

# SUPREME COURT OF QUEENSLAND

CITATION: *Dillon & Anor v Henderson* [2018] QSC 236

PARTIES: **JAMES JOSEPH DILLON AND MARDI RACHAEL DILLON**  
(applicants)  
v  
**PAUL MURRAY HENDERSON**  
(respondent)

FILE NO: BS9249 of 2018

DIVISION: Trial Division

PROCEEDING: Application for rectification of a will

DELIVERED ON: 12 October 2018

DELIVERED AT: Brisbane

HEARING DATE: 5 October 2018

JUDGE: Mullins J

ORDER: **Order as per draft initialled by Mullins J and placed with the file.**

CATCHWORDS: SUCCESSION – MAKING OF A WILL – STATUTORY POWER OF RECTIFICATION – where the testator made a will in Malaysia to dispose of his Malaysian assets – where the testator returned to Australia for medical treatment for a terminal illness – where the testator wished to make a new will to dispose of his Australian assets – where the testator’s intention was not to revoke the Malaysian will – where general revocation clause in the Australian will revoked all previous wills – whether the will can be rectified under s 33(1) of the *Succession Act* 1981 (Qld) on the basis of a clerical error or that the Australian will does not give effect to the testator’s instructions to himself to make a will that disposed of his Australian assets

*Succession Act* 1981 (Qld), s 6, s 33

*Rose v Tomkins* [2017] QCA 157, considered  
*Singh v Singh* [2008] NSWSC 715, cited  
*Vescio v Bannister* [2010] NSWSC 1274, considered  
*Re Williams (deceased)* [1985] 1 All ER 964, considered

COUNSEL: A L Raeburn for the applicants  
No appearance for the respondent

SOLICITORS: Mobbs & Marr Legal for the applicants

- [1] Mr Barry Ian Dillon (the deceased) died in Brisbane on 19 June 2018. The deceased who had extensive business interests in Malaysia made a detailed will in Malaysia on 27 April 2018 (Malaysian will) with the assistance of his Malaysian lawyers. The purpose of the Malaysian will is apparent from clause 1 of the will:
- “This Will is made for the purposes of disposing of all my movables and immovables situated in Malaysia and I revoke all earlier testamentary dispositions made relating to all my movables and immovables in Malaysia. This Will shall not revoke or have any effect on any earlier testamentary dispositions made relating to my movables and immovables located outside Malaysia.”
- [2] The executor of the Malaysian will is the deceased’s business partner Mr Paul Henderson who is the respondent to this application.
- [3] The deceased was survived by the applicants Mr Dillon and Ms Dillon who are his son and daughter.
- [4] After making the Malaysian will the deceased returned to Australia for medical treatment for leukaemia.
- [5] Whilst in the palliative care ward of the Prince Charles Hospital, the applicant Mr Dillon purchased a will kit from the post office for the deceased. It is the will form in that will kit booklet that was completed and signed by the deceased in the presence of two witnesses that resulted in the will dated 13 June 2018 that is the subject of a grant of probate made in this court on 24 July 2018. The original will remains in the booklet.
- [6] The will dated 13 June 2018 contains the usual revocation clause:
- “By this Will, I revoke all previous Wills and testamentary acts and dispositions.”
- [7] On the basis that it was the deceased’s intention to use that will kit to dispose of his Australian assets only, the applicants filed an originating application seeking a declaration pursuant to s 6 of the *Succession Act* 1981 (Qld) (the Act) that the deceased’s will dated 13 June 2018 did not revoke the will of the deceased dated 27 April 2018, insofar as the June will relates to the estate of the deceased situated in Malaysia.
- [8] When the application was heard on 5 October 2018, at my suggestion Mr Raeburn of counsel on behalf of the applicants made an oral application for rectification of the will dated 13 June 2018, by adding to the end of clause 1 “except my will dated 27 April 2018”. I made this suggestion as I doubted that the jurisdiction conferred on the court under s 6(1) of the Act would extend to making a declaration that the will dated 13 June 2018 took effect in a way that was inconsistent with the unambiguous revocation clause. After the hearing on 5 October 2018, Mr Raeburn provided supplementary submissions

to support rectification of the revocation clause by the addition of the words “except for my Malaysian Will executed on 27 April 2018” on the basis that the omission of those words arising from the use of a precedent will kit was either a clerical error or produced a will that did not give effect to the deceased’s instructions.

- [9] The declaration the applicants seek in their originating application was, in substance, for the purpose of rectifying the revocation clause in the Australian will, so that it does not revoke the Malaysian will that the applicants submit the deceased intended to apply to the deceased’s Malaysian assets, despite making a later will in Australia. The respondent provided a written consent supporting the applicants’ seeking the written declaration that the Australian will did not revoke the Malaysian will, insofar as the Australian will relates to the estate of the deceased situated in Malaysia. I therefore treat that consent as supportive of the substitute application for rectification which seeks the same result as the declaration the applicants originally sought in their application.

### **Section 33 of the Act**

- [10] Power is conferred on the court to rectify a will by s 33(1) of the Act:
- “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.”
- [11] This provision was introduced into the Act as one of many amendments that came into effect on 1 April 2006, as a result of the implementation of recommendations of the National Committee For Uniform Succession Laws (*Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills*, QLRC Miscellaneous Paper No 29, 1997). See the discussion of the law on the rectification of wills under s 33 of the Act set out in the judgment of Philippides JA (with whom the other members of the court agreed) in *Rose v Tomkins* [2017] QCA 157 at [31]-[38].

### **Evidence of the deceased’s intention**

- [12] When the deceased returned to Australia on the day after he made his Malaysian will, he gave a copy of his Malaysian will to his daughter and told her to keep it safe. When the deceased was being admitted to the palliative care ward on 7 June 2008, he asked his daughter to purchase a will kit for him for his Australian assets. The deceased’s son purchased the will kit, before the deceased’s daughter had done so.
- [13] Ms Dillon was present on 13 June 2018 when the deceased told her he had completed his will and asked her to ring the Justice of the Peace to witness him sign the will. When the Justice of the Peace arrived, the deceased asked her if he had worded the will correctly and she told him that she thought it would be fine. The Justice of the Peace and an employee of the deceased from Malaysia then witnessed the deceased sign the

will. When Ms Dillon left the hospital, she took the original will dated 13 June 2018 home with her for safe keeping.

### **Can the Australian will be rectified?**

- [14] The revocation clause in the Australian will is unambiguous. Although Mr Raeburn drew my attention to *Singh v Singh* [2008] NSWSC 715, rather than deal with the issue of whether the evidence that is relied on for the purpose of rectification would be admissible on the question of the construction of the Australian will (because of the lack of ambiguity), I will deal with the rectification application.
- [15] Most authorities on rectification of wills arise in circumstances where the lawyer who takes the instructions does not prepare a will that reflects those instructions. Section 33 of the Act, however, can apply to a homemade will, at least in the case of clerical error: cf *Re Williams (deceased)* [1985] 1 All ER 964, 969.
- [16] In disposing of a case where instructions had been given by the testator to her lawyer, Barratt J in *Vescio v Bannister* [2010] NSWSC 1274 at [12] stated to the effect that the reference to “instructions” in the equivalent NSW provision to s 33 of the Act must be a reference to instructions communicated by one person to another and that it seemed to follow that the provision “cannot apply to a will composed and written by the testator personally”.
- [17] In this matter the actual unequivocal intention of the deceased to make a will disposing of his Australian assets is not reflected in the will prepared by him by amending and completing a will form. It could be argued that he made a clerical error by not modifying the standard revocation clause. It is not a proper characterisation of the task undertaken by the deceased to describe his completion of a printed will form as composing and writing his will. He was misguided in considering the Justice of the Peace who was the witness would be able to confirm that he had worded the will correctly, when that was not within her qualifications to advise him on. In the circumstances of this case, where the deceased intended to make his own will for the purpose of disposing of his Australian assets without in any way affecting the operation of the Malaysian will, he has failed to carry out the instructions he gave himself when he completed the will form. This gives the court jurisdiction under s 33(1) of the Act. This is an appropriate case to make the order for rectification that is sought by the applicants.

### **Orders**

- [18] It follows that the orders which should be made are:
1. The Will of Barry Ian Dillon dated 13 June 2018 is rectified by the insertion of the italicized words below in clause 1 of the Will:

“By this Will, I revoke all previous Wills and testamentary acts and dispositions *except for my Malaysian Will dated 27 April 2018.*”

2. A certified copy of this order be attached to the grant of probate of the last will of Barry Ian Dillon dated 13 June 2018.
3. There be no order as to costs.

[19] I have initialled a draft order in these terms which I have placed with the file.