SUPREME COURT OF QUEENSLAND

CITATION:	*The Public Trustee of Queensland v Cole & Ors* [2019] QSC 298
PARTIES:	**THE PUBLIC TRUSTEE OF QUEENSLAND as executor of the estate of GILLIAN MARY RUTH COLE deceased** (applicant) **v** **JOSEPH FAUENA THOMAS COLE** **CHRISTOPHER MURRAY LEMAUOSAMOA COLE** (first respondents) **BELLA SINA NANIA-COLE** **KYLANI LEILUA NANIA-COLE** **SAMUELU DAVID COLE** (second respondents) **RACHAEL LEE FALZON** **DANIEL KANE BARTLETT** **TANIA MARIA BARTLETT** (third respondents) **OSCAR FALZON** **CARTER FALZON** **KAYLA NIKITA HARRISON** **JADE SHAKYA HARRISON** (fourth respondents)
FILE NO/S:	10666 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	15 November 2019
JUDGE:	Davis J
ORDERS:	**1. The time for making an application for an order to rectify the Will of Gillian Mary Ruth Cole (deceased) is extended to 2 October 2019.** **2. A copy of the application and supporting material having**

come into the possession of the first respondent Christopher Murray Lemauosamoa Cole on 3 October 2019, possession of the documents on that day is service of the documents on that day.

3. **The last Will of the deceased dated 3 July 2012 is rectified so Clause 9 reads:**

   "I Give -

   The whole of my estate to my great nieces and great nephews and my intended husband's great nephews and great nieces living at my death in equal shares".

4. **A certified copy of this order shall be attached to the Order to Administer with the Will made on 7 April 2017 on court file BS 2655/17.**

5. **The applicant's costs of the application be paid out of the estate on an indemnity basis.**

CATCHWORDS: SUCCESSION – MAKING OF A WILL – STATUTORY POWER OF RECTIFICATION – where the applicant seeks an order for rectification of the deceased's will – where the deceased's will disposed her estate to her great nieces and nephews and her intended husband's great nephews and nieces – where there was evidence that the deceased's intention was to dispose her estate to her great nieces and great nephews and her intended husband's great nephews and great nieces – whether the will should be rectified to reflect that intention

Succession Act 1981(Qld), s 31, s 33, s 33C
Uniform Civil Procedure Rules 1999 (Qld), r 105, r 117, r 125

Byrnes v Kendle (2011) 243 CLR 253, cited
Farrelly v Phillips (2017) 128 SASR 502, cited
Marley v Rawlings [2015] AC 129, cited
Palethorpe v The Public Trustee of Queensland [2011] QSC 335, cited
Perrin v Morgan [1943] AC 399, cited
Re Bryden [1975] Qd R 210, cited
Re Finch (deceased) [2018] 3 Qd R 370, cited
Rose v Tomkins [2018] 1 Qd R 549, cited
Terence John McCorley and David John Lewis (as executors of the Will of Vera Rachel Pakleppa deceased) v Norman Pakleppa [2005] QSC 83, cited
The Public Trustee of Queensland v Smith [2009] 1 Qd R 26, cited

COUNSEL: R D Cumming for the applicant
No appearance for the respondents

SOLICITORS: The Public Trustee of Queensland for the applicant
No appearance for the respondents

[1] Gillian Mary Ruth Cole, deceased (the deceased) left a will made on 3 July 2012 (the Will). The applicant was granted an Order to Administer with the Will on 7 April 2017. An issue has arisen as to the construction of the Will. The applicant seeks a declaration as to the proper construction of the Will, or in the alternative, rectification to reflect the deceased's true intentions.

Background

[2] At the time of her death, the deceased was married to Ross Douglass[1] Bryce (Mr Bryce). The deceased and Mr Bryce had been a couple for many years but had not married by the time the deceased made the Will.

[3] The Will was made by the deceased in contemplation of her marriage to Mr Bryce. The pair later married.

[4] Relevantly, the Will provided:

> "1. ***Cancellation of previous Wills***
>
> **I CANCEL** my earlier Wills.
>
> 2. ***Intended Marriage***
>
> This Will is made in contemplation of my marriage with ROSS DOUGLASS BRYCE but is not conditional on the marriage taking place.
>
> 3. ***Appointment of Executor***
>
> **I APPOINT** THE PUBLIC TRUSTEE OF QUEENSLAND to be the executor and trustee ("my Trustee") of this Will.
>
> 4. ***Survival of Beneficiaries***
>
> **I DIRECT** that to share in my estate a person must survive me for 30 days and the word "survive" is to be read accordingly.
>
> …
>
> 8. ***Disposal of my Estate***
>
> **I GIVE** -
>
> The whole of my estate to my intended husband ROSS DOUGLASS BRYCE but if this gift fails then the following provisions for distribution shall apply instead.
>
> 9. ***Further Disposal of my Estate***

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[1] On his death certificate Mr Bryce's second given name appears as Douglas not Douglass.

I GIVE -

The whole of my estate to my great nieces and nephews and my intended husband's great nephews and nieces living at my death in equal shares."

[5] Mr Bryce died on 23 February 2013, pre-deceasing the deceased who died on 2 February 2017. Therefore, by force of clause 4 of the Will, the deceased's estate passes pursuant to clause 9, not clause 8.

[6] The relationship of "nephew" or "niece" to the deceased is that of child of a sibling of the deceased. The relationship of "great nephew" or "great niece" to the deceased is that of child of a niece or nephew of the deceased. The same applies to relationships of Mr Bryce.

[7] The deceased had two brothers but no sisters. The two brothers are Paul Cole and David Cole. Paul has no children. David has two: Joseph and Christopher, both of whom are therefore nephews of the deceased. Joseph has no children, but Christopher has three: Bella Nania-Cole, Kylani Nania-Cole and Samuelu Cole. Bella and Kylani are great nieces of the deceased and Samuelu is her great nephew.

[8] Mr Bryce has only one sibling, a sister Lynn Bartlett. She has three children: Rachael Falzon, Daniel Bartlett and Tania Bartlett. Rachael and Tania are nieces of Mr Bryce and Daniel is his nephew. Daniel has no children but Rachael has two: Oscar Falzon and Carter Falzon. Tania also has two children: Kayla Harrison and Jade Harrison. Oscar and Carter are the great nephews of Mr Bryce and Kayla and Jade are his great nieces.

[9] The first respondents are the deceased's nephews.[2]

[10] The second respondents are the deceased's great nieces[3] and her great nephew.[4]

[11] The third respondents are Mr Bryce's nieces[5] and his nephew.[6]

[12] The fourth respondents are Mr Bryce's great nephews[7] and his great nieces.[8]

The issue

[13] Clause 9 of the Will identifies the beneficiaries not by name but by relationship to the deceased and to Mr Bryce.

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2 Joseph Cole and Thomas Cole.

3 Bella Sina Nania-Cole and Kylani Leilua Nania-Cole.

4 Samuelu David Cole.

5 Rachael Lee Falzon and Tania Maria Bartlett.

6 Daniel Kane Bartlett.

7 Oscar Falzon and Carter Falzon.

8 Kayla Nikita Harrison and Jade Shakya Harrison.

[14] There are two reasonable alternatives to the proper construction of clause 9. The first is that the word "great" as it appears before the word "nieces" in the clause qualifies the word "nieces" but not the word "nephew". Consistently, where the word "great" appears before the word "nephews", it qualifies the word "nephews" but not the word "nieces". I will call this "the first proposed construction".

[15] Under the first proposed construction the beneficiaries would be:

(i) the deceased's great nieces: Bella Nania-Cole and Kylani Nania-Cole;

(ii) the deceased's nephews: Joseph Cole and Christopher Cole;

(iii) Mr Bryce's great nephews: Oscar Falzon and Carter Falzon; and

(iv) Mr Bryce's nieces, Tania Bartlett and Rachael Falzon.

[16] Alternatively, the word "great" as it appears before the word "nieces" is meant to qualify both the words "nieces" and "nephews" and the word "great" as it appears before the word "nephews" is meant to qualify both the words "nephews" and "nieces". In other words, the persons who take under the Will are the "great nieces and great nephews" of the deceased and the "great nephews and great nieces" of Mr Bryce. I will call that the second proposed construction.

[17] Under the second proposed construction the beneficiaries would be:

(i) the deceased's great nieces: Bella Nania-Cole and Kylani Nania-Cole;

(ii) the deceased's great nephew: Samuelu Cole;

(iii) Mr Bryce's great nephews: Oscar Falzon and Carter Falzon; and

(iv) Mr Bryce's great nieces: Kayla Harrison and Jade Harrison.

[18] A third proposed construction was postulated by the applicant. That was that each of the deceased's nephews, nieces, great nephews and great nieces, and each of Mr Bryce's nephews, nieces, great nephews and great nieces take under clause 9. That proposed construction is not open on the terms of the Will, and nor does the extrinsic evidence support such a construction. It can be ignored.

[19] Evidence beyond the terms of the Will itself may be admissible to aid in the construction of the Will. Depending upon the circumstances, the evidence may be used to interpret the words of the Will, or may be admitted as evidence of the subjective intention of the testator. Evidence may be admitted to prove the preconditions enabling the court to rectify the Will. Before considering these principles, the evidence ought to be identified.

[20] Tracey Patricia James worked at the office of the applicant. She took the deceased's instructions for the Will in 2012 and prepared the Will on a computer. She is one of the witnesses to the Will.

[21] In her affidavit, Ms James swears as follows:

"2. I remember Ms Gillian Mary Ruth Cole (**Ms Cole**) and attending on her on 3 July 2012 for the purpose of taking instructions for her Will and to advise her in connection therewith. Ms Cole appeared to have been of a similar age to me and explained to me that she wished to make a will in contemplation of marriage to her intended husband.

3. I recorded the instructions of Ms Cole on a computer using the Public Trustee's standard Will making software. This software displays a questionnaire that is completed by entering information in answer to questions. Once the questionnaire is completed, the software allows a Will to be printed incorporating the information entered into the questionnaire. In accordance with my usual practice, I collected the personal details of Ms Cole, including brief details of major assets as well as recording her instructions concerning the disposal of her estate. Exhibit '**TPJ-1**' to this affidavit is a copy of Ms Cole's Will instructions (the **Will instructions**).

4. Pages 5 and 6 of the Will Instructions record Ms Cole's instructions as to the disposal of her estate which I typed into the Will making software. I typed in the definition of the gift under the hearing 'Second Level of Residue', that is the gift to be made if the gift to Ms Cole's intended husband Ross Douglas Bryce should fail, as:

> 'To my great nieces and nephews and my intended husband's great nephews and nieces living at my death'.

5. Exhibit '**TPJ-2**' to this affidavit is a copy of Ms Cole's Will dated 3 July 2012 (the **Will**). I recognise my signature as being one of the witnesses to the Will and the second witness signature as that of Ms Kaysan Parker, a Public Trustee employee at the time of execution of the Will.

6. By clause 9 of the Will, Ms Cole bequeathed her estate, if Ms Cole's gift to her intended husband Ross Douglas Bryce should fail, as follows:

> '***I GIVE -***
>
> *The whole of my estate to my great nieces and nephews and my intended husband's great nephews and nieces living at my death in equal shares*.'
>
> (**Clause 9**)

7. Despite the wording I recorded in the 'Second Level of Residue' in the Will Instructions and in the drafting of Clause 9, I recall that Ms Cole had explained to me, when I took instructions, that her intentions were that the substitute gift of her estate be bequeathed to her:

   (a) great nephews;

   (b) great nieces;

   (c) intended husband Ross Douglas Bryce's great nephews; and

   (d) intended husband Ross Douglas Bryce's great nieces

and that Ms Cole had also said words to me to the effect that she wanted to 'give the young ones a better start in life'.

8. In the Will Instructions and in Clause 9, I had employed the use of the word 'great' in 'great nieces and nephews' and 'great nephews and nieces' colloquially and definitely intended the word 'great' to qualify 'nephews' and 'nieces' in every instance."

[22] A few weeks after the Will was signed, Mr Ian Kent, a colleague of Ms James, pointed out that clause 9, as Ms James had drawn it, may not reflect the intentions of the deceased. Ms James then telephoned the deceased. In her affidavit, she said this:

"10. After being alerted by Mr Kent to his concern, I recall telephoning Ms Cole (although I do not recall the date) to check with Ms Cole what her intentions were regarding Clause 9. Ms Cole confirmed for me over the phone that she had intended the substitute gift of the residuary estate in Clause 9 to be bequeathed to her great nephews, her great nieces, her intended husband's great nephews and her intended husband's great nieces. I explained to Ms Cole that there was a possibility that there was an error in the drafting of Clause 9 as it may not accurately reflect her true intentions. I invited Ms Cole to attend our office for a new Will to be made with appropriate corrections.

11. After that first phone call, I recall making several further telephone calls to Ms Cole (although I do not recall the dates) inviting Ms Cole to attend our office so that a corrected Will could be prepared and signed. I recall in these phone calls that Ms Cole indicated positively of her intention to come into the office to have a corrected Will prepared and signed."

[23] The deceased did not attend the office of the applicant to make a new will despite Ms James telephoning her and she, the deceased, promising to attend. That inattention to her affairs by the deceased may be explained by the then pending death of Mr Bryce. In due course, the deceased reported Mr Bryce's death to the applicant and Ms James wrote a letter to the deceased suggesting she attend to correction of the error in the wording of clause 9. However, the deceased did not respond.

[24] Officers of the applicant have made enquiries of potential beneficiaries to obtain their attitude to the meaning of clause 9 of the Will. Several responded. Some of the responses contain typographical and grammatical errors. They are recorded below as they were written.

[25] Paul Cole, who is the brother of the deceased and who does not take under the Will no matter which proposed construction is preferred, said this:

"Gillian did make it clear to me on a few occasions (perhaps 3 times) after Ross' death, when I visited her in Brisbane following Ross' death and before her own in 2017 and in few telephone conversations, that she wished to leave her estate to our brother's son's children, that is the children of Christopher Cole, son of our brother David Cole now of Hawaii. Or at least to make Christopher's children her beneficiaries. I did not raise the matter nor did I feel that I should get involved and then Gillian's untimely death intervened. I do not recall Gillian speaking of

anyone else as possible beneficiaries so I read with surprise the reference to Ross' great nieces and nephews.

[26] Joseph Cole[9] is a nephew of the deceased. Joseph Cole would take under clause 9 of the Will if the first proposed construction prevails but would not take under the second proposed construction:

> "… this letter is my personal statement supporting a that my Aunt Gillian's estate should be distributed strictly in accordance with the words used in clause 9 of the will.
>
> I agree with the strict interpretation of the will and the specific language used. Before my Aunt Gillian passed, I had conversations that support the exact wording and is also consistent in my communications with your firm.
>
> Visiting my grandparents with my late Aunt Gillian during Feb-March, 2013 soon after Ross passed, we had conversations specific to this effect and her family, the 'Cole' family and Ross's family.
>
> In conversation with me, my Aunt Gillian spoke about her will, she mentioned explicitly that myself (Joseph Cole), my brother (Christopher Cole) and his daughters (Bella and Kylani Cole) would be the beneficiaries of her estate. Naturally, she was in a reflective state given the passing of her late husband, Ross. At this time, Samuelu Cole (her great-nephew), Christopher Cole's son was not born, hence the language used, 'great-nieces and nephews' rather than 'great-nieces and great-nephews'. What she mentioned about Ross's family is that they have already been taken care of so this further clarifies her language.
>
> The comment seemed relatively insignificant at the time, but it registered with me because of the broader conversation we were having about our families - and whom we are close to and who we are not. For these reasons, I do not doubt that the wording in her 'will' was very deliberate and clear and specific to myself (Joseph Cole), my brother (Christopher Cole) and his daughters (Bella Cole, and Kylani Cole).
>
> While I cannot comment in specificities of Ross's family, she did mention they had already been taken care of through Ross, understanding he had his own will, and that she wants to take care of her immediate family…"

[27] Christopher Cole[10] is also a nephew of the deceased. Like his brother Joseph Cole he would take under the first proposed construction of clause 9 of the Will but not the second proposed construction. He expressed his views:

> "I am writing this in reference to the letter sent to me regarding the issue of my Aunt Gillian's estate. Before my Aunt Gillian's passing we had conversations in accordance with clause 9 of her will, and therefore should be distributed as

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9 One of the first respondents.

10 The other first respondent.

written. This conversation was held in mid-February-March 2013, and clearly stated that myself (Christopher Cole), my brother (Joseph Cole), and my children (Bella and Kylani) would be the beneficiaries of her estate. At this time, my son (Samuelu Cole), had not been born, which is why he is not mentioned in the division of the estate. It is clear that my Aunt Gillian intended for the shares to be distributed equally between us as stated in clause 9 of her will."

[28] Rachael Falzon[11] is a niece of the Mr Bryce. She has two children, Oscar Falzon and Carter Falzon. If the first proposed construction prevails, then both she and her two sons[12] would take under clause 9 of the Will. If the second proposed construction is favoured, then she will not take, but her sons will. Mrs Falzon said this:

> "I respond to you letter received on 15th January 2019 on behalf of myself (Rachael Falzon) and on behalf of my children (Oscar Falzon and Carter Falzon) and wish this response to be adopted by the courts.
>
> I (Rachael Falzon) am in favour of a finding that Gillian's estate should be distributed strictly in accordance with the words used in clause 9 of the will in equal 1/7th shares to the persons names in items 1 a. and b., 2 a. and b., 3 a. and c. and 4 a. in the above letter.[13]
>
> This is my Aunty Gillian's last written will, as attached in the letter I received from the Public Trustee, and I believe it should be distributed as she requested.
>
> I see no need for an interpretation to be considered as this was her wish and last written will."

[29] Daniel Kane Bartlett[14] is Mr Bryce's nephew. He does not fall within clause 9 no matter which of the two proposed constructions of the Will prevails. In any event, he was born on 29 April 1981. In a letter sent to the applicant, he said this:

> "When I was a young boy, 8 year's of age my Uncle Ross and Aunty Gill, sat me down, told me that I was very much loved and even though they were only a phone call away they were leaving me, to live in Australia, also they told me that they had put aside Provisions in the 'Wills' in case something went wrong. At that time, I had no idea what those word[s] meant..."

[30] That conversation would have occurred in about 1989. Later, Mr Bartlett learned that Mr Bryce was terminally ill. He travelled to Australia to assist with some maintenance on the property in Redcliffe owned by the deceased and Mr Bryce. That assistance was rendered in August and September 2012, probably just after the deceased made the Will. When in Redcliffe, Mr Bartlett had a conversation with both the deceased and Mr Bryce. Of that conversation, he said this:

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[11] One of the third respondents.

[12] Two of the fourth respondents.

[13] The reference is effectively to what I have called "the first proposed construction".

[14] One of the third respondents.

> "… At this time, then again 'both' sat me down to let me know what they were both doing with their 'Wills' and they both wanted it to be equal shares to all their niece's and nephew's 5 in total. Two nephew's on Aunty Gill's Coles/Bryce's side of her Cole family, and two nieces and one nephew (me) on Uncle Ross Bryce family..."

[31] David Cole is the deceased's brother. He clearly does not take under clause 9 of the Will. He wrote:

> "… I agree with the strict interpretation.
>
> Before Gillian died we spoke her creating a will. This was about when Ross got sick. Gill wanted both my sons[15] and my granddaughters[16] on her will. Samuelu wasn't born then and I didn't think Chris was going to have any more kids. It was around late 2011 and many times 2012.
>
> When her husband Ross died Gill and I spoke many times. She brought up her will again. I didn't want to talk about it, I just wanted my sister to be okay. She said that she wanted to make sure her nephews and great nieces are taken care of."

[32] Tania Bartlett[17] is one of Mr Bryce's nieces. She would benefit under clause 9 of the Will upon the first proposed construction but not the second. She said this:

> "I believe my Aunty's will should be left the way it states…as that was and is…my aunty and uncle wishers. I'm sure this is why people use a trust so things like this don't happen..yous are surpose to make sure…everything is worded right when doing the will up with my aunty. I have hurd..that trusts just like to hold on to peoples hardernt money….so use can slowly chip away at the money..there should be no problem in my Aunty's trust…what her will states is how it should be…and stay."

[33] Mr Ian Kent, who was the colleague with whom Ms James conferred, reported as follows:

> "… I had no recollection whatsoever of this particular will dated 03/07/2012 or of the Client Notes that I made on 27/07/2012. I retired from the Public Trustee after 37 years service, following my 55th birthday in August 2012. I made hundreds of wills during my time with the Public Trust Office and checked thousands more over many years, in my role at the Redcliffe Regional Office.
>
> From my notes at the time, I believed the testator's intention in substitution clause 9, was highly likely to have been for both her and her intended husband's great nieces and great nephews to benefit. The clause as it stood rang alarm bells. I believe a will maker instructed to include great nieces and nephews and

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[15] Joseph Cole and Christopher Cole.

[16] Bella Nania-Cole and Kylani Nania-Cole.

[17] One of the third respondents.

to exclude great nephews and nieces would have seen that as highly unusual and questioned the testator further and made copious notes as to the reasons. The will Questionnaire / Instructions included no such notes leading me to believe an error in the wording of the will had been made…"

Statutory provisions

[34] Part 2 of the *Succession Act* 1981 concerns wills. Division 5 of Part 2 concerns "interpretation of wills".

[35] Section 33C[18] of the *Succession Act* 1981 is in these terms:

"**33C Use of evidence to interpret a will**

(1) In a proceeding to interpret a will, evidence, including evidence of the testator's intention, is admissible to help in the interpretation of the language used in the will if the language makes the will or part of it—

(a) meaningless; or

(b) ambiguous on the face of the will; or

(c) ambiguous in the light of surrounding circumstances.

(2) However, evidence of the testator's intention is not admissible to establish any of the circumstances mentioned in subsection (1)(c).

(3) This section does not prevent the admission of evidence that would otherwise be admissible in a proceeding to interpret a will."

[36] Subdivision 5 of Division 4 of Part 2 concerns rectification. Section 33 provides:

"**33 Court may rectify a will**

(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.

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[18] Part of Part 2 Division 5.

(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."

The relevant principles of construction

[37] The purpose of construing a will is to objectively ascertain the intention of the testator[19] from the words of the will.[20] Part of the process in construing the meaning of the words used in the will is to consider the words in "their documentary, factual and commercial context".[21]

[38] Evidence of the context against which the will was made is often, in succession cases, described as "the armchair principle".[22] The armchair principle does not permit of the admission of evidence of the subjective intention of the testator.

[39] Section 33C of the *Succession Act* allows the admission of evidence of the subjective intention of the testator in certain circumstances[23] and preserves the common law rules which allow for the admission of extrinsic evidence in aid of interpretation. In *The Public Trustee of Queensland v Smith*,[24] Atkinson J explained the operation of s 33C and its relationship with the common law principles of construction in this way:

"[22] The circumstances in which extrinsic evidence may be used and the purpose for which it may be used are now governed by s 33C of the *Succession Act* 1981 (Qld) ('the Act') which was extensively amended with effect from 1 April 2006. Section 33C sets out what extrinsic evidence is admissible in interpreting a will:

[Her Honour set out s 33C which appears in paragraph [35] above]

[23] This provision gave effect to a recommendation found in Chapter 6 Part 5 of the Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills produced by the National Committee for Uniform Succession Laws published by the Queensland Law Reform Commission as Miscellaneous Paper 29 in December 1997.

[24] As a result, in addition to the circumstances set out in s 33C(1), s 33C(3) continues to allow the admission of extrinsic evidence in the

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19 *Perrin v Morgan* [1943] AC 399, *Fell v Fell* (1922) 31 CLR 268 at 273-274.

20 *Perrin v Morgan* [1943] AC 399 at 406.

21 *Marley v Rawlings* [2015] AC 129 at [19]-[20], *Farrelly v Phillips* (2017) 128 SASR 502, the Full Court of the Supreme Court of South Australia adopting the general approach described in *Byrnes v Kendle* (2011) 243 CLR 253 at [95]-[116].

22 *The Public Trustee of Queensland v Smith* [2009] 1 Qd R 26 at [24].

23 Section 33C(1).

24 [2009] 1 Qd R 26.

construction of wills in the three circumstances which obtained prior to the introduction of s 33C in its present form on 1 April 2006. The three rules of construction which have been retained are:

(1) The 'armchair principle' which permits the court to sit in the testator's armchair to take account of his or her 'habits of speech and of his or her family, property, friends and acquaintances' in order to determine what the testator meant by the words of a will. The 'armchair principle' does not, however, allow direct evidence to be given of the testator's intention by, for example, allowing evidence of the instructions to the solicitor.

(2) The 'equivocation' exception. This rule of construction provides that 'evidence of the testator's actual intention, while not ordinarily admissible to assist in the construction of a will, is admissible where there is what is described as 'equivocation' in the will, that is, where a description, usually of a person, is equally capable of referring to more than one person.' This rule is sometimes referred to as the 'latent ambiguity rule' where there are, for example, two legatees of the same name.

(3) The equitable presumption rule. Evidence of a testator's intention may be given when a presumption arises in equity that a legacy in a will is in satisfaction of payment due under another instrument such as a deed.

[25] In addition to these three circumstances in which extrinsic evidence may be led are the three circumstances set out in s 33C of the Act:

(1) when the language used in the will makes the will or part of it meaningless;

(2) when the language used in the will makes the will or part of it ambiguous on the face of the will;

In both of these circumstances extrinsic evidence, including evidence of the testator's intention, is admissible to help in the interpretation of the language used in the will.

(3) when the language used in the will makes the will or part of it ambiguous in the light of the surrounding circumstances, then extrinsic evidence, but not evidence of the testator's intention in order to establish any of those circumstances, is admissible to help in the interpretation of the language used in the will."

[40] Prior to 2006, it was s 31 of the *Succession Act* which provided for rectification of wills. That section was analysed by Fryberg J in *Terence John McCorley and David John Lewis (as executors of the Will of Vera Rachel Pakleppa deceased) v Norman Pakleppa.*[25]

[41] Atkinson J, in *The Public Trustee of Queensland v Smith*,[26] observed that the enactment of s 33 in 2006 widened the circumstances in which rectification of a will could be made. Her Honour held that s 33 of the *Succession Act* provided for a four stage process. Those comments were followed by Philippides J (as her Honour then was) in *Palethorpe v The Public Trustee of Queensland*[27] where her Honour held:

> "[21] In *Public Trustee of Queensland v Smith* [2009] 1 Qd R 26, Atkinson J at [47] stated that under s 33 of the *Succession Act* 1981, the court is required to engage in a four stage process:
>
> (1) Has a clerical error been made?
>
> (2) Does the will fail to give effect to the testator's instructions?
>
> (3) If either or both of the above have occurred, has this caused the will not to carry out the testator's intentions?
>
> (4) If so, the court may rectify the will to carry out those intentions.
>
> [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: *Hinds v Collins* [2006] 1 Qd R 514 at 516. 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: *Re Dippert* [2001] NSWSC 167 at [17]; *Hamlet* at [14].
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> (b) The due execution of a will raises the presumption that the testator knew and approved of its contents: *Re Bryden* [1975] Qd R 210 at 212-3, *Public Trustee of Queensland v Roberts* [2004] QSC 199, *McCorley & Lewis (as executors of the Will of Vera Rachel Pakleppa deceased) v Norman Pakleppa & Ors* [2005] QSC 83 at [6].

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[25] [2005] QSC 83 at [6], following the judgment of Dunn J in *Re Bryden* [1975] Qd R 210 at 212-213.

[26] [2009] 1 Qd R 26.

[27] [2011] QSC 335.

(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:, *Hinds v Collins* [2006] 1 Qd R 514 at 5163 and *Ashton v Ashton* [2010] QSC 326 at [31].

(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: see *Public Trustee of Queensland v Smith* at [64]. 4 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.'"[28]

Procedural issues

[42] There are three procedural issues.

[43] Firstly, the second and fourth respondents are all minors. They are the great nephews and great nieces of the deceased and Mr Bryce. No litigation guardian has been appointed for them. There is no need for that to occur. For the reasons I explain, the estate passes to the second and fourth respondents under Clause 9 of the Will to the exclusion of all others. A litigation guardian could not put any more favourable position on behalf of the respondents.

[44] Secondly, there has not been service of the application upon Christopher Cole. He presently lives in Hawaii. Rule 105 of the *Uniform Civil Procedure* Rules 1999 (UCPR) requires him to be personally served. Leave to serve him in America though is not required.[29]

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[28] See also *Rose v Tomkins* [2018] 1 Qd R 549 at [38], and as to a comparison of the principles leading on the one hand to admission of extrinsic evidence for the purposes of construction, and on the other, the admission of evidence for the purposes of rectification, see *Re Finch (deceased)* [2018] 3 Qd R 370 at [33]-[35].

[29] *Uniform Civil Procedure Rules* 1999 r 125(e).

[45] Christopher Cole was contacted by the applicant and communicated with the applicant on a particular email address. Using that email address, Christopher Cole communicated with Mr Harris Shafruddin, an employee of the applicant, on each of 29 March 2019, 20 April 2019 and 20 September 2019. The email of 20 April 2019 is the communication where he expresses his view that the first proposed construction is the one that ought to be favoured.[30] On 20 September 2019, he emailed Mr Shafruddin in these terms:

> "To whom it may concern, I am worried about the estate of my Aunty Gill because I have not heard back from anyone for a few months now and was told I was going to be contacted back within two weeks. Please let me know if there is anything I can do to finalise this."

[46] On 3 October 2019, less than two weeks after the email of 20 September 2019, Mr Shafruddin emailed a copy of the application and supporting material to Mr Christopher Cole. At that point, Mr Shafruddin asked Mr Cole to acknowledge receipt. He did not. He was asked again to acknowledge receipt by emails sent on 21 October 2019, 6 November 2019 and 12 November 2019. He did not reply.

[47] The originating application seeks rectification or a declaration of construction such that the sole beneficiaries who take under Clause 9 of the Will are the second and fourth respondents, namely the great nephews and great nieces of the deceased and the great nieces and great nephews of Mr Bryce. The application therefore seeks orders contrary to the position put by Mr Christopher Cole.

[48] There are various possibilities that are open. One is that Mr Christopher Cole has died or is otherwise unable to respond to Mr Shafruddin's emails. There is no direct evidence of that and no real basis upon which such an inference could or should be drawn. Another possibility is that Mr Cole, after sending the email of 20 September 2019 asking Mr Shafruddin for an update, ceased using that email address. That seems highly unlikely. Far more likely is that, having received Mr Shafruddin's email of 3 October 2019 and seeing that the applicant was seeking orders contrary to his wishes, Mr Christopher Cole elected to ignore Mr Shafruddin.

[49] I draw the inference that the proceedings have come to the attention of Mr Christopher Cole and I therefore will make an order under r 117 of the UCPR that Mr Christopher Cole came into possession of the application and supporting material on or about 3 October 2019 by email, and he was thereby served with the proceedings on that date.

[50] Thirdly, by s 33(2) of the *Succession Act*, any application for rectification must be brought within six months after the death of the testator, unless the court otherwise orders.[31] The application was filed out of time.

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[30] See paragraph [27] of these reasons.

[31] *Succession Act* 1981 s 33(3).

[51] The discretion to extend the time for the making of an application for rectification only arises when "the final distribution of the estate has not been made".[32] No distribution of the deceased's estate has been made here.

[52] The discretion therefore arises to extend the time if "the court considers it appropriate". Here, it is appropriate to extend the time for the bringing of the application to 2 October 2019 which is the date the application was filed. In particular:

(i) given the terms of Clause 9 of the Will, serious issues arose as to the deceased's intentions in relation to the disposal of her estate;

(ii) those concerns required investigation;

(iii) the applicant investigated promptly, including by properly seeking the views of potential beneficiaries;

(iv) there is no evidence of any prejudice being suffered by any party as a result of any delay in bringing the application; and

(v) given the intention of the deceased as I have found it to be and explained below, it is appropriate for the Will to be rectified.

Application of the principles of construction to the Will

[53] At the time of the making of the Will, the deceased had no great nephews. Samuelu Cole was born after the Will was made. That is some suggestion perhaps that the second proposed construction was not intended.

[54] However, the context against which the Will was made does not otherwise give any real clue as to the construction of the Will. As observed by Joseph Cole and Christopher Cole, reference to "nephews" and "great nieces" catches two generations of the deceased's family living at the time the Will was made; Joseph Cole and Christopher Cole (nephews) and Bella Nania-Cole and Kylani Nania-Cole (great nieces).

[55] If in relation to the deceased's family, the word "great" was not intended to qualify the word "nephews", then surely the word "great" was not intended to qualify "nieces" as it relates to Mr Bryce's family.

[56] In other words, the intention was:

(i) great nieces and nephews of the deceased and great nephews and nieces of Mr Bryce were to take; or

(ii) great nieces and great nephews of the deceased and great nephews and great nieces of Mr Bryce were to take.

[57] It seems highly unlikely that the intention was that great nieces and nephews of the deceased and great nephews and great nieces of Mr Bryce would take under Clause 9.

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[32] Section 33(3)(b).

[58] The context against which the Will was made does not suggest any reason why the great nieces of Mr Bryce would be excluded, but his great nephew would be included.

[59] Ms James' evidence, if accepted, is that she received instructions to draw a will where the deceased intended to leave her estate to her great nieces and great nephews and to Mr Bryce's great nephews and great nieces. There is really no issue caused by the fact that she, at that point, did not have a great nephew. She was intending to benefit a particular generation of her family "living at her death". This is consistent with what she told Ms James, that she wanted to "give the young ones a better start in life". By catching that generation, she would include any great niece or any great nephew born between the date of the Will and the date of her death.

[60] The evidence of Paul Cole, Joseph Cole, Rachael Falzon, Daniel Bartlett, David Cole and Tania Bartlett, although no doubt well intentioned, is not of great assistance. What is critical is the intention of the deceased at the time she made the Will.

[61] Paul Cole speaks of conversations which he had with the deceased after Mr Bryce's death. Those conversations occurred then after the Will was made.

[62] Joseph Cole referred to conversations with the deceased where she said that provision was made for Mr Bryce's family by Mr Bryce and "… that she wants to take care of her immediate family". Clearly, by the time she made her Will, the deceased intended to make provision not only for his immediate family but for members of Mr Bryce's family as well.

[63] That observation is also pertinent to Mr Christopher Cole's views. He thinks, from his conversations with the deceased, that she "intended for the shares to be distributed equally between us…". The "us" is himself, his brother and his two daughters. Clearly though, by the time of the making of the Will, the deceased intended for Mr Bryce's family to share in her estate.

[64] Rachael Falzon expressed the view that the first proposed construction should be preferred but offered no evidence as to the intention of the testator, beyond the words stated in the Will as she interprets them.

[65] Daniel Bartlett refers to conversations where both the deceased and Mr Bryce expressed their desire that "all their nieces and nephews" should share the estate. There is clear reference in the Will to "great nieces" of the deceased and "great nephews" of Mr Bryce. On no available construction of the Will is the estate to be divided between just the nieces and nephews.

[66] David Cole referred to various conversations that he had with the deceased, and these probably occurred both before and after the Will was made. Those conversations were consistent with the first proposed construction of the Will and this evidence is at least on its face inconsistent with the intention of the deceased as communicated to Ms James.

[67] Tania Bartlett, like Rachael Falzon, pressed for adoption of the first proposed construction but did not offer evidence material to the testator's intention.

[68] Ms James' evidence was not challenged in the sense that no-one sought to cross-examine her. She prepared the Will as an employee of the applicant. She has no financial interest in the outcome and I can see no reason to doubt her honesty.

[69] Evidence capable, at least of casting doubt on her evidence, is that of David Cole and the circumstance that once the error in the Will was discovered, the deceased took no steps to correct it, notwithstanding Ms James' invitation for her to amend the Will.

[70] There are various possibilities as to why the deceased did not change her Will once the error was pointed out to her. Since the Will, she had married and her husband had died. She expressed an intention to Ms James that she would come into the applicant's office for that purpose, but never did. Perhaps life, and then her own death, simply intervened.

[71] I accept the evidence of Ms James and therefore accept that the Will does not give effect to the testator's instructions at the time she executed the Will. Her intention, consistently with her instructions given to Ms James, was to leave her estate to her great nieces and great nephews and to Mr Bryce's great nephews and great nieces. Clause 9 of the Will should be rectified to read:

> "I Give -
>
> The whole of my estate to my great nieces and great nephews and my intended husband's great nephews and great nieces living at my death in equal shares".

Costs

[72] The applicant seeks an order for its costs to be paid out of the estate on the indemnity basis. Such an order is appropriate.

[73] It was clearly necessary for the applicant to bring the application seeking to rectify the Will to reflect the deceased's true intentions.

[74] Here, it might be suggested that the necessity for the application was caused by an error in the drafting of the Will by Ms James. However, the internal processes and procedures adopted by the applicant identified the error and steps were promptly taken to contact the deceased with a view to having the Will remade. The deceased did not take the advice of the applicant and did not have the Will corrected. Therefore, the present application became necessary.

[75] In the circumstances, it would be unjust for the applicant to bear the expense of the application.

Orders

[76] For the reasons previously explained, there will be an order for rectification of the Will, an order pursuant to r 117 of the UCPR deeming Mr Christopher Cole to have been properly served, and an order that the applicant's costs be paid out of the estate on an indemnity basis.

[77] Section 33(4) of the *Succession Act* provides that the court may order that a certified copy of the order that the Will be rectified be attached to the Order to Administer with the Will. That order should be made.

[78] It is ordered:

1. The time for making an application for an order to rectify the Will of Gillian Mary Ruth Cole deceased is extended to 2 October 2019.

2. A copy of the application and supporting material having come into the possession of the first respondent Christopher Murray Lemauosamoa Cole on 3 October 2019, possession of the documents on that day is service of the documents on that day.

3. The last Will of the deceased dated 3 July 2012 is rectified so Clause 9 reads:

> "I Give -
>
> The whole of my estate to my great nieces and great nephews and my intended husband's great nephews and great nieces living at my death in equal shares".

4. A certified copy of this order shall be attached to the Order to Administer with the Will made on 7 April 2017 on court file BS 2655/17.

5. The applicant's costs of the application be paid out of the estate on an indemnity basis.