [56]

129. As to the construction of the will, Muir J said:

> "[59] The Court's function is to construe the words of a will according to their ordinary meaning, bearing in mind the facts existing at the time the will was made.[16] The will is to be considered as a whole, and ordinarily, the Court will strive to give effect to all the words of the will.[17] Of course, the Court should not speculate or guess about what the maker intended. Rather, the Court must adopt what seems to be the most probable interpretation of the will.[82]
>
> [60] The critical question is whether the declaration of the deceased's expressed wish and direction in clause 6 of the Will is to be treated as creating a right to reside at the Property, which overrides the right of a co-owner to sell the Property having received it as part of their share of the residual estate.
>
> ….
>
> [62] The determination of this application depends upon the proper construction or meaning of clause 6 in the context of the entire Will. Meaning must be discovered from the words of the will itself aided only by such extrinsic evidence as is necessary to enable the words to be understood.[23] In *The Trust Company Ltd* v *Zdilar* [2011] QSC 5, Wilson J observed as follows:
>
> > "Under the armchair rule, the Court receives extrinsic evidence of the factual matrix in which a testator made his will to explain what he has written and show the meaning of words he has used. The rule applies both in circumstances where the will is clear as to the testator's intentions and in circumstances where there is an ambiguity in the will."
>
> [63] Another matter to be considered when construing a will is whether it was drawn by a lawyer. As Martin J (as his Honour then was) described in *Re the Will of Edwin Marsen Tooth; Ex parte Corporation of the Synod of the Diocese of Brisbane* [2020] QSC 214:
>
> > "A lawyer is presumed to know the technical meaning of words of legal import. This is relevant when construing the meaning of terms which are used in one place and not in another. It can be assumed that there was an informed decision made to use or not to use a particular form of

[82] At [59]

> words where that form has been accepted to have a particular meaning."[83]

130. Evidence of the solicitor that drafted the will was sought however that evidence was found to not assist the court with the interpretation of clause 6.

131. It was noted that by clause 3 of the will there was specific bequests of sums of money to two beneficiaries, with words of this bequest commencing "I give devise and bequeath…", then follows the clear and direct words of clause 4 dealing with the rest and residue of the estate being held on trust to be divided equally between the surviving children.

132. As to the wording used in clause 6, Muir J said:

> There is clearly some ambiguity and tension created by the language in clause 6. On one hand, the alleged 'right to reside' is expressed as a wish, and on the other hand, it is expressed as a direction. There is also an oddity created by the words "permitted to reside", because the Property has been divided as part of the residue of the estate pursuant to the clear and unambiguous provision of clause 4. These clauses, read together, result in the applicant and first respondent being permitted to reside in a house they both own. Where such inconsistencies or anomalies exist, the Court is required to ascertain, if possible, the meaning of the instrument taken as a whole, and give effect to the intention of the framer.[84]

133. Muir J further said:

> If the deceased intended the provisions of clause 6 to override the bequest in clause 4, then, given the circumstances at the time of the Will being drafted, it is reasonable to infer that he would have used clear terms. However, I am unable to construe the words which declare a wish and a direction as positively requiring something to be done. The effect of these words in the context of the Will as a whole is not dispositive; they have no mandatory effect. The wish expressed is nothing more other than a desire of the deceased that the two brothers continue to reside at the property, as they have been, until they no longer wish to do so; and it is accompanied by a direction that they be "permitted" to do so. Clause 6 does not contain any language suggesting that

[83] At [60] – [63]
[84] At [71]

> the rest and residue of the deceased's estate is to be held on trust pursuant to the 'direction' in that clause.[85]

134. Her Honour continued that:

> [74] Further, clauses 3 and 4 disposed of the whole of the estate. In these circumstances, clause 6 does not dispose of an interest or grant rights to either the applicant or the first respondent. In particular, the words in clause 6 do not grant a right to reside. The words express a wish (and direction) that two out of the three adult children be "permitted" to reside at the Property, but do not create a legal right that they be so entitled.
>
> [75] I also note that the principles for construing wills include, if possible, that the Court ought to ascertain the basic scheme which the deceased had conceived for dealing with the estate. I consider that, in this case, the basic scheme for dealing with the estate was as outlined above: the deceased's sons were to be equal co-owners of the Property with their sister, and it was the deceased's wish that they be permitted to reside there, together, for as long as "they" wanted to.[86]

135. In conclusion Muir J found that the proper construction of clause 6 of the will is that no right of residence was created.

136. Muir J also found that if a right to reside was created by clause 6 then the tenancy was joint and not several and would come to an end when either of the brothers expressed a desire to move from the Property, which as a matter of fact, did occur in this case.[87]

137. This case highlights:

(a) the importance in the drafting of a right to reside and that it be dispositive in nature;

(b) permission to live in a property is different to a legal right of entitlement;

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[85] At [73]
[86] At [74] – [75]
[87] At [77] – [78]

(c) when drafting, and if necessary, other gifting clauses in the will may need to be made subject to the right to reside, as otherwise ambiguity and tension in interpretation may arise.

John Meredith

Callinan Chambers

15 July 2025