

# SUPREME COURT OF QUEENSLAND

CITATION: *Roper v Berry & Another* [2026] QSC 234

PARTIES: **ELLEN MARIE ROPER AS EXECUTOR OF THE  
ESTATE OF NEVILLE CECIL HUXLEY (DECEASED)**  
(Applicant)

**v**

**CATHERINE HAZEL ELLEN BERRY AS EXECUTOR  
OF THE ESTATE OF NEVILLE CECIL HUXLEY  
(DECEASED)**  
(First Respondent)

**and**

**JENNIFER LOUISE HUXLEY AS EXECUTOR OF  
THE ESTATE OF NEVILLE CECIL HUXLEY  
(DECEASED)**  
(Second Respondent)

FILE NO: 75/2026

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Townsville

DELIVERED ON: 2 October 2026

DELIVERED AT: Townsville

HEARING DATE: 30 September 2026

JUDGE: Johnstone J

RULING:

**1. That on the proper construction of the will:**

- (a) the first sentence is to be read as if the testator wrote “After payment of all of my debts and funeral expenses from either (or both) of my bank accounts maintained with the Queensland Country Bank and the Commonwealth Bank of Australia, I give all of my money held in such accounts equally to Clifford John Thomas Huxley, Sandra Cecilina Huxley, Catherine Hazel Ellen Berry, Ellen Marie Roper, Jennifer Louise Huxley, Neville William Stephen-Lee Huxley, Nicole June Huxley, Ronell Joy Huxley and Arron Elwyn Huxley. It is my intention to specifically

exclude my daughter Tina Gilbert from the aforementioned gift because I have made a specific gift for her in this will with an explanation as to why.”;

- (b) the purported direction in the second sentence in clause 5 is invalid and the sentence is to be struck out;
  - (c) the purported direction in the fourth sentence in clause 5 is invalid and the sentence is to be struck out; and
  - (d) the purported direction in the fifth sentence in clause 5 is invalid and the sentence is to be struck out.
2. It is declared that clause 5 of the will does not create any beneficial or other life interest in the land situated at 107 Millchester Road, Millchester Qld 4820 in favour of Clifford John Thomas Huxley, Neville William Stephen-Lee Huxley, Arron Elwyn Huxley whether jointly or severally.
  3. The balance of the estate is to be administered pursuant to part 3 of the Succession Act, in intestacy.
  4. The application to remove the first respondent as executor is adjourned to a date to be fixed.
  5. The Originating Application is otherwise adjourned to a date to be fixed.
  6. Each party has liberty to apply on the giving of three days written notice.
  7. The costs of the application be reserved.

**CATCHWORDS:** SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – READING THE WILL AS A WHOLE – whether the will creates a life estate or other interest for the benefit of certain beneficiaries

SUCCESSION – PERSONAL REPRESENTATIVES – DISPUTES BETWEEN PERSONAL REPRESENTATIVES – where executors cannot cooperate – power to remove executors – whether to remove an executor

*Trusts Act 2025*

*Trusts Act 1973 s 5, s 80*

*Uniform Civil Procedure Rules 1999*

*Succession Act* 1981 s8(1), Part 3, s 6

*Fell v Fell* (1922) 31 CLR 268

*In Re the Will of Fernando Masci* [2014] QSC 281

*National Trustees Executors and Agency Company Limited v Keast* (1896) 22 VLR 447

*Rabbeth v Squire* (1859) 4 De G & J 406

*Re Negrean; Borbil v Borbil* [2025] QSC 66

*Re Permewan* [2021] QSC 151

*Re Rodgers* [2002] 1 Qd R 543.

|             |                                                                                                                                         |
|-------------|-----------------------------------------------------------------------------------------------------------------------------------------|
| COUNSEL:    | AW Collins for the Applicant<br>F Zhu (Sol) for the First Respondent<br>TC Schmitt for the Second Respondent                            |
| SOLICITORS: | Arthur Browne & Associates for the Applicant<br>Strategic Lawyers for the First Respondent<br>MobbsMarr Legal for the Second Respondent |

- [1] In this proceeding, the applicant seeks various orders including declaratory relief as to the proper construction of a will, the revocation of the grant of probate, the removal of the first respondent as executor, orders vesting the property of the estate in the applicant solely, directions under the *Trusts Act* 2025, orders permitting the applicant to purchase part of the property comprising the estate of the deceased and various facultative orders.
- [2] Rather than seek final relief, the applicant, with the agreement of the second respondent (and without any opposition from the first respondent), submitted that the most appropriate way to proceed was to determine two issues in priority to the balance of the relief sought being:
- (a) the question of construction, and, in particular whether a life interest in real property has been created under the will of the testator; and
  - (b) whether first respondent ought be removed as an executor.
- [3] The application was heard on 30 September 2026 at which point I said I would deliver my reasons in the afternoon. I was unable to do so. Instead, I made the orders as set out at the end of these reasons and said that my reasons would follow.
- [4] These are my reasons.

## Background

- [5] The applicant and the first respondent are the executors of the estate their father, Neville Cecil Huxley appointed pursuant to a handwritten “Kit Will” dated 7 February 2013. The second respondent is appointed as the alternative executor to the estate.
- [6] The testator died on 11 April 2021. A grant of probate was made to the applicant and the first respondent on 29 October 2021. This appears to have occurred without a requisition being issued by the then Registrar. Having regard to the problems discussed below, it is by no means clear why the will was not requisitioned.
- [7] The estate of the testator consists of land, chattels and cash at bank. The land is located near Charters Towers situated at 107 Millchester Road, Millchester Qld 4820.
- [8] In late 2022 Jamie Martin of Heron Todd White, valued the land at \$160,000. The chattels mainly comprise old cars, car bodies and parts, and other machinery on the land. Those chattels were valued in 2022 at \$86,450. Both valuations were obtained by joint letters of instruction given on behalf of the applicant and the first respondent.
- [9] The cash was held in two bank accounts. Current approximations of the balances of those bank accounts are \$11,813.15 and \$169,654.72.
- [10] In total, the estate has a value of approximately \$427,817.87. There have already been a number of court hearings in the matter. All three parties are represented. The costs will already be significant and counsel for the applicant and the second respondent both conceded that unless the administration of the estate can be finalised soon, the vast majority of the estate will be lost to legal fees.
- [11] The administration of the estate has not progressed in a timely way. Indeed, the administration of the estate has been the subject of profound delay. The evidence demonstrates that the applicant, through her solicitor, has been endeavouring to progress the administration. The first respondent has not.
- [12] The first respondent admits there has been delay, but in her affidavit lays the blame for that at the feet of her former solicitors. She does not offer any direct evidence in support of this contention. Earlier this year, she retained different representation through Strategic Lawyers, a firm in Townsville. The retention of that firm does not

appear to have assisted in resolving any issues in dispute or in advancing the administration. Further, that firm appears to no longer wish to represent the first respondent. Indeed, when the matter came on the previous time for directions, the first respondent appeared in person apparently at the direction of her solicitor. She said her solicitor told her to appear because whatever money she had placed on trust with that firm had been exhausted. Despite that, the solicitor remained on the record. I stood down the directions hearing and required an appearance by her solicitor. When the hearing resumed, a solicitor from that firm appeared and said, amongst other things, that he knew the hearing was on but that he had accepted a “fixed fee” retainer which was now exhausted. He also said that he was “sick of it” by which he meant the matter.

- [13] In this hearing, Strategic Lawyers appeared only after it was brought to my attention that it had filed a Form 94 which incorrectly stated that I had granted it leave to withdraw as solicitors on the record for the first respondent. What was stated in that form was false. Again I required a solicitor from the firm to appear. The solicitor who appeared admitted that the form the firm had filed contained a false statement as to the purported grant of leave and she said that she did not know how to withdraw as solicitor on the record. After making that admission, the solicitor then made an oral application for leave to withdraw. No affidavit evidence was read in that application. I refused the application with reasons. It was plain that the firm had not complied with the steps required of a solicitor under the *Uniform Civil Procedure Rules 1999* (UCPR). Indeed, it became abundantly clear that the solicitor had no knowledge at all of what the UCPR required.
- [14] The hearing continued and the solicitor made no substantive submissions. Whilst it may be the case that the first respondent has not received much in the way of helpful assistance from her most recent representation, that does not explain her conduct over the preceding five years since the grant of probate was made.
- [15] Whilst there was some progress in the administration in 2022 when the parties were able to give joint instructions to the valuers, the reality is that nothing has happened since, and the administration of the estate cannot proceed due to the ongoing disputes between the applicant and the respondents.
- [16] To a large extent, the disputes seem to reflect the division between the surviving children of the deceased, of whom there are ten, although only nine seem to be

interested in the application, as to what the testamentary intention of the testator was in relation to the land.

- [17] The applicant has offered to purchase the land and the chattels at market price. The respondents objected to this offer. It is that offer which seems to have brought the hostilities to a head and caused the applicant to seek the assistance of the court. Whether, ultimately, the applicant might be the eventual purchaser of the land explains why further relief is sought in the application.
- [18] As I explain below, the second respondent's role in the proceeding was, initially, limited only to seeking orders that a litigation guardian be appointed on behalf of three of the beneficiaries. The second respondent has now entered the fray to oppose the orders sought by the applicant. This may have been because of the manner in which the first respondent's case was being conducted. In any event, the interests of both respondents are aligned and it was the second respondent who made substantive submissions in respect of the relief sought.

### **The beneficiaries**

- [19] The testator had 11 children. In order of age, they are Tina Gilbert, Clifford John Thomas Huxley, Sandra Cecilina Huxley, Catherine Hazel Ellen Berry, Ellen Marie Roper, Jennifer Louise Huxley, Neville William Stephen-Lee Huxley, Nicole June Huxley, Ronell Joy Huxley, Kurt Adrian, (who is deceased) and Arron Elwyn Huxley.
- [20] In clause 4 of the will, the testator made a specific gift to two of his daughters about which there does not seem to be any dispute. He also made a specific gift to Tina Gilbert where he said "my daughter tina gilbert (sic) is to be given \$100 because she had disowned me in 1989 for unknown reasons or explanation - my only gift to her".
- [21] Clifford, Neville and Arron Huxley, being the surviving male children, all suffer from the medical condition Fragile X Syndrome. Their disability affects their communication and decision-making. The evidence is that they each require support to manage their daily lives.
- [22] Clifford and Neville are mildly affected. Clifford is illiterate and requires support managing finances, appointments, communication, shopping, cooking and cleaning.

- [23] In 2021 the first and second respondents were appointed as guardians to Neville and Arron by the Queensland Civil and Administrative Tribunal.
- [24] Neville is illiterate and speech impaired and often communicates using hand gestures. He also requires support managing finances.
- [25] Arron is severely affected by Fragile X Syndrome. He is illiterate and is speech impaired almost to the point of being non-verbal. He requires assistance with almost every aspect of daily living.
- [26] Each of the brothers lives in supported independent accommodation. Each receives a Disability Support Pension and support packages through the National Disability Insurance Scheme.
- [27] None of the brothers lived on the land at the time the deceased died, nor have they lived there since. The property is occupied by the second respondent who does not pay rent but appears to do general caretaking. The second respondent says that Clifford, Neville and Arron each attend at the house on the land weekly to stay, and that Arron stays overnight during the second respondent's rostered periods of his care.
- [28] As noted above, the second respondent initially only appeared to seek orders that a litigation guardian be appointed on behalf of Clifford, Neville and Aaron. I declined to make that order because none were parties to the proceeding. Further, under the UCPR a litigation guardian may be appointed for a party without the need for an order to be made in court.
- [29] Despite there being evidence that a solicitor had agreed to accept the appointment as litigation guardian, and indeed appeared at an earlier directions hearing, no appointment was made and the three brothers were not joined as parties. The second respondent then took an active role in the proceeding and made submissions on the construction point. Further, the second respondent, through her counsel said that whilst she remained willing to be appointed as an executor of the estate, she would not undertake the role of co-executor with the applicant.

**What is the proper construction of the residuary clause?**

- [30] As a general proposition, a court can only give effect to a testator's intention which is express or which is readily implied in the language of the will. It is however incumbent on a court to ascertain, if possible, what the testator intended by the words of a will: *Fell v Fell* (1922) 31 CLR 268, 274.
- [31] A court will endeavour to avoid an intestacy but the court cannot rewrite a will. That is so even affording latitude where the testator has drafted their own will: *Re Rodgers* [2002] 1 Qd R 543, 546.
- [32] Clause 5 of the will is expressed in these terms:
- “I direct my Executor(s) to pay all my debts and then I give the residue of my estate ~~to~~ pay my funeral expenses as per cost & monies withdrawn from my accounts & divided between my 9 children. All power of Attorney's for my 2 son's Neville William Stephen Lee Huxley & Aaron Elwin Huxley are given to my three executors. My property is to stay in the family for my sons to live in the family home. Executors to make sure property is maintained & rates on said property is to be taken out fortnightly of my sons accounts. My sons bank accounts are to be held under trust accounts by the 3 executors. Everything on property is to be sorted & sold @ there discretion or given away & all monies divided from the sale of the assets Personal items are to be divided between my 9 children.”
- [33] It is not clear why the word “to” at the end of the typewritten part of clause 5 was struck through.
- [34] Counsel for the applicant submitted that the striking through of the word “to” has the effect of changing the meaning of the words in clause 5 from a residuary disposition of a gift/or gifts into a direction for the management of the estate. I am not satisfied that that submission is correct. Whether the “to” is to be read as being deleted from the first sentence or not does not make any real difference to the proper interpretation of the first sentence.
- [35] I will return to this below.
- [36] For ease of reference, I have separated the six sentences in clause 5 below:
- (a) I direct my executor(s) to pay all my debts and then I give the residue of my estate ~~to~~ pay my funeral expenses as per cost & monies withdrawn from my accounts & divided between my nine children.

- (b) All power of Attorney's for my 2 son's Neville William Stephen Lee Huxley & Aaron Elwin Huxley are given to my three executors.
- (c) My property is to stay in the Family for my sons to live in the family home.
- (d) Executors to make sure property is maintained & rates on said property is to be taken out fortnightly of my sons accounts.
- (e) My sons bank accounts are to be held under trust accounts by the 3 executors.
- (f) Everything on property is to be sorted sold @ there discretion or given away & all monies divided from the sale of the assets personal items are to be divided between my 9 children.

[37] As to the first sentence (and the sixth sentence), the reference to “my nine children” can only mean the surviving children excluding Tina Gilbert to whom \$100 only was left by way of specific gift. No contrary argument was advanced by the respondents. Whilst it is not clear what “accounts” the testator was specifically referring to, the evidence is that he only held two, one with Queensland Country Bank and the other with the Commonwealth Bank of Australia. It seems clear that the testator's intention was that after utilising the funds in either of those two bank accounts to pay outstanding debts and his funeral costs, the balance of those combined accounts was to be distributed equally amongst the nine beneficiaries.

[38] Purely from a grammatical perspective, reading the first sentence with or without the second “to” does not make the sentence any more or less correct. But regardless, in my view it is readily discernible as to what the testator intended by that sentence. The testator only had two bank accounts. He intended that his debts and funeral expenses were to be paid from either (or both) of those accounts after which whatever was left was to be divided amongst his surviving children, excluding his daughter Tina Gilbert. I made a declaration to that effect.

[39] Turning to the next issue, it is accepted by the applicant and at least the second respondent, that the purported dispositions in the second, fourth and fifth sentences set out above in subparagraphs [36](b), [36](d) and [36](e) are not dispositions in respect of property to which the testator was entitled at the time of his death: see s 8(1) of the *Succession Act* 1981. Therefore, those purported dispositions are not valid.

- [40] It is probably the case that the testator thought that the second and fourth sentences would work together to achieve the purpose of the third sentence. The second respondent submitted that the fourth sentence has two elements being a direction that the executors ensure the property is maintained and that rates on it are paid, and a direction as to the source of the funds for that purpose. It is also probably the case that “giving” the powers of attorney to his executors were, in the testator’s mind, one of the ways to ensure these payments were made.
- [41] The applicant submitted, correctly, that any power of attorney held by the deceased in relation to Neville and Arron expired when the testator died and the executors would only have power to take money from those accounts if they held a new power of attorney. The applicant also submitted, correctly, that the testator could not leave his sons’ bank accounts as a disposition in a will and nor did he have power to direct the executors to use the funds from the bank accounts of Neville and Arron to maintain the estate property and/or pay the rates on the property.
- [42] Appropriately, counsel for the second respondent accepted each of these submissions as correct.
- [43] There is also obvious confusion caused by the reference to “three executors” because only two would be appointed at any point in time. The testator probably was referring to “any of the three” executors when he wrote this. This however does not present any issue on the construction question.
- [44] The sixth sentence was readily understood by all parties as being a reference to the chattels located on the land. That is so, despite the different contexts in which the word “property” has been used in that sentence as opposed to in the third sentence.
- [45] The real issue however is what is the effect, if any, of the third sentence set out above in subparagraph [36](c).
- [46] The second respondent (supported by the first respondent) submitted that this sentence creates a life interest in the land for each of the three sons. The applicant submitted that it does not.
- [47] As I have said, the testator probably intended that the second and fourth sentences would provide the means by which the property could be maintained and lived in by

the three sons. In other words he probably reasoned that if his sons were to live at the property, they should pay the rates and maintenance on the property. But that intention highlights the serious problems with the two sentences, particularly given the invalidity of the purported dispositions (or directions) in the second, fourth and indeed fifth sentences.

- [48] It is unclear as to what is meant by “stay in the family” and “for my sons to live in the family home” where no express testamentary trust is created, no provision is made for what is to occur if and when the sons do not live there (or die) and were not living there even in 2021. It was not suggested by any party, particularly given their disabilities and current living arrangements, that the property could ever be their “family home”. Further, even the reference to “the family” itself is problematic. For example, whether the testator intended that all nine beneficiaries (or all ten children) would become registered as owners, or some other different form of ownership was to be effected, was not considered by him at all.
- [49] Further, the testator does not seem to have turned his mind to what would happen if one or more of his sons was unwilling or unable to live at the property at all. In such a situation, it could not possibly have been his intention that all three sons were obliged to continue to pay the rates and maintenance on the land. That problem raises the additional (unanswered) question of how or why “the family” could be compelled to expend monies on the property for maintenance and rates either in that circumstance, or if the monies the brothers each receive was insufficient to cover ongoing costs.
- [50] Similarly, the clause does not reflect that any thought was given to at what point in time “the family” (howsoever at the relevant point in time that group is determined) could decide that the property was no longer being “lived in” by any of the sons, or whether one son ceasing to live would mean that the interest created in favour of the remaining two had been severed.
- [51] Despite these difficulties, relying on *Rabbeth v Squire* (1859) 4 De G & J 406,412-13, the second respondent submitted that:

“It is a recognised rule of construction that a testamentary direction giving a beneficiary the “use and occupation” of property, or directing that property be retained for a beneficiary to occupy or live in, will be construed as creating a

life interest or an equivalent equitable interest, in the absence of words cutting the right down to one of mere personal residence.”

[52] Reference was also made to the decision of Holroyd J in *National Trustees Executors and Agency Company Limited v Keast* (1896) 22 VLR 447 in support of that proposition. Both of those cases concerned clauses which differed so significantly from clause 5 that they provide no assistance to the second respondent.

[53] The second respondent also relied on the decision of Dalton J in *In Re the Will of Fernando Masci* [2014] QSC 281. In that case the will contained a residuary clause which said:

“I give Fernando Masci my husband is to stay in the house above and to handle all monies until his demise. (death) Elizabeth Masci is to stay in the house above and handle all monies if Fernando Masci is deceased before her. On the death of both Mrs Susan Camm ... and Graham Silvano Masci ... are to sell all possessions and 50% is to go to Mrs Susan Camm and 50% to Diane Collins, daughter of Fernando Masci, Ricky Fernando Masci son of Fernando Masci and Graham Silvano Masci son of Fernando Masci. This is to be reversed if either is deceased first. This is the last will and testament of Fernando Masci and Elizabeth Masci.”

[54] About this clause, Dalton J said:

“[9] To understand the sense of the will it is necessary to take cognisance of the fact that both Fernando Masci and Elizabeth Masci had been married before they were married to each other. Further, that both of them had children from their first marriages, but no children from their marriage to each other. Fernando’s children from his first marriage are Graham, Diane and Ricky. Mrs Elizabeth Masci had one daughter from her first marriage, Susan. It seems to me that broadly the intention behind the will was that the survivor of Fernando and Elizabeth was to be looked after during their lifetime but, on their death, the property of both testators was to be equally divided so that it went half to Mr Masci’s children and half to Mrs Masci’s children. Further, the will treats the families of Fernando and Elizabeth equally. A child from each of the previous marriages is made executor, and the residue, after the life of the survivor, is to pass equally to the two families.

[10] It seems to me that the first two substantive sentences of the will establish a life estate in the survivor of Fernando and Elizabeth. The two sentences are clear enough in their intention, although they are not elegantly or formally expressed. The language “handle all monies” and “is to stay in the house” is quite distinctive. Both the verbs “to handle” and “to stay” give the clear impression that something short of an absolute interest is being given. Further, the provision that on the death of both, which must mean both Fernando and Elizabeth, the executors are to sell “all possessions” also tends to indicate that what was being given to the survivor of Fernando or Elizabeth for their lifetime was not absolute ownership but a life estate – ie., the will disposes of property

after the death of the survivor. This result is consistent with s 33K of the *Succession Act*.”

- [55] The second respondent submitted that in the present case, the statement that the property “is to stay in the family” is more directive than was the case in *Masci*. The submission was made that “that direction is reinforced, as it was not in *Masci*, by an accompanying and ... partly valid obligation on the executors to maintain the Property and pay its rates — an ongoing administrative burden imposed on a trustee for the benefit of a life tenant or occupier, and which has no sensible purpose if sentence 3 creates no continuing interest at all”. In my view the obligation on the executors to maintain the land is not partly valid at all. The obligation, so expressed, was that the executors were to maintain the land by utilising funds which were not property of the testator. A court cannot simply disregard parts of a sentence in a clause to make a direction valid. But more importantly, valid or otherwise, this statement is not dispositive. At best it is an invalid direction, but, like the entirety of the third sentence, it is in reality nothing more than a statement as to the testator’s wish.
- [56] In *Masci*, the will was a joint will where joint intentions were expressed. The residuary clause dealt with all of the assets, being the house and contents and contemplated a process whereby whichever of the husband or wife survived the other, they were to remain in the house until their own demise, at which point the house and contents were to be sold and distributed, 50% to the children of the husband, and 50% to the daughter of the wife.
- [57] Dalton J was able to discern that based on reading the will as a whole, and having regard to the undisputed facts, from the background facts as well as the manner in which the clause was expressed, however inelegantly.
- [58] Here the impossibility of fulfilment of the testator’s wish is much more akin to the situation with which Hindman J dealt in *Re Negrean; Borbil v Borbil* [2025] QSC 66. In that case, the relevant part of the clause read “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, Queensland 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.”

[59] Hindman J held (at [29]) that at most, this clause created a personal right to live in the Property which may or may not be exercised.

[60] Her Honour said (at [30]):

“...on the proper construction of the will that what Raveica 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 Raveica 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 dispositive.”

[61] In written submissions, the second respondent grappled with the obvious difficulty that three sons did not live in the house. Her counsel made the submission that:

“A testator who writes, in 2013, that “my property is to stay in the family for my sons to live in the family home,” at a time when he already knows that each of his three sons has separate, necessarily supported, accommodation arranged for reasons connected with their disabilities, cannot sensibly be taken to have intended that the sons live at the Property as their sole or primary residence to the exclusion of that separate accommodation. The more natural reading — and the one for which the Second Respondent contends — is that the testator intended the Property to remain available to his sons as a continuing family home: a place they retain the right to live in, to stay at, and to be cared for at, alongside, and not instead of, their separate supported accommodation.”

[62] The difficulty with this submission is that it really is nothing more than an attempt to re-write part of the residuary clause, something which the court is not permitted to do.

[63] Further, even if permissible, the suggestion of the second respondent is equally unworkable. It still fails to deal with who else of the Family is entitled to reside on the land, and on what terms. It similarly fails to deal with the ongoing costs of the land and it also does not deal with who is entitled to the beneficial interest in the land on the demise of the sons (and indeed all or only one of them) or once they (or any of them) cease to take advantage of the property remaining available to all or any of them to live in, even at the odd times they might choose to stay.

[64] The result is that whether the third sentence in clause 5 is read in isolation, or read it in the context of the will as a whole, it is not possible to discern what the testator’s actual intention was. Clearly, clause 5 does not deal with the land in any dispositive way. The testator’s intention, whatever it in fact may have been, was nothing more

than a wish. It does not create any beneficial or other life interest in the land in favour of Clifford, Neville and Arron.

- [65] It follows that the executors will be obliged to administer the estate as a partial intestacy in accordance with Part 3 of the Succession Act. This means that notwithstanding the testator's statement in clause 4 about his daughter Tina Gilbert, she will be entitled to share in part of the estate as a beneficiary.

**Should the first respondent be removed as an executor?**

- [66] The applicant relies on the power in s 6 of the Succession Act to seek an order removing the first respondent as executor. There is no doubt that the power in s 6 is sufficiently broad for a court to make such an order. A power also exists under ss 5 and s 80 of the *Trusts Act* 1973, and the inherent powers of the court: *Masci* (at [35]).
- [67] The applicant referred to the decision of Davis J in *Re Permewan* [2021] QSC 151. At [47] his Honour said “[a] conflict of interest between the executor and other interested parties is a relevant consideration but the existence of a conflict in itself may not be determinative. The question is as to the extent of the conflict and its likely effect upon the administration.”
- [68] There has been conflict in the past between the first respondent and the applicant which has caused the delay in the administration of the estate however, as I have said above, the disagreement as to how the land comprising part of the estate was, or should be dealt with given the manner in which clause 5 was expressed, seems to have been a significant contributor to that disagreement.
- [69] In *Masci*, Dalton J removed an executor because her Honour was concerned that her ruling would not put an end to the administration and the ongoing lack of cooperation would prevent the estate being administered properly.
- [70] In the present case, now that the construction of clause 5 has been resolved, the source of the conflict between the applicant and the first respondent may have been removed to the extent necessary to enable the estate to be administered. The executors need only sell the chattels and the land and distribute the proceeds in accordance with the will (in relation to the cash at bank and the chattels) and the intestacy rules (in respect of the land). There would seem to be no reason why any of the beneficiaries should

not be entitled to purchase the land with or without the chattels for a fair market price, if that is a cause of the ongoing dispute. To say the least, this is a very modest estate and it is in no beneficiary's interest that the administration of the estate is further delayed.

[71] In the circumstances, I do not think that it would be an appropriate exercise of the court's powers to remove the first respondent as executor at this point in time.

[72] Naturally, that position might change if the conflict between them continues.

[73] I therefore decided to adjourn this part of the application, as well as the balance of the Originating Application to a date to be fixed with liberty apply.

[74] The applicant sought her costs of the application from the respondents although costs against the second respondents were not sought when I made the orders I did.

[75] In my view it was necessary that the question of the construction of clause 5 be determined.

[76] In the circumstances, the order I made was that the costs of the application be reserved.

### **The orders**

[77] For these reasons, I made the following orders:

1. That on the proper construction of the will:
  - (a) the first sentence is to be read as if the testator wrote "After payment of all of my debts and funeral expenses from either (or both) of my bank accounts maintained with the Queensland Country Bank and the Commonwealth Bank of Australia, I give all of my money held in such accounts equally to Clifford John Thomas Huxley, Sandra Cecilina Huxley, Catherine Hazel Ellen Berry, Ellen Marie Roper, Jennifer Louise Huxley, Neville William Stephen-Lee Huxley, Nicole June Huxley, Ronell Joy Huxley and Arron Elwyn Huxley. It is my intention to specifically exclude my daughter Tina Gilbert from the aforementioned gift because I have made a specific gift for her in this will with an explanation as to why.";
  - (b) the purported direction in the second sentence in clause 5 is invalid and the sentence is to be struck out;
  - (c) the purported direction in the fourth sentence in clause 5 is invalid and the sentence is to be struck out; and

- (d) the purported direction in the fifth sentence in clause 5 is invalid and the sentence is to be struck out.
- 2. It is declared that clause 5 of the will does not create any beneficial or other life interest in the land situated at 107 Millchester Road, Millchester Qld 4820 in favour of Clifford John Thomas Huxley, Neville William Stephen-Lee Huxley, Arron Elwyn Huxley whether jointly or severally.
- 3. The balance of the estate is to be administered pursuant to part 3 of the Succession Act, in intestacy.
- 4. The application to remove the first respondent as executor is adjourned to a date to be fixed.
- 5. The Originating Application is otherwise adjourned to a date to be fixed.
- 6. Each party has liberty to apply on the giving of three days written notice.
- 7. The costs of the application be reserved.