SUPREME COURT OF QUEENSLAND

CITATION:	*Prosper v Wojtowicz & Ors* [2005] QSC 177
PARTIES:	**GEOFFREY ROBERT PROSPER (as Executor of the Will of Owen George Harrow Robertson Deceased)** (applicant) v **PATRICIA WOJTOWICZ, COLLEEN NORMA ROBERTSON, MEGAN ANN FRAHM, VERNON GEORGE FRAHM AND ZOE ROBERTSON** (respondents)
FILE NO:	S3103 of 2003
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	24 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	14 June 2005
JUDGE:	Wilson J
ORDER:	**1. That the letter of instruction signed by the testator and left with the will is not to take effect for the purposes of clause 6(c) of the will;** **2. That the words contained in clause 6(c) of the will are not void for uncertainty and are therefore valid and capable of being given effect to.**
CATCHWORDS:	SUCCESSION – THE MAKING OF A WILL – TESTAMENTARY INSTRUMENTS – INCORPORATION OF UNATTESTED AND DETACHED PAPERS – OTHER CASES – where the testator left a signed letter of instruction with his will – where the letter of instruction purported to alter the effect of will – where the letter of instruction not in existence when will made - where the letter of instruction not referred to in will as already in existence – whether the letter of instruction can take effect SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – UNCERTAINTY AND FAILURE TO DISPOSE – IN RESPECT OF OBJECT OF GIFT – where the testator left part of his estate to "such persons who attended my funeral and who are not (and were not) at any time related to me" – whether the gift is invalid

for uncertainty of beneficiaries
Succession Act 1981 (Qld), Part 3, Schedule 2, ss 6, 9
Trust Act 1973 (Qld), s 96

Antill-Pockley v Perpetual Trustee Company Limited (1974) 132 CLR 140, cited
In re Bridgen [1938] Ch 205, cited
In re Gansloser's Will Trusts [1952] 1 Ch 30, cited
In re Hain's Settlement [1961] 1 WLR 440, discussed
In re Saxone Shoe Co Ltd's Trust Deed [1962] 1 WLR 943, considered
In the will of Spears dec'd [1959] VR 430, cited
Kinsela v Caldwell (1975) 132 CLR 458, considered
Morice v Bishop of Durham (1805) 10 Ves Jun 521 at 539; 32 ER 947, cited
Mustard v Oikonomov, Supreme Court of WA, Owen J, 19 August 1998, distinguished
Re Fox [1997] 1 QdR 43 at 46, cited
Re Leverhulme [1943] 2 All ER 274, cited
West v Weston (1998) 44 NSWLR 657, discussed

COUNSEL: K Dorney QC and R Cameron for the applicant executor Geoffrey Robert Prosper
R Peterson for the respondent Colleen Norma Robertson
R Whiteford for the respondents Megan Ann Frahm and Vernon George Frahm
D Morgan for the respondent Maxwell Francis Cooper

SOLICITORS: Bridge Brideaux Solicitors for the applicant executor Geoffrey Robert Prosper
de Groots for the respondent Colleen Norma Robertson
Taylors Solicitors for the respondents Megan Ann Frahm and Vernon George Frahm
Gill & Lane for the respondent Maxwell Francis Cooper

[1] **WILSON J**: Owen George Harrow Robertson died by suicide on 9 January 2001, a few weeks before his 59th birthday. He had made a will on 19 August 1997, appointing the applicant as his executor and disposing of his estate. The value of his estate is presently estimated at $750,000-00. The executor has formulated a number of questions for the Court's determination as to the true meaning of the will and entitlement to the estate in the events that have happened. The Court has power to determine these questions under s. 6 of the *Succession Act* 1981 and s. 96 of the *Trust Act* 1973.

Dramatis personae

[2] The testator married twice.

[3] His first wife's maiden name was Megan Ann Williams. She is now known as Megan Ann Frahm. That marriage was dissolved, the decree absolute being dated 28 December 1972. She is a respondent to the application.

[4] There was a son of the first marriage - Vernon George Robertson, now known as Vernon George Frahm, born in about 1972. He is a respondent to the application, and has a family provision application pending.

[5] Zoe Robertson was born in January 1974 (after the dissolution of the testator's first marriage). The testator's name appears on her birth certificate as her father, but her mother Ms Frahm now asserts that he was not Zoe's father. Zoe is also known as Zoe Frahm. Although informed of this application, she did not appear at the hearing.

[6] The testator's second wife was Colleen Norma Robertson (formerly Winter). She had three children by an earlier relationship, all of whom are now adults. At the time of the testator's death, proceedings for dissolution of the marriage and property settlement were pending. She is a respondent to the application, and has a family provision application pending.

[7] Patricia Wojtowicz, referred to in the will as Patricia Henderson (nee Bowden), was made a respondent to this application by order of Fryberg J on 6 May 2003. She was duly served in accordance with His Honour's orders, but did not appear.

[8] The day before his death the testator gave certain written instructions about the disposition of his estate, the effect of which is one of the matters for determination by the Court. In those instructions he referred to four people: Ryll Cooper (Gantor), Walter Plep, John Summerhayes and Julia Leung. He was not related to any of them by blood or marriage. Ms Cooper is also known as Florence Ganter. Ms Leung appears to have been his girlfriend at the time. Those four persons were all joined as respondents by Fryberg J, and duly served. On 1 June 2005 orders were made by Helman J removing Ms Ganter as a party and discontinuing the proceeding against the other three.

[9] Maxwell Francis Cooper was a close personal friend of the testator, not related to him in any way. He is a former husband of Ryll Cooper. By order of Muir J made on 12 August 2004 he was made a respondent to the proceeding and appointed to represent, for the proceeding, all of the persons within the class of beneficiaries referred to in clause 6(c) of the will, being "such persons who attend my funeral and who are not (and were not) at any time related to me (which may include the persons named herein as my executors and trustees)".

[10] The applicant executor Geoffrey Robert Prosper was a friend of the testator.

Disposition of estate

[11] By clause 6 of his will the testator disposed of his estate as follows:-

> "I give the whole of my estate to my estate to my trustees upon trust as follows:
>
> a) to give one third of my estate to Patricia Henderson (nee Bowden) provided that if Patricia Henderson has already died or dies before me or before attaining a vested interest leaving children who attain 21 years of age (or marry under that age) then those children on attaining their respective majorities (or marrying under that age) take equally the share which their parent would otherwise have taken;

b) to give one third of my estate to Megan Ann Williams (also known as Megan Ann Robertson) provided that if Megan Ann Williams has already died or dies before me or before attaining a vested interest leaving children who attain 21 years of age (or marry under that age) then those children on attaining their respective majorities (or marrying under that age) take equally the share which their parent would otherwise have taken;

c) to give the reminder of my estate to such persons and in such proportions (or amounts) as I have specified by any written instructions signed by me and left with this my Will PROVIDED THAT if there are no instructions, or the instructions are uncertain of meaning, or this disposition is not a valid legal disposition for any other reason, then the remainder of my estate shall be divided equally between such persons who attend my funeral and who are not (and were not) at any time related to me (which may include the persons named herein as my executors and trustees)."

[12] The following handwritten instructions, which were signed and dated 8 January 2001, preceded a suicide note:-

"Instead of Item 6 Section C of my will I want the balance 1/3 of my estate to be distributed equally in 4 Equal quarters between

Ryll Cooper (Gantor)
Walter Plep
John Summerhayes
and
Julia Leung."

Because these instructions were not signed before two witnesses in accordance with s 9 of the *Succession Act* 1981, they could not take effect as a codicil to the will.

Questions for determination

[13] The Court is asked to determine whether on the true construction of the will and in the events that have happened -

"(a) the leaving of a letter of instruction dated 8 January 2001 by the deceased with a copy of his Will on 9 January 2001, and

(b) the Executor not being able to identify or ascertain with certainty the persons who attended the testator's funeral held on 13 January 2001:-

(i) the letter of instruction is to take effect as the 'written instructions' signed by the testator 'and left with' his Will for the purposes of clause 6(c) of the Will and, if so, in such premises is there a valid disposition pursuant to clause 6(c) of the Will so that the

> Executor may distribute the remaining one third of the Estate equally between Ryall [sic] Cooper, Walter Plep, John Summerhayes and Julia Leung;
>
> (ii) if the answer to question (i) is no, then, are the words '*then the remainder of my estate shall be divided equally between such persons who attended* [sic] *my funeral and who are not (and were not) at any time related to me (which may include the persons named herein as my Executors and trustees)'* contained in clause 6(c) of the Will not void for uncertainty and therefore valid and capable of being given effect to;
>
> (iii) if the answer to question (ii) is no, then is there a partial intestacy and, if so, then is the rest and residue of the estate (being the remaining one third of the estate) to be distributed by the Executor pursuant to the intestacy rules provided for in the *Succession Act* 1981(Qld)."

If the answer to (ii) is yes, the Court is asked for directions as to the means by which the Executor is to ascertain the identity of the persons within the class that is the object of clause 6(c) of the Will.

The letter of instruction

[14] Police attended at the testator's residence on the evening of 9 January 2001, where they found his body in the den. They found the will and the handwritten document on the desk of the same room.

[15] On 27 March 2001 the applicant applied for probate of the will dated 19 August 1997. Exhibited to an affidavit accompanying the application were the will, the testator's death certificate and copy of the handwritten document. He said of the handwritten document -

> "6. I am informed by my Solicitor, CHRISTOPHER JOHN BRIDGE, that Police Constable Tina Anderson provided to him the document marked "C" and informed him that the original of the said document was found with the Will of the deceased near his body. I am informed by my said Solicitor and believe that the original of the said document is in the possession of the Coroner."

A grant of probate issued on 12 April 2001. Both the will and the handwritten document were attached to it.

[16] Probate is conclusive evidence of the validity and contents of a will and the appointment of an executor, but the admission of an instrument to probate does not pre-empt the functions of the Court as a court of construction. For example, when more than one instrument has been admitted to probate, the admission of the earlier instrument to probate does not prevent a court of construction from deciding that all its provisions were revoked by the later instrument. Pertinently in the present case, where a testator effectually incorporates an unexecuted document into his will by

reference, that unexecuted document becomes part of his will and is admissible in a court of construction, whether it is included in the probate or not. See Clark & Martyn *Theobald on Wills* 15th ed (1993) at 212 - 213.

[17] A document not executed in accordance with the requirements for execution of a testamentary instrument may be incorporated into a will by reference if three conditions are met:

(a) the document must be in existence at the time the will is made;

(b) the will must refer to the document as already in existence; and

(c) the document must be clearly identified in the will:

see *In the will of Spears dec'd* [1959] VR 430; Clark & Martyn *op cit* at 58 - 61.

[18] It was common ground among those who appeared on the hearing of the application that the handwritten letter of instruction dated 8 January 2001 did not meet the first two of these tests, and so was not incorporated into the will by reference. The four persons named in the handwritten document who might have sought to argue to the contrary and who had previously been joined as respondents had all been released from the proceeding by the orders made on 1 June 2005.

[19] The stance adopted by those present at the hearing was plainly correct. While the letter of instruction probably should not have been admitted to probate, nothing turns on this. In determining the present application the Court is sitting as a court of construction, and I am unwilling to accede to the oral application of counsel for Ms Robertson and counsel for the Frahms for an order revoking probate of the letter of instruction.

[20] The answer to question (i) is "no".

The funeral

[21] The testator's funeral was held on 13 January 2001 at the Alex Gow Funeral Chapel at Newstead in Brisbane. There was an attendance book available for people who attended the funeral to sign. It contains 109 signatures.

[22] The applicant attended the funeral, although he was not then aware that he had been appointed executor. He said in an affidavit sworn on 3 April 2003 -

> "5. From my observations at the funeral I verily believe that there were many more persons who attended the funeral who did not sign the attendance book. From my reading of the attendance book I say that I am familiar with some of the persons who have signed, the vast majority of persons are not known to me. I do not know the whereabouts of the vast majority of those persons who attended the funeral."

He said in oral evidence that the funeral chapel was about the same size as the courtroom in which the application was heard (court 14 in the Law Courts Complex, Brisbane). He sat at the rear, and observed that the chapel was filled - that is, that almost every available seat was occupied, although he did not remember whether

there were people standing in the aisles. While there were more people in the chapel than there were signatures in the attendance book, he could not say how many more.

[23] The solicitors for the applicant have sent copies of the attendance book to about 10 persons known to have been at the funeral. From their responses and from the applicant's instructions, it has been possible to identify all but 13 of the signatures, and to identify at least another six people who were in the congregation. In addition there were the civil celebrant and the staff of the funeral directors. There may have been others. Mr Bridge, the solicitor with the carriage of the matter on behalf of the applicant, said in an affidavit sworn on 30 July 2004 –

> "55. At present the Executor verily believes (acting on advice from me) that the only way that further attendees at the funeral might be identified (albeit without any means on the part of the Executor to independently verify such attendants) is by forwarding a copy of the Attendance Book to each of the 95 persons so far identified as having attended the funeral and requesting each of those persons (with the exception of MacKenzie Winter, an infant, and the mother of the deceased, she now being deceased) and request those persons to assist with identifying any attendees at the funeral being those persons who have not yet been identified from the Attendance Book and any other person they knew to have attended the funeral. I estimate that the cost of undertaking that exercise will be in the vicinity of some $3,000.00 - $5,000.00 (such costs including time spent in sending and receiving correspondence)."

[24] The second question for determination raises two issues - whether the trust is invalid because a complete list of beneficiaries cannot be compiled and the meaning of the exclusionary provision. I shall address each in turn.

Disposition to those who attend funeral

[25] The trust created by clause 6(c) of the testator's will was a fixed trust. Equity will not uphold the validity of a trust unless it can enforce and control it. In the case of a fixed trust, unless all the beneficiaries can be identified, it is impossible for the trustee to identify the size of an individual share and to execute the trust, and impossible for the Court to enforce and control the trust. The principle was expressed by Lord Eldon in *Morice v Bishop of Durham* (1805) 10 Ves Jun 521 at 539; 32 ER 947 at 954 in these terms -

> "As it is a maxim that the execution of a trust shall be under the control of the court, it must be of such a nature that it can be under that control; so that the administration of it can be reviewed by the court; or, if the trustee dies, the court itself can execute the trust; a trust therefore which, in cases of maladministration, could be reformed; and a due administration directed; and then, unless the subject and the objects can be ascertained, upon principles, familiar in other cases, it must be decided that the court can neither reform mal-administration, nor direct a due administration."

[26] The requirement for certainty of beneficiaries may be satisfied even though the particular persons who will benefit cannot be ascertained at the commencement of the trust (in this case at the date of the testator's death). As the High Court said in *Kinsela v Caldwell* (1975) 132 CLR 458 at 461 -

> "A trust is not uncertain merely because the actual persons to whom the distribution will be made cannot be known in advance of the date of distribution; it is sufficient that the provisions of the trust ensure that upon that date the beneficiaries can be ascertained with certainty."

[27] There the High Court upheld a decision of Mahoney J (*Kinsela v Caldwell* (1973) 9 BPR 16,459) that the following provision of a deed of settlement made in 1964 was not void for uncertainty:

> “If on the vesting day none of the named beneficiaries is living, the Trustees shall on that day pay and assign the capital and any undistributed income of the Trust to the next-of-kin of the Shareholder in the shares and proportions to which they would be entitled under the laws relating to intestate succession then in force if the shareholder had died on the vesting day.”

"The vesting day" was 1 January 1984. “The named beneficiaries” were not in fact named but the phrase was defined as -

> “the shareholder, the lawful wife from time to time or the widow of the Shareholder and the sons and daughters and any remoter issue of the Shareholder.”

The shareholder was the settlor. The "next-of-kin of the Shareholder" meant -

> “that person or those persons who would if the Shareholder died intestate on the first day of January, 1984 be entitled to a beneficial interest in the Estate of the Testator according to the laws relating to intestate succession then in force.”

The "Testator" referred to in the definition of next-of-kin was the settlor's late father (who was dead when the deed was made).

[28] The High Court expressly adopted Mahoney J's reasoning. After referring to equity's requirement that a trust be of such a nature that it can be under the control of the Court, Mahoney J said:-

> “However, I was not referred to any case in which was held that a court of Equity could not “enforce and control” a trust for individuals where the individuals could not presently be ascertained or were not presently in existence but where the provisions for ascertaining such individuals were sufficiently certain to enable them to be ascertained in the future.”

He approved the following passages from Scott and Fratcher *Scott on Trusts* 3rd ed (1967) ((1973) 9 BPR at 16,462-3):-

> "A trust can be created in favour of beneficiaries not specifically named in the trust instrument and not ascertainable from facts existing at the time of the creation of the trust if they are ascertainable at some future time within the period of the rule against perpetuities. Thus a provision for a division of the trust property among the members of a definite class of persons to be ascertained at the time of distribution is valid if the distribution is to be made within the period of the rule against perpetuities. It is very common, of course, to provide for a division among the children or grandchildren or other relatives of the testator who are living at the time of the death of a life tenant."
> (vol 2, para 112, pp 874-75)
>
> "It is not essential that the beneficiaries of a trust should be in existence at the time of the creation of the trust. There is no doubt, of course, that a trust can be created in which some of the beneficiaries are not yet in existence. Thus in the case of a marriage settlement provision is ordinarily made not only for one or both of the parties to the marriage but also for the prospective children of the marriage. So also it is common in a testamentary trust to provide for children who are not born or conceived at the time of the death of the testator. Such trusts are undoubtedly valid and if children are later born they are entitled to enforce the trust. Even before any children are born, the trust, unless a statute otherwise provides, as in New York, cannot be revoked by the settlor, even with the consent of the other beneficiaries."
> (vol 2, para 112.1, p 878)
>
> "A trust can be created in favour of the members of a class where the class is defined enough so that its membership can be ascertained. The trust will fail, of course, if the membership of the class cannot be ascertained within the period of the rule against perpetuities. But if the membership can be ascertained within that period the trust is valid although the members of the class are not individually named in the instrument but are designated by description of the class."
> (vol 2, para 120, p 905)
>
> "Where a testator devises or bequeaths property in trust for all of the members of a class of persons and neither the trustee nor anyone else is given power to make a selection among the members of the class the intended trust is invalid if the membership of the class cannot be definitely ascertained at the death of the testator or at some time within the period of the rule against perpetuities."
> (vol 2, para 122, p 913).

These passages are repeated in the 4th edition (1987) at pp 156-157; 161-162; 197; and 208 respectively.

[29] The ascertainability of a class at the date of distribution is to be assessed from the vantage point of the date the trust instrument took effect: *Kinsela v Caldwell* (1975) 132 CLR 458 at 461; Creighton "Certainty of Objects of Trusts and Powers: The

Impact of *McPhail v Doulton* in Australia" (2000) 22(1) *Sydney Law Review* 93 at 96. See also *Re Leverhulme* [1943] 2 All ER 274.

[30] The test of ascertainability was discussed in *In re Saxone Shoe Co Ltd's Trust Deed* [1962] 1 WLR 943 by Cross J. In that case the testator died in 1929 leaving a will made six years earlier. It provided that during the life of his wife the income of the residuary estate should be paid in equal shares to a named charity and to the directors of a company who were the trustees of a certain trust fund for the benefit of the fund; further he bequeathed certain legacies, including legacies of his shares, and provided that after the death of his wife the balance of his shares should be held on trust for the benefit of the fund. The trust referred to was a discretionary trust created in 1914 for employees or former employees and their dependants. Cross J held that the trust declared by the 1914 deed was initially void because a complete list of beneficiaries could probably not have been compiled in 1914. His Lordship reviewed a number of cases on the issue of ascertainability including *IRC v Broadway Cottages Trust Ltd* [1955] Ch 20; *In re Gestetner Settlement* [1953] Ch 672; and *In re Hain's Settlement* [1961] 1 WLR 440, and concluded that all that was necessary was for the court to be satisfied that a complete list of beneficiaries could probably be ascertained.

[31] In the present case, when the testator died the class was sufficiently defined to be ascertainable at the date of distribution: it would have been possible to have a complete list of funeral attendees compiled. That such a complete list was not in fact compiled does not invalidate the trust (although it does give rise to administrative problems for the applicant).

[32] In *In re Hain's Settlement* [1961] 1 WLR 440 in 1954 the settlor made a trust in favour of his children and remoter issue and his past, present and future employees. Six years later he unsuccessfully sought a declaration that the trust was invalid on the ground that he could not compile a complete list of the persons employed by him since he had first employed a servant in about 1943. At 448 Upjohn LJ said -

> "The sole question, therefore, we have to consider is whether the beneficiaries, who are defined in clause 2, are defined in such manner that they are incapable of ascertainment. That may happen in one of two ways: first, the language used to describe the class may be ambiguous or uncertain as a matter of construction; or secondly, on the evidence, the class may in fact be incapable of ascertainment.
>
> There is no ambiguity or uncertainty of construction in this case and the sole question is whether, on the facts, the class is incapable of ascertainment. The date on which that matter is to be considered must, it seems to me, quite clearly be the date of the settlement in 1954. If looking at the words the settlor has used in the light of all the relevant facts the beneficiaries are sufficiently defined so as to be capable of ascertainment, the settlement cannot be subsequently invalidated because some of the class may have disappeared or become impossible to find or it has been forgotten who they were. That is only a matter which may increase the difficulty of the trustees in the administration of the trust though."

Finding no difficulty with the language, His Lordship then turned to the facts, saying at 449 -

> "No difficulty arises as a matter of language, but it is said when you look at the facts it was in 1954 impossible to find out who those past employees were. … the affidavit which has been filed by the settlor seems to me to fall far short of establishing that point as a fact. In the year 1960 the settlor does appear to be uncertain as to some of the servants that he has employed, but there is no evidence whatever that in 1954 it would have been impossible to make a list (and it was quite a short list, … probably something under two dozen) of those whom he had employed. This is not the case of a man who owns some vast organisation with many employees. He is, fortunately, a man of wealth and the only employees he has are domestic indoor and outdoor servants. He was a young man in his twenties in 1942 when he married and in 1954 it seems to me it must have been not only not difficult but very easy to have made a list of his past servants. At any rate, the contrary has not been proved and upon the evidence it seems to me impossible to contend with any hope of success that the beneficiaries as defined in clause 2 of the settlement are incapable of ascertainment."

[33] Counsel for the applicant and counsel for Mr Cooper urged the Court to uphold the trust in reliance on the decision of Young J in *West v Weston* (1998) 44 NSWLR 657, while counsel for Ms Robertson and counsel for the Frahms submitted that that case was wrongly decided and ought not be followed. In deference to the submissions of counsel, I shall refer to the case, although in my view it deals with a different problem from that in the present case.

[34] In *West v Weston* the testator died in 1994 leaving his estate on trust to be divided equally (per capita) amongst such of the issue of his four grandparents living at his death as attained the age of 21 years. He died at the age of 76, having been predeceased by his parents and leaving no issue, no siblings, no grandparents, no uncle or aunts and no dependants. The executrix engaged a genealogist and historical researcher, with whose assistance 1,675 beneficiaries had been identified by the date of the trial. But, as His Honour observed, the real problem was in tracking down all members of the class, and one could never be certain that they had all been identified. The relevant inquiry was whether a complete list of the beneficiaries could probably be compiled at the date of death, but one could use what had in fact happened with the inquiries made by the genealogist to say the probabilities as at the date of death (p 662). His Honour acknowledged that if he followed the English cases on certainty of fixed trusts, this trust would fail for uncertainty. However, he saw fit to modify the rule as to certainty for what he regarded as different conditions in present day Australia. His Honour's reformulation of the rule was as follows -

> "The rule will be satisfied if, within a reasonable time after the gift comes into effect, the court can be satisfied on the balance of probabilities that the substantial majority of the beneficiaries have been ascertained and that no reasonable inquiries could be made which would improve the situation." (p 664)

This reformulation of the test for certainty of beneficiaries of a fixed trust has been trenchantly criticised as contrary to principle and contrary to the High Court's decision in *Kinsela v Caldwell*. See Ong *Trusts Law in Australia* 2nd ed (2003) at 82; Creighton *op cit* at 96 - 99.

[35] In *West v Weston* a complete list of beneficiaries could not have been compiled at the date of the testator's death. In the present case the problem arises not from unascertainability as at the date of the testator's death, but from the subsequent omission to keep a complete record of those who attended the funeral. This case is in the same category as *In re Hain's Settlement*, and not in the same category as *West v Weston.* Thus it is not necessary to decide whether *West v Weston* ought be followed.

[36] I was also referred to *Mustard v Oikonomov* (Supreme Court of WA, Owen J, 19 August 1998), which concerned the validity of a testamentary disposition in favour of "the survivors of the THANAS family". The trust was void because of the uncertainty of the language used by the testator. Thus, it was quite different from the present case where the trust was initially valid, even though there are now difficulties in identifying some of the beneficiaries.

[37] Before leaving this question I record the assistance I gained from the article by Emery "The Most Hallowed Principle – Certainty of Beneficiaries of Trusts and Powers of Appointment" (1982) 98 *The Law Quarterly Review* 551.

[38] For the foregoing reasons I consider that the trust is not invalid because of uncertainty of beneficiaries.

Exclusion of persons related to testator

[39] The testator restricted the beneficiaries to those who attended his funeral

> "and who are not (and were not) at any time related to me (which may include the persons named herein as my Executor and trustees)."

In so doing he created a subcategory of persons who attended his funeral who were to be excluded form the trust. The question then is who falls into that subcategory.

[40] A trust in favour of persons related to the settlor would be prima facie void for uncertainty of beneficiaries, as it would be uncertain what degree of relationship was required. See *Antill-Pockley v Perpetual Trustee Company Limited* (1974) 132 CLR 140 at 147-148. In order to save such trusts the Courts have adopted a rule of construction or convenience which applies in the absence of an intention to the contrary. Such an intention may be gleaned as a matter of inference from the words used and their context.

[41] By this rule of construction, "relations" will be restricted to those blood relations who would have taken under the intestacy rules applicable in the circumstances of the particular case: *Re Fox* [1997] 1 QdR 43 at 46; *In re Gansloser's Will Trusts* [1952] 1 Ch 30; *In re Bridgen* [1938] Ch 205.

[42] In this case the testator referred to those "who are not (and were not) at any time" related to him. A person cannot cease to be a blood relation, and so he must have

intended to exclude persons related by marriage (whether or not the marriage was subsisting at the date of his death) as well as those related by blood. Thus the subcategory of persons who attended the funeral but who were excluded from the trust consists of –

(a) persons related by blood who would have taken under the intestacy rules; and

(b) persons then or formerly related by marriage, the relationship being of such degree that had the marriage been subsisting at his death, those persons would have taken under the intestacy rules.

[43] Under the *Succession Act* Part 3 and Schedule 2 (as in force at the date of the testator's death), the testator's spouse and issue would have taken on an intestacy.

[44] Ms Colleen Robertson and Mr Vernon Frahm attended the funeral. As the testator's spouse (a person related by marriage), Ms Robertson falls within the exclusion and is not a beneficiary. As the testator's son (a person related by blood), Mr Frahm falls within the exclusion and is not a beneficiary.

[45] Ms Zoe Frahm appears not to have attended the funeral; thus she would not prima facie be within the class of beneficiaries, and it is not necessary to resolve the question of her paternity.

[46] Ms Megan Frahm (the testator's first wife) appears not to have attended the funeral, and so not prima facie to be within the class of beneficiaries. Had she done so, she would have been within the exclusion and so not a beneficiary.

[47] The answer to question (ii) is yes - the words are valid and capable of being given effect to.

Third question

[48] It is not necessary to answer question (iii).

Directions

[49] The applicant sought directions as to the means by which he is to ascertain who are all of the persons within the class that is the object of clause 6(c) of the will. I will hear counsel on the question of directions.