SUPREME COURT OF QUEENSLAND

CITATION:	*Kuhz & Anor v Trainor & Ors* [2018] QSC 299
PARTIES:	**MARGARET JOAN KUHZ and COLIN WILLIAM KUHZ as executors of the Will of June Constance Hollett (deceased)** (applicants) **v** **BELINDA RITA TRAINOR** (first respondent) **v** **ROBYN GAIL HOLLETT** (second respondent) **v** **ASHLEY JAMES TRAINOR** (third respondent)
FILE NO/S:	SC No 1039 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	14 December 2018
DELIVERED AT:	Townsville
HEARING DATE:	27 August 2018
JUDGE:	North J
ORDER:	**1. Pursuant to section 33 of the *Succession Act* 1981 (Qld) the Will of June Constance Hollett dated 21 August 2012 be rectified by:** **(a) Deleting the words "and trustees" where they appear in clause 2 of the Will;** **(b) Deleting the words "I GIVE all my real and personal estate not otherwise disposed of by this Will or any codicil including any property over which I may have any power or testamentary disposition to my trustees UPON TRUST with power to collect, sell, and convert, to pay all my debts funeral and administration expenses, all legacies (if any) given by this Will or any codicil, all death duties (if any) payable on any part of my estate unless specifically**

charged on a gift, any payments directed to be made out of residue, and to hold the balance then remaining ("my residuary estate") upon the following trusts in equal shares as tenants in common, namely:- " where they appear in clause 9 of the Will and inserting the words "I give all of my real and personal estate not otherwise disposed of by this Will to JULIE MARGARET MINNS and SHAYE LEIGH JACKSON or the survivor of them AS TRUSTEES upon the following trusts in equal shares, namely:-"

(c) Deleting the words "tenants in common" where they appear in clause 9A of the Will;

(d) Deleting the words "tenants in common" where they appear in clause 9C(c) of the Will;

2. Unless any party files submissions seeking a different order for costs within 21 days (in which case I will reconsider the question of costs on the papers), there will be an order with respect to costs as follows.

3. The applicants and respondents have their costs paid from the estate on an indemnity basis.

CATCHWORDS: SUCCESSION – MAKING OF A WILL – STATUTORY POWER OF RECTIFICATION – where the applicants apply for rectification of the will to create a discretionary trust – where the application is supported by the third respondent but opposed by the first respondent – whether the will does not carry out the testator's intention because a clerical error was made or because it does not accord with the testator's instructions – whether the discretion of the court is enlivened to make the orders sought

Acts Interpretation Act 1954 (Qld), Sch 1
Succession Act 1981 (Qld), s 33, s 33G
Trusts Act 1973 (Qld), s 96

Chan v Cresdon Pty Ltd (1989) 168 CLR 242, cited
CPT Custodian Pty Ltd v Commissioner of State Revenue (2005) 224 CLR 98, considered
Federal Commissioner of Taxation v Vegners (1989) 90 ALR 547, considered
In the Will of Thomas Henry Finch (dec'd) [2018] QSC 16, applied
Jessup Lawyers Private Mortgages Ltd & Ors [2006] QSC 3, considered
Legione v Hateley (1983) 152 CLR 406, cited

O'Brien & Anor v Smith & Anor [2012] QSC 166, considered
Palethorpe v Public Trustee of Queensland & Ors [2011] QSC 335, applied
Parkes-Linnegar v Watson [2011] NSWSC 37, considered
Public Trustee of Queensland v Smith [2008] QSC 339, applied
Rose v Tomkins [2017] QCA 157, applied
Stern v McArthur (1988) 165 CLR 489, cited

COUNSEL: RJ Armstrong for the applicants
LA Neil for the first respondent
The second respondent appeared on her own behalf
AW Collins for the third respondent

SOLICITORS: Lee Turnbull and Co Solicitors for the applicants
Jeneve Frizzo Estate Law for the first respondent
The second respondent appeared on her own behalf
Mobbs & Marr Legal for the third respondent

Introduction

[1] **NORTH J:** The applicants are the executors of the estate of the late June Constance Hollett ("the deceased"). The applicants seek an order pursuant to s 33 of the *Succession Act* 1981 (Qld) ("*Succession Act*") that the will of the deceased be rectified. The original application also sought an alternative order for proper construction of the will however this is no longer pressed by the applicants. The first respondent to the application is the adult granddaughter of the deceased. The second respondent is the adult daughter of the deceased. The second respondent represented herself at the hearing and informed the court that she did not wish to participate in the application and would comply with any orders.[1] The third respondent is the adult grandson of the deceased. It is not in dispute between the parties that the will dated 21 August 2012 is the last will of the deceased.[2] The estate is modest, comprising a house worth approximately $120,000.00, household contents, and approximately $111,000.00 in cash and annuities.[3]

[2] The relevant provisions of the will are:[4]

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1 Transcript 1-5 l 26 – 1-6 l 7.
2 Transcript 1-4 l 40 – 1-5 l 11.
3 Applicants' Outline of Submissions filed 8 May 2018 at [4].
4 Exhibit "A" to the Affidavit of RJ Hudson filed 14 December 2017.

"2. **I APPOINT** my sister, **MARGARET JOAN KUHZ** and my brother-in-law, **COLIN WILLIAM KUHZ** as joint executors and trustees of this will **PROVIDED THAT** if they predeceases me, renounce or otherwise do not act or continue to act, or die before my estate has been completely administered **THEN I APPOINT** my nieces **JULIE MARGARET MINNS** and **SHAYE LEIGH JACKSON** the executors and trustees of this will **PROVIDED THAT** if one should predecease me, renounce or otherwise not act or continue to act **THEN I APPOINT** the other the executor and trustee of this my will.

The expression "trustee" and "trustees" includes the trustee or trustees for the time being of this will.

…

4. **I GIVE** all my estate and interest in the land and residence wherein I now reside located at 8 Fraser Street, Charters Towers which lands are more fully described as Lot 14 on Crown Plan MPH35253 and in all the furniture and other articles and effects of domestic household and garden use or ornament (other than any motor vehicle and my collection of tea pots and the cabinets that they are displayed in) in or about the house at the date of my death to **JULIE MARGARET MINNS AND SHAYE LEIGH JACKSON** or the survivor of them **AS TRUSTEES** for my granddaughter **BELINDA RITA TRAINER** absolutely.

…

9. **I GIVE** all my real and personal estate not otherwise disposed of by this will or any codicil including any property over which I may have any power of testamentary disposition to my trustees **UPON TRUST** with power to collect, sell, and convert, to pay all my debts funeral and administration expenses, all legacies (if any) given by this will or any codicil, all death duties (if any) payable on any part of my estate unless specifically charged on a gift, any payments directed to be made out of residue, and to hold the balance then remaining ("my residuary estate") upon the following trusts in equal shares as tenants in common, namely:-

A. **UPON TRUST** to invest the same and to pay or apply the whole or any part of the income thereof to or for the benefit of my grand daughter **BELINDA RITA TRAINOR** during her life (free of all duties) and to accumulate any surplus income by investing the same and the resulting income thereof either as an accretion to the capital or as a separate trust for the absolute enjoyment of **BELINDA RITA TRAINOR** at the discretion of my trustees with power to pay the income or any part thereof to any person or persons having the care of **BELINDA RITA TRAINOR** without seeing to the application thereof and with the power also at any time or times to apply such accumulations as if the same were income of the then current year and during the remainder of the life of **BELINDA RITA TRAINOR** to pay or apply any income not paid or applied to or for the benefit of **BELINDA RITA TRAINOR** to the persons or for the purposes to or for which the same would be payable or applicable if **BELINDA RITA TRAINOR** were dead and after the death

of **BELINDA RITA TRAINOR** my trustees shall stand possession of my residuary estate and accumulations (if any) and the income therefore respectively Upon Trust for my daughter **ROBYN GAIL HOLLETT** and **ASHLEY JAMES TRAINOR** (if more than one then equally as tenants in common) absolutely.

B. **UPON TRUST** for my grandson **ASHLEY JAMES TRAINOR** if he shall so survive me for 30 (thirty) days and attain the age of 25 (twenty-five) years.

C.

(a) **UPON TRUST** to invest the same and to hold the nett income thereof upon protective trusts for the benefit of my daughter **ROBYN GAIL HOLLETT**, if she shall survive my for 30 (thirty) days, during her lifetime (free of all duties) **PROVIDED THAT** the discretionary trusts pursuant to s 64 of the *Trusts Act 1973* (QLD) (as amended) following the failure of determination of the trusts to which paragraph (1)(a) of that section refers shall be varied as follows:

(i) The trustees may in their discretion apply income accrued but unapplied in any previous year for the purposes of such discretionary trusts in any subsequent year but at a time not exceeding 21 years after the date hereof.

(b) Notwithstanding the provisions of paragraph (a) hereof my trustees may in their discretion at any time (and more than once) by any deed or deeds appoint that the protective trusts will be terminated in respect of the whole or any party of the net income. That net income so removed from the protective trusts will be paid or applied to the benefit of **ROBYN GAIL HOLLETT** during her lifetime.

(c) From and after the death of **ROBYN GAIL HOLLETT** my trustees will hold my residuary estate as to both capital and income **UPON TRUST** for my grandchildren **ASHLEY JAMES TRAINOR** and **BELINDA RITA TRAINOR** (if more than one then equally as tenants in common)."

[3] A summary of the changes sought by the applicants appears below:

Clause	**Delete**	**Insert**
2	"and trustees"	Nil
4	"absolutely"	"upon a testamentary discretionary trust for Belinda Rita Trainor. After the death of Belinda Rita Trainor the property at 8 Fraser Street, Charters Towers (Lot 14 on Crown Plan MPH35253) and furniture and other articles and effects of domestic household and garden use and or ornament or any fund

		resulting from the sale of such property as may still be in existence and not otherwise have been dealt with by the trustees in exercising their powers pursuant to the testamentary discretionary trust for Belinda Rita Trainor to be held upon trust for ROBYN GAIL HOLLETT and ASHLEY JAMES TRAINOR (if more than one then equally)."
9	"I GIVE all my real and personal estate not otherwise disposed of by this will or any codicil including any property over which I may have any power or testamentary disposition to my trustees UPON TRUST with power to collect, sell, and convert, to pay all my debts funeral and administration expenses, all legacies (if any) given by this will or any codicil, all death duties (if any) payable on any part of my estate unless specifically charged on a gift, any payments directed to be made out of residue, and to hold the balance then remaining ("my residuary estate") upon the following trusts in equal shares as tenants in common, namely:-"	"I give all of my real and personal estate not otherwise disposed of by this will to JULIE MARGARET MINNS and SHAYE LEIGH JACKSON or the survivor of them AS TRUSTEES upon the following trusts in equal shares, namely:-"
9A	"tenants in common"	Nil
9C(c)	"tenant in common"	Nil

[4] A mediation was held between the parties prior to the hearing and agreement was reached on each aspect of rectification except for the rectification of clause 4.[5] The rectification of clause 4 is opposed by the first respondent, but supported by the third respondent, albeit on different grounds. Despite the consensus between the parties to rectify some of the clauses, it remains to be determined whether the discretion of the court is enlivened to make the rectification sought.

[5] Section 33 of the *Succession Act* provides:

"s 33 Court may rectify a will

[5] Applicants' Outline of Submissions filed 8 May 2018 at [2]-[3].

> (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.
>
> (2) An application for an order to rectify a will may only be made within 6 months after the date of death of the testator.
>
> (3) However, the court may, at any time, extend the time for making an application under subsection (2) if—
>
> (a) the court considers it appropriate; and
>
> (b) the final distribution of the estate has not been made.
>
> (4) If the court makes an order to rectify a will, the court may direct that a certified copy of the order be attached to the will.
>
> (5) If the court gives a direction under subsection (4), the court must hold the will until the certified copy is attached to it."
>
> [Emphasis added]

"Construing" the will

[6] The clause in issue is clause 4 of the will. It is useful to "construe" the will as a whole to provide context to the clause in issue as a prelude to addressing the issues relating to rectification. A plain reading of clause 4 provides for the creation of a bare trust over the residence for the sole benefit of the first respondent and the appointment of two trustees. The trustees appointed in clause 4 are different from the executors. The parties accept that the clause does not create an absolute gift, life interest or discretionary trust.

[7] By clauses 5 and 6 of the will the deceased makes absolute gifts to the first respondent of her motor vehicle and collection of tea pots and display cabinets. By clause 7 any gift is conditional upon the recipient surviving the deceased by 30 days. Clause 7 also provides that s 33 of the *Succession Act* does not apply, with the consequence that great-grandchildren are not to take by representation. By clause 9 the will creates a trust over the residuary estate of the deceased in equal shares for the benefit of the first, second and third respondents. Individual trusts are created for each beneficiary, and each of the beneficiaries is named as a remainder beneficiary in the event of the death of the others. Clause 11 provides for the powers of the trustees.

Principles of admissibility

[8] All represented parties made submissions concerning the interpretation and application of s 33 and the admissibility of evidence.

[9] Atkinson J in *Public Trustee of Queensland v Smith*[6] identified a four stage process to determining a rectification application:

> "[47] Under s 33, if it is alleged that the will does not carry out the testator's intentions, the court engages in a four stage process:
>
> 1. Has a clerical error been made?
> 2. Does the will fail to give effect to the deceased' instructions?
> 3. If either or both of the above has occurred, has this caused the will not to carry out the deceased's intentions?
> 4. If so, then the court may make an order to rectify a will to carry out the testator's intentions.."

[10] Philippides J (as her Honour then was) in *Palethorpe v Public Trustee of Queensland & Ors*[7] summarised the relevant principles:

> "[22] I accept the submissions made by counsel for the first respondent that the authorities establish the following principles which are pertinent in the present case:
>
> (a) There is a difference between ascertaining the testator's intention as to the *effect* of the words used in the Will and ascertaining the testator's intention as to whether or not those words should *appear* in the Will. It is the latter enquiry which is relevant. It is not sufficient for the purpose of an order for rectification to establish that the testator would not have wanted property to go in a way that, in the events which have happened, a particular clause results in property going.
>
> (b) The due execution of a will raises the presumption that the testator knew and approved of its contents.
>
> (c) Although the standard of proof is the civil standard, to rebut this presumption the applicant must discharge "a heavy burden" by means of "clear and convincing proof" of the testator's actual intention.

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6 [2009] 1 Qd R 26 at [47].
7 [2011] QSC 335 at [22].

(d) As the Court's enquiry is directed to whether the will does not carry out the testator's intentions because a clerical error was made or whether the will did not reflect the testator's instructions, evidence of statements made by the testator about intentions earlier or later than the giving of the instructions is generally inadmissible. This was also the position under the repealed s 31: see *McCorley & Lewis* per Fryberg J at [6]:

> "It is not appropriate for a court to entertain general evidence of the testator's intentions at earlier stages or subsequently to the completion of the will."

In a similar vein, Wilson J observed in *Public Trustee of Queensland v Roberts* [2004] QSC 199 at [6]:

> "The best (if not only) evidence on which the Court will act is that of the person who took instructions for the will. Generally it will not receive evidence of the testator's actual intentions at an earlier stage or subsequently to the completion of the will."

[Footnotes omitted]

[11] Recently in *Rose v Tomkins*[8] Philippides JA further clarified the principles of rectification:

> "[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.
>
> [33] The following passages quoted in Palethorpe v The Public Trustee of Queensland, referring to Pagone J's consideration in ANZ Trustees Ltd v Hamlet 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**

[8] [2017] QCA 157 at [32].

> **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."**
>
> … That does not mean that a party seeking rectification is always obliged to seek orders for the construction of the Will but it does mean that the statutory condition upon which the Court's power depends must be satisfied."

…

[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."

[Emphasis added]

[12] Counsel for the applicants and third respondent also relied on the authority of *In the Will of Thomas Henry Finch (dec'd)*[9] in support of their submission that the court is entitled to consider evidence apart from the will and will instruction checklists in a rectification application. It was submitted that *Finch* was authority for the principle that evidence of the testator's intention other than during the execution of the will is

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9 [2018] QSC 16 ('*Finch*').

admissible to determine whether the applicant has overcome the presumption that the deceased knew and approved of the contents of their will.

[13] Lyons SJA in *Finch* considered the admissibility of statements made by a deceased on several occasions separate from the time of giving instructions for the drafting of a will:[10]

> "[36] …It would seem to me that the affidavit is admissible in both the application for rectification and the application for construction on the basis of the armchair principle. That principle permits the court to sit in the armchair of the deceased and take account of his or her family, property, friends and acquaintances in order to determine what was meant by the words in the Will. In this regard it has been consistently held that evidence is necessarily admissible to show facts and circumstances corresponding as far as possible with those referred to in the Will in order to show that the persons and property actually existed. As Lord Atkin said in *Perrin and Others v Morgan and Others23 "*No will can be analysed *in vacuo*. There are material surroundings such as I have suggested in every case, and they have to be taken into account. The sole object is, of course, to ascertain from the will the deceased's intention".
>
> [37] In my view the evidence contained in paragraphs 8-16 is relevant and can be relied upon in the application for rectification in relation to the argument as to whether the applicant has overcome the presumption that the deceased knew and approved the contents of his Will.
>
> …
>
> [38] …[T]he issue I first must determine in relation to the rectification application is to identify the instructions and intentions of the deceased. I must then determine the effect of the Will and compare the two and ascertain whether the Will gives effect to the instructions or intentions."

[14] Having reviewed the relevant principles of admissibility it is necessary to determine what evidence is admissible in determining the testator's intention. The cases above demonstrate that ordinarily evidence of intention is limited to the time of taking instructions. However, evidence from statements made at earlier times may be admissible in determining whether the applicants have overcome the presumption that the deceased knew and approved of the contents of her will.

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[10] Ibid at [36] – [38].

Evidence

[15] Mrs Margaret Kuhz, a sister of the deceased and one executor of the estate, gives evidence about statements made by the deceased leading to and before the execution of her will and her family circumstances generally. With regards to the family circumstances Mrs Kuhz deposes that:[11]

(a) the deceased always expressed to her that she had concerns about the first respondent and her future, and wanted to ensure she was looked after;

(b) the deceased was mainly concerned that the second respondent could not take care of the first respondent;

(c) the deceased often told her that she was worried that if she left any money to the second respondent, the second respondent would spend it and not use it for the benefit of the first respondent; and

(d) the deceased was concerned that if any money or property was to go to the first respondent that the second respondent would take all the money from the first respondent and use it for her own benefit.

[16] With regards to the execution of the deceased's will in her affidavit Mrs Kuhz deposes that in approximately August 2012 she attended Bill Petschler Lawyers with the deceased for the purpose of the deceased making a new will. Mrs Kuhz deposes that at this attendance the deceased stated that:[12]

(a) she wanted the first respondent to be looked after and that the only way this would happen was to have two people named as trustee for the first respondent;

(b) Julie Minns and Shaye Jackson would have to be trustees for the first respondent as they would do the right thing and were the only people who could stand up to the second respondent;

(c) she wanted the second respondent to get nothing from her estate;

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[11] Affidavit of MJ Kuhz filed 14 December 2017 at [4]-[6].
[12] Ibid at [6].

(d) she wanted to leave her house and contents including the cupboard and teapots inside the cupboard to the first respondent;

(e) she wished to leave her car to the first respondent, if she still owned a car at her death;

(f) if the trustees saw that the first respondent was unable to maintain the house with rates, insurance and electricity it was to be sold by the trustees;

(g) the second respondent was to receive $5,000 and move out of the house because she would take everything from the first respondent;

(h) she was concerned that the second respondent would not pay for anything and expect the first respondent to look after her; and

(i) the third respondent was to get some money.

[17] Mrs Kuhz deposes that a will was drafted but after the deceased read the will some changes were required to be made, and that after the changes were made the deceased signed the will of 21 August 2012.[13]

[18] After the death of the deceased enquiries were made to locate the original file of the solicitor. The following documents were obtained:[14]

(a) Original will of June Hollett dated 21 August 2012;

(b) Will Execution Checklist dated 21 August 2012;

(c) Will Execution Checklist dated 1 August 2012; and

(d) Will Instructions dated 18 May 2011.

[19] The Will Execution Checklist dated 1 August 2012 contained the following details: [15]

(a) Ticked boxes next to the following statements:

- 'Read through will and explain provisions'

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[13] Ibid at [7].
[14] Affidavit of RJ Hudson filed 14 December 2017 at [6].
[15] Exhibit "C" to the Affidavit of RJ Hudson filed 14 December 2017.

- 'If client cannot read, has will been read out in full to the client'
- 'Has client confirmed he/she knows and approves of contents of the will'
- 'Has will been signed and witnessed?'

(b) Handwritten (presumably by the solicitor or staff member) under the heading 'Notes':

'Mrs Hollett wanted to change her will insofar as she wanted the house to go to Belinda solely for her benefit. Mrs Hollett was very happy to keep Julie and Shaye as trustee for Belinda [in] the house and residue. WP crossed out reference to the house being left to Robyn Gail Hollett and Ashley James Trainor and Mrs Hollett initialled the change as did Brenda Sullivan the other witness and myself. WJP.'

(c) Handwritten under the heading 'Other details':

'WP advised Mrs Hollett that I would prepare a new will to reflect the above change.'

[20] The Will Execution Checklist dated 21 August 2012 contained the following details:[16]

(a) Ticked boxes next to the following steps:

- 'Read through will and explain provisions'
- 'If client cannot read, has will been read out in full to the client'
- 'Has client confirmed he/she knows and approves of contents of the will'
- 'Has will been signed and witnessed?'

(b) Handwritten (presumably by the solicitor) under the heading 'Notes':

'Q – Do you remember signing your last will? A – Yes. Q - Do you recall what the changes were to be made in this new will? A – Yes – I want to leave the house solely for Belinda with Julie and Shaye to look after it for her. Q – Are you sure this is the way you want to leave the house? A – Yes'.

(c) Handwritten (presumably by the solicitor) under the heading 'Other Details':

'Mrs Hollett appeared to me to understand the contents of her new will before she signed it. She [reiterated] that her daughter was a spendthrift and she wanted to ensure that Belinda her granddaughter would always have a home. She said that Julie and Shaye would look after Belinda's interest'.

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[16] Exhibit "B" to the Affidavit of RJ Hudson filed 14 December 2017.

[21] Exhibited to the affidavit were Will Instructions dated 18 May 2011 containing the following details:[17]

(a) Handwritten under the heading 'Specific Gifts':

'House @ 8 Fraser St as tenants in common in equal shares Robyn Gail Hollett Ashley James Trainor Belinda Rita Trainor'.

(b) Handwritten, but struck through, under the heading 'Testamentary Trust':

'Trust Fund, Belinda Rita Trainor Trust Fund, Trustees Julie Margaret Minn Shaye Leigh Jackson, Beneficiaries Belinda Rita Trainor'.

(c) Handwritten under the heading 'Residue':

"Robyn Gail Hollett 33.33%, Ashley James Trainor 33.33%, Belinda Rita Trainor 33.33%".

(d) Handwritten under the heading 'Substitute Beneficiaries':

"*No revert to surviving beneficiaries as above".*

[22] The evidence contained in the affidavit of Mrs Kuhz concerning the deceased's statements of intention at the time of giving instructions for the will of 21 August 2012 and shortly before is admissible. Similarly, the Will Instruction Checklists dated 1 August 2012 and 21 August 2012 are admissible because they are evidence of the deceased's intentions at the time of giving instructions.

[23] I am inclined to the view that the Will Execution Checklist dated 18 May 2011 is inadmissible being so remote in time from when the instructions leading to the will of August 2012 were given. At best it may be admissible for the limited purpose of determining whether the applicants have overcome the presumption that the deceased knew and approved of the contents of her will. It is not admissible as evidence of intention at the time of giving instructions. Even if admissible, which is doubtful, it is of limited weight. The evidence of Mrs Kuhz about statements made by the deceased on different occasions about the family are similarly admissible on this limited basis.

[24] Evidence before the court touched upon the capacity of the first respondent. There was lay opinion evidence from solicitors who had dealings with her. [18] There was a short

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[17] Exhibit "D" to the Affidavit of RJ Hudson filed 14 December 2017.

[18] See letter from the Townsville Community Legal Service Inc of 17 January 2018, Exhibit "JAM1" to the Affidavit of JA Mobbs filed 23 February 2018.

letter from a medical practitioner. [19] Opinion evidence from lay persons is not admissible. Only experts can offer opinion evidence as proof of the, in this case, incapacity or capacity. But evidence from lay persons of another's behaviour or apparent functioning is admissible as part of the "armchair principle" discussed by Lyons SJA in *Finch* and as such is only relevant to the consideration of whether the applicants have overcome the presumption that the deceased knew and approved the contents of her will.

Applicants' submissions

[25] Counsel for the applicants submitted that the intention of the deceased was to create a discretionary trust in favour of the first respondent, and that the court should exercise its discretion to rectify clause 4 to create a discretionary trust which provides for the trust property to revert to the second and third respondents upon the first respondent's death.[20] It was submitted that evidence of the intention to create a testamentary discretionary trust for the benefit of the first respondent was evident in:[21]

(a) the notations in a number of Will Execution Checklists;

(b) the instructions which Mrs Kuhz heard the testator give to the solicitor drafting the will;

(c) the differences between clause 4 and the absolute gifts in clauses 5 and 6; and

(d) the difference between clause 4 and clauses 9B and 9C.

[26] Counsel further submitted that clause 4 fails to provide for when the trust ends and how the trust property should vest on termination.[22] It was submitted that clause 4 should be rectified to provide that upon the death of the first respondent the trust property should revert to the other beneficiaries. In support of this submission counsel relied on the Will Execution Checklist of 18 May 2011 which made reference to a reversion of the residuary to the other beneficiaries. Counsel stated that an inference could reasonably

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[19] See letter from Dr Alroe, Exhibit "SAH-1" to the Affidavit of SAJ Hayward filed 18 May 2018. The applicants raised professional conduct issues concerning the medical practitioner who authored the letter. It should be noted there was no direct challenge to the opinion evidence of the practitioner, he was not cross-examined. There was no contrary expert opinion evidence.

[20] Applicants' Outline of Submissions filed 8 May 2018 at [18].

[21] Ibid.

[22] Ibid at [19].

be drawn that the intention of the testator was for any surviving beneficiaries to take the share of the other if a beneficiary failed to survive the others. Counsel also relied on the intention in clause 8(b) that great-grandchildren not take by representation, and the provision in clause 9C(c) that upon the death of the second respondent, the second respondent's share of the residuary revert to the first and third respondents.[23]

[27] In oral submissions counsel submitted that the testator's intention to create the 'gift-over' of the house upon the first respondent's death was evidenced by the fact that if the first respondent predeceased the testator the gift would have failed and the house would have reverted to the residuary beneficiaries nominated in clause 9 (that is, the second and third respondents). Again it was submitted that an inference could reasonably be drawn that this result was contemplated by the deceased.

[28] In supplementary submissions counsel also raised issues about the first respondent's capacity and the potential influence of the second respondent because of this.[24] Counsel noted that Mrs Kuhz deposed in her affidavit that the deceased had expressed concerns that the first respondent was autistic and had ADHD, that the first respondent was easily led and could be talked into doing things she did not wish to do, that the second respondent would spend any money or property if left anything and would not use it for the benefit of the first respondent, and that if any money or property was left to the first respondent the second respondent would take it from the first respondent and use it for her own benefit.[25]

[29] Counsel noted the outline on behalf of the first respondent asserts that the issue of the first respondent's capacity is not relevant to the present application, that there is no evidence that the first respondent is autistic, and that the only medical evidence available is the report of Dr Alroe who states that the first respondent has capacity. Counsel raised professional conduct concerns relating to the medical practitioner, and also referred to the affidavit of the first respondent's solicitor who swore that she was of the opinion that the first respondent did not have impaired capacity and did not

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23 Ibid.
24 Applicants' Supplementary Outline of Submissions filed 20 August 2018.
25 Ibid at [9].

require a litigation guardian, and the affidavit of the first respondent who swore that she does not have autism or ADHD and has never been diagnosed with such a condition.[26]

[30] It was submitted that the court should remain concerned about the state of the evidence as to capacity because:[27]

(a) the report of Dr Alroe does not specifically state that the first respondent is not autistic or have ADHD, is not easily led by people and does not require protection in financial matters;

(b) Mrs Kuhz's evidence should be given more weight because it is evidence of persons who have known the first respondent over her life (despite not being medical expert opinion);

(c) exhibit 'JAM1' to the affidavit of the third respondent's solicitor shows a letter from the Townsville Community Legal Centre which states: "the First Respondent has informed us that she suffers from an intellectual impairment and learning difficulties. We hold immediate concerns that she does not understand the nature of the application or the orders sought, or may be under a legal disability in the context of these proceedings"; and

(d) the third respondent informed his solicitor that the first respondent has been diagnosed on the autism spectrum scale, that he does not dispute that Belinda is easily led by people and talking into doing things she does not want to, and that the first respondent can perform day-to-day activities but cannot manage big decisions.

[31] Overall counsel submitted that on the combination of evidence of the Will Execution Checklists and the extrinsic evidence relating to the first respondent's capacity, it could not be reasonably concluded that the deceased intended to create a bare trust in which the first respondent had the power to determine the trust at her will.[28]

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[26] Ibid at [10]-[12].
[27] Ibid at [13].
[28] Ibid at [14].

First respondent's submissions

[32] Counsel for the first respondent submitted that the intention of the testator in clause 4 of the will is unambiguous and that the rectification sought by the applicants is in direct conflict with the testator's intentions.[29] In support of this argument counsel relied on the evidence of Mrs Kuhz, the applicant executor and sister of the deceased, who states that the deceased intended to ensure the first respondent was looked after, that she wished to leave the house and contents to the first respondent and ensure the second respondent received nothing from her estate. Counsel further relied on the Will Instruction Checklist which noted the testator's instructions to 'give the house to [the first respondent] solely for her benefit', and the handwritten amendments to clause 4 of the will dated 1 August 2012 which struck out the names of the second and third respondents.[30]

[33] It was submitted that that the deceased did not give instructions about the subsequent or future disposition of the house because it was her intention to give the house to the first respondent absolutely, and that clause 4 confirms the deceased's intentions by stating that the property is to be held on trust for the first respondent 'absolutely'. Counsel submitted that clause 4 creates a simple or bare trust, imposing no duties on the trustees other than to hold the property on trust until the first respondent directs them on how to deal with the property. Counsel rejected the submission made by the applicants that clause 4 fails to create a valid trust and submitted that the essential elements of a trust (a trustee, trust property, beneficiary and personal obligations attached to the trust property) are present and create a valid trust.

[34] Further, it was submitted that the evidence does not support a finding that the testator intended to create a discretionary trust because there are no notations to any of the will checklists of the word 'discretionary', and Mrs Kuhz's evidence is that the deceased's instructions were that the first respondent was to have the care of the house with the trustees only overseeing the property. If the trustees saw the first respondent was unable to maintain the residence, the residence was to be sold.

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29 First Respondent's Outline of Submissions filed 8 August 2018 at [3.2]-[3.3].
30 Exhibit "SAH-6" to the Affidavit of SA Hayward filed 18 May 2018.

[35] Counsel submitted that it was not within the court's power in s 33 to create a discretionary trust and effectively a sub-trust by creating a class of remainder beneficiaries as sought by the applicants. Counsel noted that clause 9C(a) creates a discretionary trust through clear wording, and submitted that if the testator wished to create a discretionary trust in clause 4 the testator would have done so in similar terms. Counsel also noted that it was a relevant consideration that the will was prepared by a solicitor, and that it must be assumed that the testator knew and understood the importance of the terminology 'discretionary trust', and chose not to use it in clause 4.

[36] Counsel further submitted that it was not the intention of the deceased to create a life interest over the residence as the will instruction checklist was marked 'no' at the relevant question. Counsel highlighted that a life interest was created by clause 9A of the will in favour of the first respondent with a remainder interest created for the second and third respondent, and submitted that if the testator wished to create a life interest in clause 4 it would have been drafted in similar terms to clause 9A.

[37] With regards to the creation of remainder beneficiaries it was submitted that no intention could be found for the trust to end on the death of the first respondent entitling the disposition to someone else. Counsel submitted that such a creation was in fact in direct conflict to the testator's intentions that the second respondent receive nothing from the estate. Counsel submitted that there is no requirement for a remainder beneficiary or vesting date for a trust to be valid, and the absence of such provisions in the will clearly supports the contention that it is a bare trust. It was submitted that the trust could be terminated by the first respondent during her lifetime, or if not it would pass through her will or through the rules of intestacy. Counsel rejected the third respondent's submission that the absence of a vesting clause or remainder beneficiaries would result in the reversion of the trust property to the residual beneficiaries of the deceased's will.

[38] With regards to the applicants' concerns about the capacity of the first respondent, counsel submitted that it had no relevance to the current application.

Third respondent's submissions

[39] Counsel for the third respondent submitted that the will is incomplete because it neither sets out the duties and powers of the trustee nor provides for termination. Counsel accepted in oral submissions that the trustees could draw their powers from the *Trusts Act* but submitted that this would not be necessary if the court finds a clerical error was made.[31] It was submitted that at the very least a clerical error was made in failing to provide a residuary clause. Counsel submitted that the starting point was to read the will as a whole, taking note of the following features:

(a) the specific gifts made to the first respondent in clauses 5 and 6;

(b) clause 7(b) which states: 'Section 33 of the Succession Act will not greatly apply to the intent that I would not want any great-grandchildren to take by representation'; and

(c) clause 9.1 which states: 'Provided that if any persons named in clause 9 of my will fail to survive me, then the remaining beneficiaries named in clause 9 will take my residuary estate, and if more than one, equally as tenants in common absolutely'.

[40] Counsel adopted the first respondent's position that there is nothing in the material to support the contention that there was an intention to provide a discretionary trust insofar as clause 4 is concerned.[32] Counsel submitted that it appears that clause 4 was taken from a precedent in the Queensland Law Society Will Precedents which reads as follows:[33]

> "7.1.6 Life interest in land and residence
>
> I GIVE all my estate and interest in the land and residence Located at (#1) and described as (#2) and in all the furniture and other articles and effects of domestic, household and garden use or ornament in or about the same at the date of my death (including/excluding any motor vehicle) not specifically given by this will or codicil unto my trustees UPON TRUST for the use and benefit of (#3) during (#4) lifetime free of all duties but subject to the payment by (#3) during such life estate of all rates levies

[31] Transcript l-11 l 46 – 1-12 l 4.
[32] Transcript l-33 l 42-44.
[33] Exh "JAM 1" to the Affidavit of JA Mobbs filed 20 August 2018.

> taxes insurance premiums repairs and other outgoings properly applicable to income in respect therefore and from and after death of (#3) or on prior termination of the life estate to hold the same in its then state and condition whether original or otherwise upon the same trusts in all respect as apply to my residuary estate."
>
> [Emphasis added]

[41] Counsel submitted that the underlined passage above was not placed in clause 4 of the will but that the drafting of clause 4 is similar to the clause above. It was submitted that clause 4 of the will was more consistent with the drafting of an incomplete trust than an absolute gift, and that a clerical error was made by failing to insert the underlined passage above. Counsel submitted that this approach accorded with the testator's intention that the trustees look after the property in the first respondent's interests. Counsel submitted that there was nothing in the material to support the submission that it was the testator's intention to create a bare trust where the trustees hold the property for the sole purpose of transferring it upon demand. In oral submissions counsel also rejected the first respondent's submission that the first respondent could leave her beneficial interest through her own will. In support of this proposition counsel relied on clause 7(b) of the will which demonstrates the testator's intention that great-grandchildren were not to take from the will. Counsel also relied on s 33G of the *Succession Act* which provides:

> "33G Effect of a failure of a disposition of property
>
> (1) If a disposition of property by a will is fully or partly ineffective, the will takes effect as if the property were part of the residuary estate of the testator.
>
> (2) Subsection (1) does not apply if a contrary intention appears in the will.
>
> In this section—
>
> *disposition of property* does not include the exercise of a power of appointment."

[42] Counsel relied on the comments of Chesterman J in *Jessup Lawyers Private Mortgages Ltd & Ors*[34] as to the nature of a bare trust:

> "[50] The defendants object to these conclusions. Attention was drawn to the remarks of Gummow J in *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271 at 281:

[34] [2006] QSC 3 at [50]-[53] ("*Jessup*").

> 'Today the usually accepted meaning of "bare" trust is a trust under which the … trustees hold property without any interest therein, other than that existing by reason of the office and the legal title as trustee, and without any duty … to perform, except to convey it upon demand to the beneficiary …'

Reference was also made to the judgment of Meagher JA in *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370 at 398. The question in that case considered the meaning of the term "bare trustee" in section 8(8)(a)(iii)(B) of the *Companies (NSW) Code*. Meagher JA said:

> A "bare trust" is one in which the trustee has no active duties to perform and is usually contrasted with a trust where there are such active duties. A recent discussion of the topic may be found in … *Herdegen* … In that case, [Gummow J] points out that the precise nuances of the phrase must depend on the context in which it is found … But as a matter of strict logic almost no situation can be postulated where a trustee cannot in some circumstances have active duties to perform … Bearing in mind the evident statutory purpose, … I think the expression must be related to situations where a trustee is no more than a nominee or cypher, in a commonsense commercial view.'"

[51] I was also referred to *Target Holdings Ltd v Redferns (a firm)* [1996] 1 AC 421 at 434-6; Jacobs' Law of Trust in Australia 6th ed., paragraphs 305 and 318; and Snell's Equity 31st ed., paragraphs 19-20. I might say that I have found the discussion in Ford and Lee Principles of the Law of Trusts paragraph 9620 to be the most helpful on the topic of 'bare trustees'.

[52] The defendants' submission is that LPM was a bare trustee. It took the moneys from the solicitors and advanced it, as directed by the contributors, to Holdings. It was a 'cypher or nominee in a commonsense commercial view.' It had no other duty to perform as trustee. It did not breach that duty and could, by definition breach no other, since none existed.

[53] I cannot accept this submission. I note that the authors of Jacobs in the paragraph referred to, 305, said:

> 'A simple trust is one in which the trustee has no active duties to perform beyond the conveyance of the property to the beneficiaries when required to do so. In such a case the trustee is called a passive or bare trustee. If the trustee has duties … in connection with the trust property so that he has to do something more … than merely convey the trust

> property to the beneficiaries, the trust is called a special trust and the trustee an active trustee.'"

[43] Counsel's ultimate submission was that no intention could be found that the testator intended for the property to be held on trust in the fashion described by Chesterman J in *Jessup*, and that a clerical error was made because of the failure to provide for residuary beneficiaries and the powers and duties of the trustees.

What were the deceased's intentions?

[44] I have already made it plain that the parties to the application made considerable reference to the first respondent's capacity in their arguments. As previously discussed, this evidence is relevant to informing the court of the testator's state of mind but is not direct evidence of her intentions at the time of giving instructions for the will. In this way it provides a context to the application, however that is as far as the evidence can be taken. Notwithstanding the reference to this issue in submissions (written and oral) and in affidavits and letters exhibited, the issue was not forensically litigated. No one was cross-examined and only one short letter of expert opinion was placed before the court. Ultimately I have come to the conclusion that I should not express any view upon this issue. It is of limited relevance to the issue before me and its determination should await an occasion when the issue is litigated and necessary to decide.

[45] The admissible evidence of the intention of the deceased includes the Will Execution Checklist dated 21 August 2012 and that of 1 August 2012 together with the will which is exhibited to the affidavit of RJ Hudson. This is supplemented by the evidence of Margaret Kuhz of the statements by the deceased of her intention at [15] and [16] above.

[46] Probable intentions given circumstances that may or may not eventuate are not admissible or relevant to an application for rectification.[35] It is the actual intention at the time of execution that is the issue. A review of the admissible evidence allows me to draw the following conclusions about the deceased's intentions at the time of making her will:

(a) The deceased wanted to leave the house solely to the first respondent;

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[35] *Rose v Tomkins* [2017] QCA 157 at [38].

(b) Julie and Shaye were to act as trustees for the respondent;

(c) The deceased wanted to ensure the first respondent always had a home; and

(d) The deceased did not want the second respondent to receive the house, as she believed she was a spendthrift.

Does the will carry out the testator's instructions?

[47] Evidence of the deceased's instructions can be found in the Will Instruction Checklists of 1 and 21 August 2012. On both the Will Instruction Checklists of 1 August 2012 and 21 August 2012 are marked boxes beside the questions 'Read through will and explain provisions' and 'has client confirmed he/she knows and approves of contents of the will'. The due execution of a will drawn by a solicitor raises the presumption that the deceased knew and approved of its contents. This is reinforced by the checklist, ticked boxes, and the evidence that the deceased read the will and apparently understood it. Further, clause 4 which is grammatical, and not relying upon absent words for its meaning, accords with the apparent instructions of the deceased.

[48] The terms of clause 4 and the identification of the first respondent as the sole beneficiary of the trust suggest that the deceased did not have a discretionary trust in mind when she provided instructions, approved the terms of the will and executed it. In *Federal Commissioner of Taxation v Vegners*[36] Gummow J said:

> "A fixed trust is used to describe a species of express trust where all the beneficiaries are ascertainable and their beneficial interests are fixed, there being no discretion in the trustee or any other person to vary the group of beneficiaries or the quantum of their interests. The expression "discretionary trust" is used to identify another species of express trust, one where the entitlement of the beneficiaries to income, or the corpus, or both, is not immediately ascertainable. Rather, the beneficiaries are selected from a nominated class by the trustee or some other person and this power may be exercisable once or from time to time."

[49] The evidence of the approval by the deceased of the contents of her will of 21 August 2012 and of the words used in clause 4[37] satisfy me that the deceased knew of the words used in clause 4 and approved of its contents. It is worth repeating some of the

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[36] (1989) 90 ALR 547 at 551-2.
[37] See para [18] - [20] above.

reasons of Philippides J in *Palethorpe v Public Trustee of Queensland & Ors* quoted above:[38]

> "There is a difference between ascertaining the testator's intention as to the *effect* of the words used in the Will and ascertaining the testator's intention as to whether or not those words should *appear* in the Will. It is the latter enquiry which is relevant. It is not sufficient for the purpose of an order for rectification to establish that the testator would not have wanted property to go in a way that, in the events which have happened, a particular clause results in property going."

And in *Rose v Tomkins:*[39]

> "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."

There is evidence that the deceased was motivated to protect the interest of the first respondent from the influence of the second respondent. Whatever may be the case as to whether the measure might be successful in all circumstances is not to the point. What is clear is the words as drafted were brought to her attention and she approved them.

[50] Concerning the trust created by clause 4, there is no evidence the deceased intended to create a discretionary trust in respect of the house and contents with the second and third respondents as remainder beneficiaries. No suggestion of this can be found in any of the documents such as the Will Checklist of 21 August 2012 let alone the will. It is not suggested by the evidence from Mrs Kuhz of the statements made by the deceased. There is no evidence that on 21 August this issue was raised with or by the deceased. The Will Checklist of 1 August 2012 is evidence that the deceased did not intend a discretionary trust or to make any provision for either the second or third respondents in this context.[40] The evidence does not demonstrate by clear and convincing proof that the deceased intended to make a discretionary trust, and also intended that the second

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38 See para [10].
39 See para [11] above.
40 So too is the striking out and changes made to clause 4 of the draft will of 1 August 2012. See "SAH-6" to the Affidavit of SAJ Hayward filed 18 May 2018.

and third respondents be named as remainder beneficiaries. For the court to exercise its discretion to rectify a will the applicants must satisfy the court of both a positive and a negative proposition. In this case, the court must be satisfied that the deceased did not intend to create a bare trust over the residence in favour of the first respondent, *and* that the deceased intended to create a discretionary trust in the terms provided in the amended originating application. This requires the court to be satisfied that the deceased intended that the second and third respondent have a beneficial interest in the trust asset as remainder beneficiaries. This onus simply cannot be discharged on the evidence.

[51] The application on this ground insofar as clause 4 is concerned should be refused.

Was there a clerical error?

[52] Because of my finding that the will accords with the intentions of the deceased it is not strictly necessary to consider this argument. However for the sake of completeness and out of respect for the energy of counsel I address it. This argument[41] was advanced by the third respondent whose counsel made the frank concession that:

> "There's absolutely nothing in the material to support the contention that there was an intention to provide a discretionary trust insofar as clause 4 is concerned."[42]

He submitted that in the absence of a discretionary trust with the remainder to be held on behalf of the second and third respondents clause 4 creates an incomplete trust because of the failure to provide for residual beneficiaries and the powers and duties of the trustees. Philippides J (as her Honour then was) in *Palethorpe v Public Trustee* considered the test for clerical error:

> "[49] As to rectification for clerical error, Williams on Wills (2002, 8th ed) states at [6.2]:
>
> > "It has been stated that the term 'clerical error' means an inadvertent error made in the process of recording the intended words of the testator in drafting or in the transcription of his will. Thus where a solicitor failed to include a clause in a later

[41] See paras [39] to [43] above.
[42] Transcript 1-33 l 42-44.

> will which was intended to mirror a clause in an earlier will which it replaced, it was held to be an error made in the process of recording the intended words of the testatrix. The will was rectified to include the omitted clause. [6] The introduction of a clause which is inconsistent with the testator's instructions in circumstances in which the draftsman has not applied his mind to its significance or effect is also a 'clerical error' for the purposes of this provision."

[50] In *Re Segelman* [1996] Ch 171, Chadwick J considered the meaning of "clerical error" in the context of the comparable UK legislation. His Honour referred (at 184) to a passage from *Mortimer's on Probate Law and Practice* (1927, 2nd ed. at 91-92), cited with approval by Latey J in *Re Morris* [1971] P 62 at 80, where a distinction is made between two types of cases:

> "*First*. Where the mind of the draftsman has really been applied to the particular clause, then, whether the error has arisen from the fact that he misunderstood the instructions of the testator, or, having understood the instructions, has used inappropriate language in seeking to give effect to them, the testator who executes the will is - in the absence of fraud - bound by the error so made as if it were his own, even if the mistake were not directly brought to his notice; and the court will not omit from the probate the words so introduced into the will.
>
> *Secondly*. Where the mind of the draftsman has never really been applied to the words of the particular clause, and the words are introduced into the will *per incuriam*, without advertence to their significance and effect, by a mere clerical error or engrosser, the testator is not bound by the mistake unless the introduction of such words was directly brought to his notice."

[53] I do not accept the submission that clause 4 creates an incomplete trust. It is worthwhile to bear in mind that:

> "[26] The requirements for a valid trust are described in *Jacobs' Law of Trusts in Australia*:

> "There are four essential elements present in every form of trust: the trustee, the trust property, the beneficiary or charitable purpose, and the personal obligation annexed to the property."[43]

Clause 4 creates a valid bare trust with the first respondent as the sole beneficiary.[44] The trustees have no active duties over the trust property other than to hold the property for the benefit of the first respondent unless or until (assuming capacity) she calls for it. Trustees can also draw their powers from the *Trusts Act* 1973 (Qld) and case law, and can apply to the court for directions and guidance if necessary.[45]

[54] As a sole beneficiary in a bare trust, the first respondent has an equitable proprietary interest in the trust property. The High Court in *CPT Custodian Pty Ltd v Commissioner of State Revenue*[46] confirmed this approach:

> "[43] *Saunders v Vautier* is a case which has given its name to a "rule" not explicitly formulated in the case itself, either by Lord Langdale MR (at first instance) or by Lord Cottenham LC (on appeal). In Anglo-Australian law the rule has been seen to embody a "consent principle" recently identified by Mummery LJ in Goulding v James [94] as follows:
>
> > "The principle recognises the rights of beneficiaries, who are sui juris and together absolutely entitled to the trust property, to exercise their proprietary rights to overbear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations of a will or trust instrument."

[55] The equitable interest of the beneficiary of a bare trust of land to insist upon the performance of the trust or to call for a conveyance of the land creates for the beneficiary an interest in the property. This is consistent with the interest a purchaser

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43 See *O'Brien & Anor v Smith & Anor* [2012] QSC 166 at [26] per Margaret Wilson J.
44 See for example Kessler & Flynn, "*Drafting Trusts & Wills Trusts in Australia*", Lawbook Co., 2018 at p 327 ff.
45 s 96 *Trusts Act* 1973 (Qld).
46 (2005) 224 CLR 98 at [43]. See also *The Comptroller of Stamps (Victoria) v Howard-Smith* (1936) 54 CLR 614 at 622 and *Simonson Properties Pty Ltd v Hardy* [2014] NSWSC 229 at [93].

under a contract or other agreement has in land where "the extent of the purchaser's interest is to be measured by the protection which equity will afford to the purchaser".[47]

[56] If the first respondent were to die the trust asset would not revert to the testator's estate. Rather, the first respondent's equitable interest would pass according to her will or the rules of intestacy. Section 8 of the *Succession Act* supports such a conclusion:

> "8 Property that may be disposed of by will
>
> (1) A person may dispose by will of **any property to which the person is entitled** at the time of the person's death."
>
> [Relevant part only included, emphasis added]

[57] The term 'property' is defined in the *Acts Interpretation Act* 1954 (Qld):[48]

> ***"property*** means any legal or **equitable estate or interest** (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action."
>
> [Emphasis added]

[58] The *Succession Act* clearly contemplates the disposition of equitable interests in property through a person's will. Counsel for the third respondent also relied on s 33G of the *Succession Act* to support a submission that the death of the first respondent would result in the trust failing and the trust property reverting to the residual beneficiaries nominated under the will. Section 33G provides for a disposition of property to form part of the residuary estate where such 'a disposition of property by a will is fully or partly ineffective'. I do not consider that there will be an ineffective disposition of property. The first respondent has survived the testator for more than thirty days.[49] The comments of Pembroke J on this topic in the New South Wales jurisdiction in *Parkes-Linnegar v Watson*[50] are relevant:

> "[16] …It is well established that if there is a specific bequest to an executor on trust, and the executor assents to the trust, the property bequeathed ceases to be part of the testator's assets. The executor is

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47 See *Legione v Hateley* (1983) 152 CLR 406 at 446; *Stern v McArthur* (1988) 165 CLR 489 at 522 and *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 252-3.

48 Sch 1.

49 s 33B *Succession Act* 1981 (Qld).

50 [2011] NSWSC 37 at [16].

> then precluded from dealing with the property as executor: Martyn J R, and Caddick N, Williams, Mortimer & Sunnucks, Executors, Administration & Probate, 19 th Edition at [78]-[21]]. The principle is well explained in Jacob's Law of Trusts in Australia, 7 th Edition, Heydon & Leeming at [240]:
>
> > "Further, if the executor carries out an instruction in the will to set aside a fund and hold it on trust for certain beneficiaries, he or she will become a trustee in respect of that property. An important result of this is that the subject matter of that fund will thereupon cease to be part of the general estate of the testator and therefore if there is any loss to the subject matter of the fund, that loss will fall on the beneficiaries of the fund, and not upon any other beneficiaries in the testator's estate…"

[59] The application on this ground should be refused.

Orders

[60] Earlier [51] I noted that the parties were united however in seeking rectification of clauses 2, 9, 9A and 9C(c) to the particular effect specified in paragraph [3] above. In each case the changes are necessary either to correct an obvious clerical error or to avoid a drafting lacuna that would introduce an ambiguity into a clause. In each case the amendment contended for is consistent with the evident intention of the deceased and necessary to avoid confusion. In these cases I will order rectification in the terms sought.

[61] Whether or not rectification of one clause should be ordered was contentious. But in other respects the application is both necessary and successful. All represented parties acted reasonably in the conduct of the application. Subject to any issue or matter that has not occurred to me which the parties wish to draw to my attention I consider the parties cost should be paid for out of the estate on an indemnity basis.

[62] In light of my reasons I make the following orders:

1. Pursuant to section 33 of the *Succession Act* 1981 (Qld) the Will of June Constance Hollett dated 21 August 2012 be rectified by:

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[51] At [4] above.

(a) Deleting the words “and trustees” where they appear in clause 2 of the Will;

(b) Deleting the words "**I GIVE** all my real and personal estate not otherwise disposed of by this Will or any codicil including any property over which I may have any power or testamentary disposition to my trustees **UPON TRUST** with power to collect, sell, and convert, to pay all my debts funeral and administration expenses, all legacies (if any) given by this Will or any codicil, all death duties (if any) payable on any part of my estate unless specifically charged on a gift, any payments directed to be made out of residue, and to hold the balance then remaining ("my residuary estate") upon the following trusts in equal shares as tenants in common, namely:-" where they appear in clause 9 of the Will and inserting the words "I give all of my real and personal estate not otherwise disposed of by this Will to JULIE MARGARET MINNS and SHAYE LEIGH JACKSON or the survivor of them AS TRUSTEES upon the following trusts in equal shares, namely:-";

(c) Deleting the words "tenants in common" where they appear in clause 9A of the Will;

(d) Deleting the words "tenants in common" where they appear in clause 9C(c) of the Will;

2. Unless any party files submissions seeking a different order for costs, within 21 days (in which case I will reconsider the question of costs on the papers), there will be an order with respect to costs as follows.

3. The applicants and respondents have their costs paid from the estate on an indemnity basis.