The Estate of the late Smith [2004] NTSC 15

PARTIES:	The Estate of the late SMITH, Marjorie Lillian Nancy
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	72 of 2003 (20307307)
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JUDGMENT OF:	MARTIN (BR) CJ

CATCHWORDS:

SUCCESION – WILLS, PROBATE AND ADMINISTRATION

Construction and effect of testamentary dispositions – "All my personal possessions to my family as arranged by me and known to my executor" – whether intention of testatrix can be determined from the words of the will – whether valid will.

Hughes v National Trustees, Executors and Agency Company of Australasia Limited (1979) 143 CLR 134 at 137, 149 and 150, applied.

REPRESENTATION:

Counsel:

Applicant:	J Waters QC
Caveator:	D Francis

Solicitors:

Applicant:	Sean Bowden
Caveator:	David Francis & Associates

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Estate of the late Smith [2004] NTSC 15
No. 72 of 2003 (20307307)

The Estate of the late MARJORIE LILLIAN NANCY SMITH late of 35 Beard Road, Humpty Doo in the Northern Territory of Australia, Pensioner, Deceased

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 2 April 2004)

[1] This is an application by Alan Gregory Smith for an order that administration of the estate of his late mother, Marjorie Lillian Nancy Smith, be granted to him.

[2] The deceased was born on 22 September 1912. She executed a will on 23 January 2001 and died on 2 July 2001. She is survived by six children and approximately 27 grandchildren, 80 great grandchildren and 12 great great grandchildren.

[3] The applicant claims that the will executed by the deceased on 23 January 2001, which purports to appoint the applicant's brother Anthony John Smith as executor, is invalid. During submissions senior counsel for the applicant conceded that the will formally complies with the requirements of the Wills

Act which was then in force, but submitted that the contents of the will were not sufficient to dispose of the property nor did they enable the executor to do the job required of the executor.

[4] After appointing Anthony John Smith as the executor and trustee of the will, the wording of the will is as follows:

> "I give devise and bequeath all my personal possessions to my family as arranged by me and known to my executor Mr Smith."

[5] In essence, it is the applicant's case that the words "my family" are incapable of being read down in order to give a practical meaning to the words. Secondly, adequate meaning cannot be given to the words "as arranged by me". The end result is that the words are too vague and ill defined and the attempt at a gift must fail.

[6] Anthony Smith appeared through counsel to support the validity of the will. As part of the material advanced in support of his case, Mr Smith tendered an affidavit in which he spoke of his belief as to what the deceased intended by the expressions "my personal possessions", "as arranged by me" and "my family".

[7] By implication, Mr Smith also sought to put before the court the content of some of the instructions given to him by the deceased. Paragraph 11 of Mr Smith's affidavit of 17 November 2003 speaks of specific distribution of property which has already occurred "in accordance with instructions given

to me by my late mother prior to her death". It is unclear whether the instructions were given before or after the execution of the will.

[8] Counsel for Mr Smith initially submitted that evidence of Mr Smith's belief and, in substance, of instructions given by the deceased to Mr Smith was admissible as evidence of extraneous circumstances relating to the will. Counsel's attention was drawn to the decision of the High Court in *Hughes v National Trustees, Executors and Agency Company of Australasia Limited* (1979) 143 CLR 134 in which the court had occasion to consider statements by a testatrix made at about the time she executed her will concerning the conduct of her son and his de facto wife. Barwick CJ observed that such statements were not evidence of the facts they asserted concerning the conduct of the son, but they provided "evidence only of the subjective attitude or beliefs of the testator or testatrix" (p 137).

[9] In a judgment with which Mason and Aickin JJ agreed, Gibbs J held that the statement of the testatrix that her son had been guilty of misconduct and for that reason she had excluded him from any benefit under her will, was not admissible to prove that the son was guilty of misconduct. The statement about the son's conduct was hearsay. His Honour added that such a statement is admissible as "original evidence to prove the knowledge, motive or other state of mind of the testatrix *should that be relevant*" (p 149) (my emphasis). Later in his judgment his Honour observed that once evidence is admitted of statements by the testatrix, those statements are "admissible only to provide some evidence of the reason why the testatrix

has disposed of her estate in a particular way", but they are "not admissible to prove that what the testatrix said or believed was true" [150].

[10] Faced with that authority, counsel for Mr Smith effectively conceded that the statements in the affidavits of Mr Smith concerning his belief and instructions from the deceased are inadmissible. In those circumstances, he argued only faintly that the instructions in the will were not so vague and ill defined as to result in the invalidity of the gift.

[11] The critical question is whether, bearing in mind the admissible surrounding circumstances, the court is able to determine the intention of the deceased from the words of the will.

[12] As to surrounding circumstances, while the deceased had lived for some years with Mr Smith and his children and accepting the evidence that she had become close to that particular family, those surrounding circumstances do not provide any significant assistance in endeavouring to determine the intention of the deceased from the words "my family". Perhaps the difficulty in this regard is well illustrated by the case for Mr Smith that the expression is not confined to the immediate surviving children of the deceased, but also includes Mr Smith's children who are but two of many grandchildren. The fact that the deceased lived with the family of Mr Smith and was very close to them does not tell the court anything about the deceased's feelings for her other children and grandchildren. There is nothing in the evidence to suggest that the deceased regarded only her

children as her "family" nor whether she did or did not regard any of her grandchildren as part of her "family".

[13] Similarly, the surrounding circumstances do not provide any assistance in determining the intention of the deceased from the words "as arranged by me". As I have mentioned, the evidence of Mr Smith's belief and of statements by the deceased are not admissible for the purpose of interpreting the words "as arranged by me". The intention of the deceased cannot be ascertained from those words and there is no admissible evidence that can assist.

[14] Notwithstanding the reluctance of a court to find that a disposition fails for uncertainty, in my opinion the words of the deceased's will are incapable of conveying to the court her intention and the disposition must fail by reason of the uncertainty as to her intention.

[15] As to the consequences, counsel for Mr Smith submitted that if the gift to the family failed, the gift of all the personal possessions would pass as on an intestacy, but the will remains valid. It is only the particular gift which is invalid. Counsel contended that in accordance with the Administration and Probate Act, as executor Mr Smith would act in accordance with the intestacy provisions.

[16] In support of his proposition, counsel for Mr Smith referred to par 421 of Halsbury's Laws of England (4th edition reissue) in which the observation is made that where there is no residuary bequest, lapsed bequests of personalty

pass as on an intestacy. However, the authorities cited in that paragraph do not support the broad proposition for which counsel contended. It is not difficult to envisage a situation where an individual bequest fails by reason of uncertainty without affecting the validity of the will. However, such a situation is to be contrasted with the failure by reason of uncertainty of the entire gift comprised in the will under consideration. In my view, a failure of that type renders the will invalid.

[17] As the will is invalid, the applicant Mr Alan Smith seeks that Letters of Administration of the deceased's estate be granted to him. However that application is opposed by Anthony Smith. At the outset of the hearing I indicated that I would hear submissions relating only to the validity of the will. I will hear counsel further as to the future progress of this application.
