SUPREME COURT OF QUEENSLAND

CITATION:	*Rose v Tomkins & Ors* [2017] QCA 157
PARTIES:	**JULIA MARY ROSE (as executor of the will of Cheryl Marie Jones deceased)** (appellant) **v** **BEVAN WARREN TOMKINS** (first respondent) **PETER JOSEPH JONES** **PAUL EDWIN JONES** (second respondents) **KAREN LEE SCOTT** **NICOLE ANN KILPATRICK** **MICHAEL WARREN TOMKINS** (third respondents)
FILE NO/S:	Appeal No 10920 of 2016 SC No 7759 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2016] QSC 216
DELIVERED ON:	21 July 2017
DELIVERED AT:	Brisbane
HEARING DATE:	30 March 2017
JUDGES:	Morrison and Philippides JJA and Flanagan J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The will of CHERYL MARIE JONES deceased dated 20 May 2015 be rectified as follows:** **In clause 6(d), deleting the words 'then it shall form part of my residuary estate' and inserting the following words in their stead:** **"Then my interest in the property shall be transferred absolutely to those of my sons PETER JOSEPH JONES and PAUL EDWIN JONES who survive me and if more than one in equal shares as tenants in common".** **2. The respondents pay the appellant's costs of and incidental to the appeal, but limited to the amount the respondents recover pursuant to the certificate below.**

3. The respondents be granted a certificate under s 15 of the *Appeal Costs Fund Act* 1973.

CATCHWORDS: SUCCESSION – MAKING OF A WILL – STATUTORY POWER OF RECTIFICATION – where the testatrix was in a de facto relationship – where the testatrix and her de facto partner both had their own respective children – where the testatrix and her partner held their residential home as joint tenants – where the testatrix and her partner gave instructions that they both wished their half-share in the residence to pass to their respective children after both of them died – where instructions were given to sever the joint tenancy – where the testatrix's will gave her partner the right to occupy the home until he died or remarried, at which stage the residence would form part of the testatrix's residuary estate – where the testatrix's will gave a half-share in her residuary estate to her children and the other half-share to her partner's children – where it was not known whether the testatrix's partner's will mirrored hers – whether there was clear and convincing proof that the will did not carry out the testatrix's intentions because it failed to give effect to her instructions

Succession Act 1981 (Qld), s 33

ANZ Trustees Ltd v Hamlet [2010] VSC 207, considered
Beardsley v Loogatha [2001] QCA 438, applied
Lockrey v Ferris [2011] NSWSC 179, considered
Long v Long; Estate of Ethel Edith Long [2004] NSWSC 1002, considered
Palethorpe v The Public Trustee of Queensland [2011] QSC 335, considered
Rawack v Spicer [2002] NSWSC 849, considered
Rose v Tomkins & Ors [2016] QSC 216, overruled
SAY v AZ; ex parte Attorney-General (Qld) [2006] QCA 524, applied
Vescio v Bannister [2010] NSWSC 1274, considered

COUNSEL: C A Brewer for the appellant
No appearance by the respondents

SOLICITORS: Cooke and Hutchinson Lawyers for the appellant
No appearance by the respondents

[1] **MORRISON JA:** I have read the reasons of Philippides JA and agree with those reasons and the orders her Honour proposes.

[2] **PHILIPPIDES JA:** This is an appeal from a decision dismissing an application for rectification of a will of the deceased testator, Cheryl Jones, (the Will) brought by the executor, Julia Mary Rose, pursuant to s 33 *Succession Act* 1981 (Qld) (the Act).

Factual background

[3] Ms Jones, who died on 5 February 2016, was in a de facto relationship with Mr Bevan Tomkins (the first respondent). Ms Jones had two sons from a previous

marriage; Peter Joseph Jones and Paul Edwin Jones (the second respondents). Mr Tomkins had three children from a previous marriage; Karen Lee Scott, Nicole Ann Kilpatrick and Michael Warren Tomkins (the third respondents).

[4] On 13 February 2015, Ms Jones and Mr Tomkins attended upon a solicitor, Ms Sophie Lever. Ms Lever gave affidavit evidence that the instructions she received from the Ms Jones were as follows:[1]

> "6. To the best of my recollection, the deceased told me that she wanted to ensure that upon the passing of both of them, a ½ share in the house would pass to her children and a ½ share in the house would pass to Mr Tomkins' children.
>
> 7. To achieve that end, I told them that they could give each other the right to occupy the home until the surviving partner died or remarried, whereupon the house would be sold and each ½ share of the home property would pass to their respective children.
>
> 8. The deceased and Mr Tomkins agreed that they would like to 'quarantine off the home' and have it protected for the future so that it would eventually pass to their respective children – a ½ share to the deceased's children and the other ½ share to Mr Tomkins children.
>
> 9. At the time of receiving their instructions, the deceased and Mr Tomkins were joint tenants of the property. I told them it was necessary to sever the joint tenancy, and this was subsequently carried out."

[5] Instructions were given to Ms Lever to sever the joint tenancy and a transfer document severing the joint tenancy was executed on 22 April 2015. Also on that day, Ms Jones and Mr Tomkins attended Ms Lever's office to execute their wills.

[6] On 20 May 2015, Ms Jones contacted Ms Lever to have her executor altered from Mr Tomkins to her sister, Ms Rose. On the same day, Ms Jones attended the solicitor's office and a new will incorporating the change of executor was executed in the presence of the new executor. The reason for the change in executor was that Ms Jones wanted a bank account held on trust for her son, Peter Jones, to be managed by her sister. Also on 20 May 2015, the transfer document severing the joint tenancy was lodged. The transfer document was registered on 28 May 2015 and Ms Jones and Mr Tomkins were advised accordingly on 3 June 2015.

The Will

[7] By clause 6 of the Will, in relation to her half-share of the residence, Ms Jones granted to Mr Tomkins the right to reside subject to certain conditions, it thereafter forming part of her residuary estate. As the primary judge described it, clause 6 "made a clumsy right to reside in the home in favour of Mr Tomkins provided he paid the rates and an insurance policy on the house and kept it in repair, and provided that he did not marry or enter into a de facto relationship."[2] That clause

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1 *Rose v Tomkins* [2016] QSC 216 at [1].

2 *Rose v Tomkins* [2016] QSC 216 at [8].

provided that at the end of the right to reside, the interest in the home fell into residue. Clause 6 was relevantly in the following terms:

> "6. I GIVE all my estate and interest in and to the land and residence located at 53 Moomba Street, Pacific Paradise in the State of Queensland and described as Lot 705 on Registered Plan No. 92688, County of Canning, Parish of Maroochy and being Title Reference 13291166 ("the house") unto my trustees UPON THE FOLLOWING TRUSTS:
>
> (a) my said partner BEVAN WARREN TOMKINS may live in the house as long as he wishes provided he pays the rates levies and taxes levied on the house, the premiums on any insurance policies taken out by my trustees on the house and keeps it in repair to their satisfaction;
>
> (b) until he has in the opinion of my trustees ceased to live in the house permanently, or entered into a de facto married living arrangement lasting for a period of 6 months or more or a marriage, or has failed to comply with the conditions of his right of occupation the house shall not be sold without his consent;
>
> (c) my said partner BEVAN WARREN TOMKINS shall be responsible for outgoings affecting the house including repairs and for keeping it insured comprehensively on such terms as my trustees may require but my trustees shall not be responsible for ensuring that he carries out such obligations;
>
> (d) when my said partner BEVAN WARREN TOMKINS shall cease to live permanently in the house or enters into a de facto married living arrangement lasting for a period of 6 months or more or a marriage, then it shall form part of my residuary estate;
>
> (f) I direct my trustees to pay any duties payable on the right of occupation out of my residuary estate and to pay from my residuary estate such amount as to my trustees may seem advisable by way of compounding any duties that may be presumptively payable upon the termination of the right of occupation."

[8] By clause 7 of the Will, Ms Jones gifted the residue as to one half-share to her two children and one half-share to her partner's children. Clause 7 of the Will provided:

> "7. I GIVE the rest and residue of my estate to my trustee UPON TRUST as follows:-
>
> (a) As to a one half share for such of them my children PETER JOSEPH JONES and PAUL EDWIN JONES as shall survive me for a period of thirty (30) days and if more than one in equal shares as tenants in common.

(b) As to a one half share for such of them my said partner BEVAN WARREN TOMKINS' children namely KAREN LEE SCOTT, NICOLE ANN KILPATRICK and MICHAEL WARREN TOMKINS as shall survive me for a period of thirty (30) days and if more than one in equal shares as tenants in common.

(c) If any child of mine or my partner BEVAN WARREN TOMKINS shall predecease me or fail to survive me for the period aforesaid but leave a child or children who shall survive me for thirty (30) days such child or children shall take and if more than one in equal shares the share which his, her or their parent would have taken under this my Will had such parent survive me for thirty (30) days."

The application

[9] Initially, the application sought orders that would alter the effect of clauses 7(a) and 7(b) of the residue clause as follows:[3]

> "By deleting clauses 7(a) and 7(b) thereof, and inserting the following words in their stead:
>
> (a) As to a one half share for my child PETER JOSPEH JONES;
>
> (b) As to a one half share for my child PAUL EDWIN JONES;
>
> In clause 7(c), by deleting the words "or my partner BEVAN WARREN TOMKINS."

[10] However, at the hearing of the application, the order sought related only to the remainder interest in the house after Mr Tomkins' right to reside, with no alteration being sought to the residue clause. The order proposed in the written submissions,[4] and as set out in the draft order, sought rectification of clause 6(d) as follows:

> "In clause 6(d), deleting the words 'then it shall form part of my residuary estate' and inserting the following words in their stead:
>
> > Then my interest in the property shall be transferred absolutely to those of my sons PETER JOSEPH JONES and PAUL EDWIN JONES who survive me and if more than one in equal shares as tenants in common"

The reasons of the primary judge

[11] The primary judge made the following observations about Ms Lever's affidavit:[5]

> "It is apparent from the exhibits to [the] affidavit sworn by Ms Lever, that she severed the joint tenancy and prepared wills for each of Mr Tomkins and Ms Jones, as well as preparing Enduring Powers of Attorney and Health Directives for both of them. Ms Lever swore

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3 The respondents did not appear on the application, nor did they appear on the appeal.

4 This was sought in [17] and [18] of the appellant's written submissions.

5 *Rose v Tomkins* [2016] QSC 216 at [5]-[6].

> that she exhibited a true copy of her file but had removed from it 'copies of draft wills of Mr Tomkins, as the instructions were joint to draft wills for each of them.' This explanation is not logical. Nothing is said as to a signed copy of the will of Mr Tomkins and whether that has been removed from the file. It appears … that both wills were signed and both were in the firm's custody. She does not depose to why no final or signed copy of Mr Tomkins will is in her file.
>
> It is evident from Ms Lever's affidavit that she consulted with Mr Tomkins and Ms Jones together; that she opened only one file to deal with instructions from both of them, and she describes their instructions as 'joint'. It is further apparent from paragraphs 6-9 of her affidavit (extracted above) that her clients, … *were concerned primarily that their shares in their main asset, their home, passed to their respective children after both of them died*. There is nothing on Ms Lever's file to indicate that she received any separate instructions from Mr Tomkins. At p 25 of the exhibit bundle is a draft of Ms Jones' will, with Ms Lever's note, 'Same as Bevan's' at one paragraph dealing with a bequest of household furniture." (emphasis added)

[12] Notwithstanding the deficiency in the evidence as to the terms of Mr Tomkins' will, the primary judge inferred that "the only logical conclusion on the evidence" was that (but for clauses dealing with some personal possessions of the testator) his will was in identical terms to Ms Jones' will and made a finding to that effect. However, her Honour stated she could not "express any concluded opinion on whether or not in these circumstances the wills were mutual" as that issue was not before her, but remarked that it appeared "that this may well have been the case".[6]

[13] Her Honour reasoned as follows proceeding on the inference (and finding) made as to the wills being identical:[7]

> "If, as I infer, Mr Tomkins' will was in the same terms as Ms Jones' will, then Ms Jones' instructions that when both she and Mr Tomkins died one half share of the home would pass to her children and one half share of the home would pass to his children were effectuated. In these circumstances I do not consider that either of the statutory conditions for rectifying this will have arisen. There was certainly no clerical error, and it seems to me that the wills did give effect to the testator's instructions."

[14] Her Honour made the following observations as to the appellant's submissions:[8]

> "In effect the argument on behalf of the applicant was that had the solicitor chosen a different way of giving effect to her instructions, namely drafting Ms Jones' will to leave the rest and residue to her children and drafting Mr Tomkins' will to leave the rest and residue to his children, the children of Ms Jones would have been in a better

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6 *Rose v Tomkins* [2016] QSC 216 at [7], referring to *Masci v Masci* [2014] QSC 281 at [19]-[29] and on appeal [2015] QCA 245 at [37].

7 *Rose v Tomkins* [2016] QSC 216 at [10].

8 *Rose v Tomkins* [2016] QSC 216 at [11]-[12].

> position in the events which have happened. Of course, had Mr Tomkins died first leaving a will in terms of that which Ms Lever drafted for him, Ms Jones' children would be in that better position. It is only a better position if there is doubt that the wills were mutual.
>
> The applicant's contention also assumes that Ms Jones would have been content with a situation where it was certain on her death that her children would receive a half share of the home and Mr Tomkins' children would face whatever uncertainty resulted from the potential that he might make a new will disinheriting them. But these were not to the instructions given to Ms Lever."

[15] Her Honour reiterated her earlier finding that the instructions given to the solicitor from both Ms Jones and Mr Tomkins were that "*they both wished their half-share of their home to pass to their respective children"* and observed that:[9]

> "The way Ms Lever chose to draft the residue clause was capable of achieving that. So was the alternative residue clause propounded by the applicant. *Whichever residue clause was used, it was necessary that the wills be mutual if the instructions of Ms Jones and Mr Tomkins were to be effected.*" (emphasis added)

[16] Her Honour made some additional observations as to the consequences arising from there being doubt as to the wills being mutual wills:[10]

> "If there were doubt that the wills were mutual, then, depending on whether Ms Lever's residue clause or the alternative residue clause was used, and depending upon whether it was Ms Jones or Mr Tomkins who predeceased the other, uncertainty would result for one group of children. In the events which have occurred since the making of the will – Ms Jones predeceasing Mr Tomkins – it is Ms Jones' children who face that uncertainty. But that does not give the Court jurisdiction to rectify the will. It does reflect Ms Jones' instructions.
>
> It does not seem that Ms Lever raised the question of mutual wills with Ms Jones and in particular she does not seem to have given advice that the agreement to make mutual wills ought to be documented. The applicant did not raise the question of whether the wills were mutual in this application."

[17] As to the actual terms of the residue clause, her Honour stated:[11]

> "It does not seem that Ms Lever discussed with Ms Jones and Mr Tomkins whether to use a residue clause in terms of the one she drafted, or in terms of the alternative residue clause. Had she done so, it may be that Ms Jones would have chosen the alternative residue clause – this will never be known. Even if she had, at most this means that if advised differently, Ms Jones might have given different instructions, to paraphrase the words of Philippides J in *Palethorpe* at [58]."

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9 *Rose v Tomkins* [2016] QSC 216 at [12].
10 *Rose v Tomkins* [2016] QSC 216 at [12]-[13].
11 *Rose v Tomkins* [2016] QSC 216 at [14]-[16].

[18] Her Honour also noted[12] that, after Ms Jones received a copy of her will, she gave instructions to Ms Lever to change various parts of it, which would ensure that some of her possessions passed to her own children rather than passing to Mr Tomkins, should she predecease him. Her Honour considered that the instructions showed that Ms Jones understood how the rest and residue clause worked in relation to chattels and concluded that Ms Jones had a real opportunity to ask that clause 7 of the Will be changed, including in terms of the alternative residue clause, if she felt that clause 7 did not reflect her instructions, but did not do so.

[19] Her Honour noted that the authorities recognise that an applicant for rectification cannot succeed unless there is clear and convincing proof that the will does not give effect to the deceased's instructions.[13] Her Honour was not convinced to the requisite standard that the appellant here has discharged that heavy burden.

Grounds of appeal

[20] The grounds of appeal are that the primary judge erred in finding that:

1. Ms Jones' instructions were effectuated;[14]
2. It was necessary for the wills to be mutual wills in order for the deceased's instructions to be carried out;[15] and
3. The Will as drafted was capable of achieving (as opposed to that it would achieve) the deceased's instructions that her half-share of the house pass to her children (subject to the right of residence).[16]

[21] The appellant also contended that it appeared that the learned primary judge considered the initial proposed alternative residue clause set out in the Originating Application[17], as opposed to the amended rectification clause sought at the hearing of the application.

[22] The argument raised by the appellant was that, while the learned primary judge accepted the uncontested fact that Ms Jones instructed that her children were to take her one-half share in the house,[18] her Honour proceeded on the erroneous views, which were contrary to those instructions, that:

(a) Ms Jones intended that her children take a one-quarter interest in the house in the events that transpired; and

(b) Ms Jones' instructions reflected an intention that her partner's children should be protected from her partner changing his mind as to his children inheriting his one-half share of the house to detriment of her own children.

Submissions of the appellant

[23] The appellant's contention was that it was to be inferred from the evidence of the solicitor that Ms Jones' intentions were that *her* half-share of the house go to *her*

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12 *Rose v Tomkins* [2016] QSC 216 at [15].
13 *Rose v Tomkins* [2016] QSC 216 at [16].
14 *Rose v Tomkins* [2016] QSC 216 at [10].
15 *Rose v Tomkins* [2016] QSC 216 at [12].
16 *Rose v Tomkins* [2016] QSC 216 at [12].
17 See the reference in reasons at [12] to the "alternative residue clause propounded by the applicant".
18 *Rose v Tomkins* [2016] QSC 216 at [12].

children, and that *her partner's* share of the house go to *his* children. It was submitted that this accorded with the severance of the joint tenancy. Severance of the tenancy would otherwise have been unnecessary, as would clause 6 of the Will, because the entire house would have passed by survivorship to either of Ms Jones or Mr Tomkins and then passed as part of the residue in accordance with their respective residue clauses. The appellant argued that that submission was further supported by the executor's evidence that Ms Jones had told her that "her half of the property that she owned with Mr Tomkins would ultimately pass to her sons… subject to [Mr Tomkins' right of residence]."[19]

[24] Before this Court, it was argued that the primary judge accepted as much, stating that the instructions received from both Ms Jones and Mr Tomkins was that they both wished "their half-share" of their home to pass to "their respective children."[20]

[25] The appellant relied on the submission, raised at first instance, that rectification of clause 6 in the terms sought was required to give effect to Ms Jones' instructions – this would be achieved by gifting the remainder interest in her half share of the house to her children, instead of half to her children and half to the Mr Tomkins' children.

[26] The appellant submitted that the Will as drawn did not give effect to, nor was it capable of giving effect to, Ms Jones' instructions. Ms Jones' children did not receive *her* half-share of the house after both she and her partner died (or the earlier expiration of the right to reside), but in fact received only a one quarter interest in the remainder of the house.

[27] The appellant submitted that it was not necessary for the wills to be mutual wills in order for the deceased's instructions to be carried out. If clause 6 were rectified, as sought at first instance, that would carry out the testator's instructions. Whether the wills were mutual or not was irrelevant.

[28] The appellant argues that, while the primary judge took as the starting point that the testator was concerned to ensure that her partner's offspring should inherit, that was **not** the effect of Ms Jones' instructions. Rather, her instructions were that Ms Jones' share in the house go as she directed – that is, **to her children**. From Ms Jones' perspective, it was entirely irrelevant whether her partner's children took at all. That was a matter for her partner. His share of the house was for him to dispose of as he saw fit.

[29] Further, it was argued that the primary judge assumed that, because under one possible future scenario the children would eventually end up taking as Ms Jones intended (assuming her partner's will mirrored hers and further assuming that he did not change his will), it was irrelevant that they would not take as intended under other possible scenarios (for example, if her partner chose to change his will). It was submitted that the reasoning assumed that Ms Jones understood the subtleties of the alternative scenarios. If the solicitor had explained all of that to Ms Jones, then such an inference may be open. But the solicitor did not do so and gave effect to the instructions, but only in one possible scenario. The appellant submitted that the proposed rectification would give effect to Ms Jones' instructions in **all** scenarios.

The relevant legislation

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19 Affidavit of Rose at [6] (AB at 67).

20 *Rose v Tomkins* [2016] QSC 216.

[30] Section 33(1) of the Act provides:

> "**33 Court may rectify a will**
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> (1) The court may make an order to rectify a will to carry out the intentions of the testator if the court is satisfied that the will does not carry out the testator's intentions because—
>
> (a) a clerical error was made; or
>
> (b) the will does not give effect to the testator's instructions."

The law in relation to the rectification of wills

[31] The current rectification power in s 33 of the Act is a broader power than existed under the provision it replaced. Section 33 was introduced as part of substantial amendments to the Act which came into effect on 1 April 2006.[21] It was modelled on what became s 31 *Wills Act* 1994 (Vic)[22] and is in the same terms as s 27 *Succession Act* 2006 (NSW).

[32] For present purposes, in order that the power to rectify a will be enlivened under s 33 of the Act, the appellant was required to satisfy the Court that the Will did not carry out the testator's intentions because the terms of the Will did not give effect to her instructions. As has long been recognised, the intention must be examined as at the date of the will, not the date of death.[23]

[33] The following passages quoted in *Palethorpe v The Public Trustee of Queensland*,[24] referring to Pagone J's consideration in *ANZ Trustees Ltd v Hamlet*[25] of s 31 *Wills Act* 1994 (Vic) are pertinent:

> "… the power in provisions such as s 31 of the Act does not remove the need for the proper construction of a Will and is not an optional alternative for the proper construction of the terms of a Will. Indeed, it is a condition precedent to the exercise of the power in s 31 that the Court be satisfied that the Will does not carry out the testator's intentions and that this satisfaction be based on one of two specified reasons namely, either that a clerical error was made or that the Will does not give effect to the testator's instructions."
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> … That does not mean that a party seeking rectification is always obliged to seek orders for the construction of the Will but it does

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21 The reforms enacted the legislative recommendations of the National Committee for Uniform Succession Laws in its *Consolidated Report to the Standing Committee of Attorneys-General on the Law of Wills* as put forward by the Queensland Law Reform Commission Miscellaneous Paper No 29 Dec 1997.

22 That provision was seen as a compromise between the narrower provision in s 31 of the Act and the very much broader power in other jurisdictions such as in s 12A *Wills Act* 1968 (ACT): Queensland Law Reform Commission Miscellaneous Paper No 29 Dec 1997 at 60.

23 *Re Estate of Spinks; Application of Mortensen and Eassie* (NSWSC, Needham J, 22 August 1990, unreported); and in the Court of Appeal in *Bryan William Mortensen and Elizabeth Gedge Eassie v State of New South Wales* (NSWCA, 12 December 1991, unreported) at 5; *Rawack v Spicer* at [27] - [28]; *Vescio v Bannister (Estate of the late Betty Tait)* [2010] NSWSC 1274 at [5].

24 [2011] QSC 335 at [16].

25 [2010] VSC 207 at [3].

> mean that the statutory condition upon which the Court's power depends must be satisfied." (footnotes omitted)

[34] Also of assistance are the following statements, in respect of the identical New South Wales provision, of Barrett J in *Vescio v Bannister*:[26]

> "Implicit in [the section] is an assumption that the testator gave 'instructions' as to the content of the will. 'Instructions' are, of their nature, communicated by one person to another with a view to compliance or obedience by that other person …
>
> Having ascertained 'the testator's instructions', the court must construe the will as executed and compare its effect, according to its proper construction, with those instructions … Only if some discrepancy appears can an order be made under [the section]; and the only permissible order is one that causes the will to be in a form that carries out the testator's 'intentions'.
>
> It follows that the court must also make findings about the 'intentions' of the testator – necessarily, of course, the 'intentions' existing when the will was made. It is those 'intentions' that any rectifying order must reflect. Although the legislation does not expressly say so, it must, I think, be inferred that the 'intentions' of the testator correspond, as to content, with the 'testator's instructions'. I say this because, in the ordinary course, a testator's intention is that his will should implement the instructions he gives for its preparation. It is with that intention that [the section] is concerned. This seems to have been assumed in … *Lawlor v Herd* [2010] QSC 281."

[35] In *Lockrey v Ferris*,[27] Hallen AsJ adopted the approach taken by Hodgson J in *Trimmer v Lax; Estate M A Fresen*,[28] observing:

> "It is clear then, that the Court must make findings about the "intentions" of the testator because, until it does, it cannot be satisfied that the Will does not carry out those intentions. Thus, what it was that the testator intended concerning the part of the will that is sought to be rectified must be established. What must be shown is the **actual** intention, not what the intention probably would have been had the testator thought about the matter."

[36] That approach also applies to s 33 of the Act which, unlike the very broad terms of s 12A *Wills Act* 1968 (ACT), does not allow the Court to rectify a will to give effect to the testator's "probable intention".

[37] In *Long v Long; Estate of Ethel Edith Long*,[29] Barrett J, after citing *Rawack v Spicer*[30] with approval, stated:

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26 [2010] NSWSC 1274 at [12]-[15].
27 [2011] NSWSC 179 at [67].
28 Unreported, NSWSC, 9 May 1997.
29 [2004] NSWSC 1002 at [9] and [10].
30 [2002] NSWSC 849.

> "The important point is that the court must be satisfied, according to the balance of probabilities, as to not only a negative proposition (that the testatrix did not intend the will to be in the form it eventually took) but also a positive proposition (that the testatrix intended the will to be in the form for which the plaintiff contends). This is the effect of the statute and, as Sheller JA observed in *Mortensen v State of New South Wales* (unreported, NSWCA, 12 December 1991), the court's task is to give effect to the language of the section without paying 'over much regard to the principles evolved by equity as part of the doctrine of rectification'."

[38] The legal principles in respect of the rectification power in s 33(1)(b) of the Act may be summarised as follows:

(a) The Court must ascertain the testator's intention, that is, the actual intention of the testator reflected in the instructions given by the testator, not what would probably have been the intention in the circumstances that eventuated.

(b) The Court must construe the provision of the will sought to be rectified.

(c) The Court is required to compare the relevant provision of the will properly construed with the testator's intention as ascertained.

(d) The Court must be satisfied the relevant provision of the will does not carry out the testator's intentions because it does not give effect to the testator's instructions and that rectification in the terms sought would give effect to those instructions.

(e) The Court must be so satisfied on the balance of probabilities, on clear and convincing proof.

Consideration

[39] As mentioned, the primary judge found that the instructions received from both Ms Jones and Mr Tomkins were that they were concerned that "their" half-share of their home pass to their respective children after both of them died. The advice given by Ms Lever in respect of effecting those instructions was that it was necessary to sever the joint tenancy and that they could then give each other the right to occupy the home until the other died or remarried, whereupon the house would be sold and a half-share of the home property would pass to their respective children.

[40] There was nothing in the instructions given by Ms Jones to indicate that her intention was to do more than ensure that her half-share went to her children. There is thus no evidence that Ms Jones intended by her Will to do more than ensure that her own children inherited her half-share in the house. Certainly, there were no instructions given that Ms Jones and her partner wanted to put in place mutual wills. Nor was any such finding made or sought. The finding that the wills were identical was made inferentially, in the absence of a copy of Mr Tomkins' will as drafted by the solicitor or evidence from the solicitor to that effect.

[41] Importantly, the fact that both Ms Jones and Mr Tomkins wished their respective children to inherit their half interest does not lead to the conclusion that each

intended by their will to protect and guarantee the inheritance of the other's children. They were primarily concerned with ensuring that their interest went to their respective children. The implicit intention from the instructions given by Ms Jones was that she was concerned that her own children did not face uncertainty. There is nothing to indicate she was concerned by her will to ensure that the children of her partner also did not face uncertainty. Ms Jones' instructions were not that she wanted by her will to provide for the children of Mr Tomkins.

[42] It cannot be disputed that, by clauses 6 and 7, Ms Jones' children did not receive the entirety of her half-share of the house after both she and her partner died (or the earlier expiration of the right to reside), but only a one quarter interest in the remainder of the house with the other quarter interest being gifting to Mr Tomkins' children. In my view, the appellant's submission that the will as drawn did not give effect to, nor was it capable of giving effect to, Ms Jones' instructions is correct, in that Ms Jones' children did not receive her half-share of the house but only a one quarter interest in the remainder of the house.

[43] In the circumstances of the present case, the Will did not carry out Ms Jones' intentions because it did not give effect to her instructions that her half interest go to her children. The Will was only capable of achieving the result that her children received a half interest in the event that her partner's will was (and remained) in the same terms. The Will as drafted was not capable of guaranteeing that a half interest pass to them. But it is evident that Ms Jones' instructions were to safeguard her children's inheritance without qualification. That is consistent with the advice given to her by her solicitor to sever the joint tenancy.

[44] Just as there is clear and convincing proof that the Will did not give effect to Ms Jones' instructions, likewise it can be said that rectification in the terms sought would give effect to those instructions.

[45] In those circumstances, the orders I propose are as sought by the appellant and set out below.

Costs

[46] The appellant argued that upon the appeal succeeding, the appellant succeeded on a question of law. There is no jurisdiction under the *Appeal Costs Fund Act* 1973 for the Court of Appeal to grant an indemnity certificate to an appellant (only to a respondent). As such, the appellant seeks an order similar to those made in matters where a respondent does not appear.[31] The orders sought are:

1. the respondents pay the appellant's costs of and incidental to the appeal, but limited to the amount the respondents recover pursuant to the certificate below; and

2. the respondents be granted a certificate under s 15 of the *Appeal Costs Fund Act* 1973.

Orders

[47] I would make the following orders:

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[31] See *Beardsley v Loogatha* [2001] QCA 438 and *SAY v AZ; ex parte A-G (Qld)* [2006] QCA 524.

1. The will of CHERYL MARIE JONES deceased dated 20 May 2015 be rectified as follows:

   In clause 6(d), deleting the words 'then it shall form part of my residuary estate' and inserting the following words in their stead:

   > "Then my interest in the property shall be transferred absolutely to those of my sons PETER JOSEPH JONES and PAUL EDWIN JONES who survive me and if more than one in equal shares as tenants in common".

2. The respondents pay the appellant's costs of and incidental to the appeal, but limited to the amount the respondents recover pursuant to the certificate below.

3. The respondents be granted a certificate under s 15 of the *Appeal Costs Fund Act* 1973.

[48] **FLANAGAN J:** I agree with the orders proposed by Philippides JA and with her Honour's reasons.