

SUPREME COURT OF QUEENSLAND

CITATION: *Ashton & Ors v Ashton & Ors* [2010] QSC 326

PARTIES: **DYANN LESLIE ASHTON and BROOKE MAREE ASHTON as executors of the Will and Testament of LESLIE ROY ASHTON (Deceased)**
(applicants)
v
GAYLE BARBARA ASHTON
(first respondent)
SUSAN JANE LYONS
(second respondent)
JAMES LESLIE ROY ASHTON
(third respondent)
BARBARA ANNE MILLER
(fourth respondent)
TENILLE LESLIEANN ASHTON
(fifth respondent)
PAUL LESLIE ASHTON
(sixth respondent)
PRUE ELLEN ASHTON
(seventh respondent)

FILE NO/S: BS No 3071 of 2010

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 3 September 2010

DELIVERED AT: Brisbane

HEARING DATE: 6 August 2010

JUDGE: Boddice J

ORDER:

CATCHWORDS: *Succession Act* 1981 (Qld), s 33
Allgood v Blake (1873) LR 8 Ex 160
ANZ Trustees Ltd v Hamlet [2010] VSC 207
Brennan v Permanent Trustee Co (1945) 73 CLR 404
Charter v Charter (1874) LR 7 HL 364
Fell v Fell (1922) 31 CLR 268
Hawkins v Perpetual Trustee Co (1960) 103 CLR 135
Hinds v Collins [2006] 1 Qd R 514

Layer v Burn Philp Trustee Co Ltd (1986) 6 NSWLR 60
Public Trustee of Queensland v Smith [2009] 1 Qd R 26
Re Willis [1996] 2 Qd R 664
Underwood v Underwood [2007] QSC 256

COUNSEL: L Bowden for the applicants/executors
 J I Otto for the first respondent/applicant
 D R M Murphy SC for the second, third, fourth and fifth Respondents
 No appearance for the sixth and seventh respondents

SOLICITORS: Rees R & Sydney Jones for the applicants
 Murphy Schmidt for the first respondent
 McCullough Robertson for the second, third, fourth and fifth Respondents
 No appearance for the sixth and seventh respondents

- [1] Leslie Roy Ashton (“the deceased”) died at Rockhampton on 13 March 2009. He had been married twice. His second wife, Gayle Barbara Ashton (“Mrs Ashton”) survives him as do eight children, five from his first marriage and three from his second marriage.
- [2] At the time of his death, the deceased owned various assets, including real property at Lot 5 Laura Close, Parkhurst (as a joint tenant with Mrs Ashton) (“Laura Close”) and a grazing property at Dingo called “Gordon”.
- [3] Prior to 2006, the deceased and Mrs Ashton resided at “Gordon”. In or about that year, they built a residence at 49 Forbes Avenue, North Rockhampton. In January 2008, the deceased and Mrs Ashton purchased Laura Close. A large seven bay shed was built on the land and steps were taken for the construction of a house. Ultimately, a Rockhampton builder, Ben Hooper of Hooper Constructions, was contacted with a view to preparation of plans and provision of a quote to build a house on that property. Plans were prepared by Rockhampton Drafting Services and Mr Hooper submitted a quote to build and landscape the house in February 2009. In late February or early March 2009, Mr Hooper submitted the plans to Rockhampton Building Approvals.
- [4] Whilst discussions were progressing for the construction of the house at Laura Close, the deceased entered into negotiations to sell “Gordon”. A contract for the sum of \$12 million was entered into but it did not proceed to completion. “Gordon” has, however, been sold subsequent to his death.
- [5] The deceased, who was diagnosed with cancer in 2007, was admitted to hospital on 6 March 2009. On that day, he arranged for Mr Hooper to attend the hospital. At that time, a letter was signed by Mr Hooper, the deceased and Mrs Ashton. That letter, on Hooper Constructions letterhead, was in the following terms:

“To Les Ashton
 Hooper Constructions is currently engaged in the building and landscaping of the house and block of land at Lot-5 Laura Close, Rockyview.”

- [6] Prior to signing that letter, the deceased telephoned his solicitor, Roger Baker of Rees R & Sydney Jones Solicitors, and arranged for the making of the Codicil. Mr Baker made notes of that conversation in the following terms:
 “6/3/2009 Les Ashton
 Change Will –
 Will says properties to be sold & proceeds split 8 children & 2 parts to Gail. Include, house at ‘Laura Close Parkhurst’ be paid for from proceeds of Gordon & Gail to get the house & 2/10th of residue – guarantee house is finished – contract signed – Les says it’s a joint tenancy.
 Mater Hospital room [213] now room [230]. Gayle 0408 191 848.” [sic]
- [7] After the deceased signed the letter referred to above, Mr Baker and his Para-legal attended the hospital. The terms of the Codicil were discussed with the deceased and he signed it, witnessed by Mr Baker and his secretary. Mr Baker made notes of that meeting. They record:
 “6/3/09
 Les – hospital trip – Amy to sign – saw Gayle/Les ‘not good’
 I read Codicil – explained to Les 2.1 gets house built, 2.2 is necessary in case not J/T, and 2.3 just in case there is a mortgage to clear. ‘Yeah – that’s okay’
 - ‘dream home’
 I asked if wanted me to go through his Will in detail – ‘No, I know what’s in it’.
 Les’s competence fine.” [sic]
- [8] The last Will of the deceased was a Will dated 10 November 2008 together with the Codicil to that Will dated 6 March 2009. The Will appointed a daughter from his first marriage, Dyann Leslie Ashton, and a daughter from his second marriage, Brooke Maree Ashton (“the executors”) as executors and trustees of his estate. Probate was granted on 17 June 2009.

Applications

- [9] By application filed 25 March 2010, the executors sought orders as to the proper interpretation of the Will and it’s Codicil. The issues requiring determination are:
- (a) whether the executors of the estate of the deceased are required to allow the construction of a house on property at Laura Close Parkhurst in the State of Queensland to proceed and, if so, according to what plan or design of such house and at what cost to the estate is the said construction to proceed; (“First Question”)
 - (b) whether certain motor vehicles namely a Toyota Landcruiser registered number LRA-01, a Holden SS Commodore Utility registered number LRA and a Toyota Landcruiser Trayback Utility LRA-02 are:
 - (i) personal effects within the meaning of Clause 3.1(b) of the Will of the deceased;
 - (ii) “contents” within the meaning of Clause 2.2 of the Codicil of the said deceased; or
 - (iii) form part of the residue;
 (“Second Question”)

- (c) as to whether the proceeds of sale of certain goods, chattels and effects sold at auction in July 2009 by Callide Dawson Machinery Club constitutes:
 - (i) personal effects under Clause 3.1(b) of the Will;
 - (ii) items of furniture and articles of household use and adornment under Clause 3.1(b) of the Will; or
 - (iii) form part of the residue.”
 (“Third Question”)

[10] By application filed 1 June 2010, Mrs Ashton cross-applied for an order pursuant to s 33(1) of the *Succession Act* 1981 (Qld) rectifying the terms of the Codicil together with a declaration as to the proper construction of the rectified Codicil. She also applied for time for the application for rectification to be extended.

Will

[11] Relevantly, the Will provides:

“3. DISPOSAL OF ESTATE

3.1 I give the whole of my estate (‘my Trust Estate’) to my Trustee upon trust:

...

(b) As to all items of furniture and articles of household use and adornment in the homestead at ‘Gordon’ Dingo, together with my personal effects to my wife to be distributed by her, at her absolute discretion, amongst herself and my children.

...

(g) As to the rest and residue of my Trust Estate as follows:

- (i) A one fifth share in the rest and residue of my trust estate for my wife **GAYLE BARBARA ASHTON**;
- (ii) A one tenth share in the rest and residue of my trust estate for my daughter **SUSAN JANE NYLONS**;
- (iii) A one tenth share in the rest and residue of my trust estate for my son **JAMES LESLIE ROY ASHTON**;
- (iv) A one tenth share in the rest and residue of my trust estate for my daughter **BARBARA ANNE MILLER**;
- (v) A one tenth share in the rest and residue of my trust estate for my daughter **DYANN LESLIE ASHTON**;
- (vi) A one tenth share in the rest and residue of my trust estate for my daughter **TENILLE LESLIEANN ASHTON**;
- (vii) A one tenth share in the rest and residue of my trust estate for my daughter **BROOKE MAREE ASHTON**;
- (viii) A one tenth share in the rest and residue of my trust estate for my daughter **PRUE ELLEN ASHTON**;
- (ix) A one tenth share in the rest and residue of my trust estate for my son **PAUL LESLIE ASHTON**.”

[12] The Codicil is in the following terms:

“1. LAST WILL

- 1.1 This is a First Codicil to my Last Will.
 - 1.2 My Last Will is dated 10 November 2008.
- 2. FURTHER PROVISION TO WILL**

- 2.1 I record that my wife and I own residential land at Laura Close Parkhurst and have signed a building contract for the construction of a house on the site. It is my intention that the house be fully constructed and paid for out of the residue of my estate. To effect this intent I make the further provisions to my Last Will.
- 2.2 I leave to my wife **GAYLE BARBARA ASHTON** my interest in the land, fixtures (and contents) of the house property at Laura Close Parkhurst, free from encumbrances.
- 2.3 I direct my personal representatives to allow the construction of the house to proceed to completion (if not completed as at the date of my death), and to discharge any liability secured against the house property out of the residue of my estate.

3. CONFIRMATION OF WILL

- 3.1 In all other respects, I confirm my Last Will.”

Executors’ application

- [13] The first question involves the proper construction of the Codicil. The principles applicable to that question were not in dispute at the hearing. The Will and Codicil are to be constructed having regard to their words. If the usual meaning of those words is clear, they will be given that construction. If not, the Court may have regard to extrinsic evidence as allowed by the rules of construction applied by the Court and s 33C of the *Succession Act* 1981 (Qld).¹
- [14] In undertaking this determination, the Will and Codicil:
- (a) must be construed as a whole to ascertain the meaning of the instrument taken as a whole, in order to give effect, if it be possible to do so, to the intention of the framer of it;²
 - (b) should not be construed in a strictly technical or legalistic sense and its construction should be sensitive to the factual context of ordinary lives and circumstances.³
- [15] One of the rules of construction is to allow evidence under the “armchair rule”. This rule allows the Court to put itself in the position of the testator and to consider all material facts and circumstances known to the testator with reference to which he or she is taken to have used words in the Will and Codicil and then to declare what was the testator’s intention evidenced by the words used with reference to those facts and circumstances.⁴ The testator’s language is to be read in the sense the testator appears to have attached to the expressions used, unless a rule of law gives them some fixed operation.⁵
- [16] Adopting these principles, I am satisfied the words of the Codicil are ambiguous and are not sufficiently clear as to be given a usual meaning. It is therefore necessary, in construing those words, to have regard to the facts, matters and

¹ *Public Trustee of Queensland v Smith* [2009] 1 Qd R 26 at 33 [26].

² *Fell v Fell* (1922) 31 CLR 268 at 273-274; *Underwood v Underwood* [2007] QSC 256 at 7 [16].

³ *Re Willis* [1996] 2 Qd R 664 at 667; see also *Underwood* at 7 [17].

⁴ *Allgood v Blake* (1873) LR 8 Ex 160 at 162.

⁵ *Brennan v Permanent Trustee Co* (1945) 73 CLR 404 at 414.

circumstances in existence at the time of the making of the Codicil. Those facts, matters and circumstances were as follows:

- (a) On 6 February 2009, Mr Hooper presented a preliminary quote of \$1,320,600⁶ to build and landscape the house. The quote specified the items within it, and included the builder's margin and GST.⁷ It was not a final quote and was intended to give the deceased a "ball park" figure.⁸ Mr Hooper was still awaiting "engineering" and a few other quotes which were received subsequent to the deceased's death.⁹ However, Mr Hooper had allowed something for those outstanding items in his quote.¹⁰
- (b) The Laura Close site was surveyed, soil tests conducted, and four pegs representing the corners of the house were put in place. Items to be used in the construction of the house were purchased and stored in its shed.¹¹
- (c) Plans for the house at Laura Close, finished by Rockhampton Drafting Services in February 2009, were submitted for approval by Mr Hooper in late February or early March 2009.¹² Rockhampton Building Approvals requested further information by letter dated 2 March 2009.
- (d) Mr Hooper understood he had been engaged to build the house by the deceased as they had "shaken hands on it".¹³ Mr Hooper had set aside 12 months to build the house and turned down other work. He had started to engage trades.¹⁴ Arrangements were also made by the deceased for Brosnan's Earthmoving to begin earthworks on 9 March 2009.¹⁵
- (e) When the deceased was admitted to hospital on 6 March 2009, Mr Hooper attended the hospital that day to sign a letter in relation to the building of the house at Laura Close. The deceased told him "what the letter had to say".¹⁶
- (f) The deceased telephoned his solicitor, Mr Baker, on the afternoon of 6 March 2009 and advised he had "signed a building contract for the construction of a new house at Laura Close" and that the house should be finished "so that his wife Gayle would inherit the completed Laura Close house property plus 2/10th of the residue".¹⁷

[17] A consideration of the words in the Codicil, having regard to those facts and circumstances, renders its terms unambiguous. The expression "a house on the site" refers to the construction by Mr Hooper of the residence at Laura Close in accordance with the plans submitted by him in late February or early March 2009. The expression "building contract" refers to the letter signed by the deceased,

⁶ Affidavit of Roger Walter Baker sworn 23 March 2010, exhibit "RWB-5".

⁷ Transcript 1-20/5.

⁸ Affidavit of Benjamin Ray Hooper, para 7.

⁹ Transcript 1-20/15.

¹⁰ Transcript 1-24/30.

¹¹ Affidavit of Gayle Barbara Ashton filed 1 June 2010, para 11; Transcript 1-21/1; see also affidavit of Gavin Arthur Siddins filed 1 June 2010, para 4.

¹² Affidavit of Gayle Barbara Ashton filed 1 June 2010, para 10.

¹³ Affidavit of Benjamin Ray Hooper, paras 7-8.

¹⁴ Transcript 1-24/20.

¹⁵ Affidavit of Gayle Barbara Ashton filed 1 June 2010, para 13.

¹⁶ Affidavit of Benjamin Ray Hooper, para 11.

¹⁷ Affidavit of Roger Walter Baker filed 1 June 2010, para 14.

Mrs Ashton and Mr Hooper on 6 March 2010. That letter refers to building and landscaping of the house at Laura Close, and is referable to those items contained in Mr Hooper's quote dated 6 February 2009.

- [18] I accept the first respondent's contention that it is irrelevant that no formal written building contract had been entered into and that no building construction had actually been commenced prior to the deceased's death. The facts referred to above, which were known to the deceased at the time he made the codicil, give bearing and application to the language used within it and allow the Court to ascertain the thing to which the description in the Codicil "can be reasonably and with sufficient certainty applied".¹⁸ The "house" and "contract" reasonably and with sufficient certainty refer to the plans submitted by Mr Hooper, and the itemised quote obtained from Mr Hooper prior to the deceased's death.
- [19] This construction of the Codicil is consistent with the structure of the Codicil itself. Clause 2.1 of the Codicil contain the deceased's express intention that "the house be fully constructed and paid for out of the residue of my estate". This intention was confirmed by clause 2.2 which gave to Mrs Ashton his interest in Laura Close "free from encumbrances" and clause 2.3 which directed the executors to allow construction of the house to proceed to completion and to discharge any liabilities secured against the house property out of the residue of his estate.
- [20] The first question is answered as follows:
- (a) The executors of the estate of the deceased are required to allow the construction of a house on property at Laura Close, Parkhurst in the State of Queensland to proceed.
 - (b) The construction of that house is to be in accordance with the plans submitted for approval to Rockhampton Building Services in or about late February or early March 2009.
 - (c) The cost to the estate is in accordance with fees rendered by the builder, Mr Hooper, for the construction of the house property in accordance with those plans, the building work to include those specified items contained in the quote from Hooper Constructions dated 6 February 2009.
- [21] In order to determine the second question, it is necessary to treat the Will and Codicil as one document.¹⁹ The structure of the Will and Codicil was to deal with the deceased's properties separately. Relevantly, the Will dealt with the disposition of the contents of the homestead at "Gordon" (clause 3.1(b)) and the Codicil dealt with the disposition of Laura Close, including its fixtures (clause 2.2).
- [22] Clause 2.2 of the Codicil left Mrs Ashton the deceased's "interest in the land, fixtures (and contents) of the house property at Laura Close, Parkhurst, free from encumbrances". The reference to fixtures must include the shed constructed on that property. The words "(and contents)" are, by the inclusion of the brackets, properly referable to fixtures on that property. "Contents" is an unambiguous expression.

¹⁸ *Charter v Charter* (1874) LR 7 HL 364 at 377; see also *Layer v Burns Philp Trustee Co Ltd* (1986) 6 NSWLR 60 at 65.

¹⁹ *Hawkins v Perpetual Trustee Co* (1960) 103 CLR 135 at 146.

- [23] I am satisfied that the contents of the fixtures at Laura Close included the three motor vehicles referred to in the second question. The evidence establishes those three motor vehicles were usually garaged at the time of the deceased's death, and prior to his death, in the shed constructed at Laura Close.
- [24] The second question is answered as follows:
 "The motor vehicles namely, a Toyota Landcruiser registered number LRA-01, a Holden SS Commodore Utility registered number LRA and a Toyota Landcruiser Trayback Utility registered number LRA-02 are "contents" within the meaning of clause 2.2 of the Codicil of the deceased."
- [25] The third question requires a consideration of Clause 3.1(b) of the Will. It provides:
 "As to all items of furniture and articles of household use and adornment in the homestead at 'Gordon' Dingo, together with my personal effects to my wife to be distributed by her, at her absolute discretion, amongst herself and my children".
 Whilst the expression "personal effects" is a term of art, its meaning can depend upon the context of its use in the particular Will. In the absence of that context, it generally means physical chattels having "some personal connection with the testator, such as articles of personal or domestic use or ornament, clothing, furniture and so forth".²⁰
- [26] The words "personal effects" in clause 3.1(b), must be viewed in the context of the balance of the words in that clause. Those words specifically relate to items in the homestead at "Gordon". The reference to personal effects should have a construction that refers to physical chattels having a personal connection with the deceased located in the homestead at "Gordon".
- [27] The evidence establishes the goods and chattels sold at auction in July 2009 were held in various sheds located on "Gordon", a farming property. Those goods and chattels were, in broad terms, farming memorabilia. Those items are not, on a proper construction of clause 3.1(b) of the Will items within the term "personal effects".
- [28] The third question is answered as follows:
 "The proceeds of sale of certain goods, chattels and effects sold at auction in July 2009 by Callide Dawson Machinery Club form part of the residue of the deceased's estate."

Cross application

- [29] My conclusion in respect of the first question renders it unnecessary to determine the first respondent's cross-application for rectification of the Codicil. However, as the issue was argued, I will proceed to express my conclusion on this issue had I determined the first question in the negative.
- [30] Section 33 of the *Succession Act* relevantly provides:
 "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 intention because –

²⁰ Haines, DM, *Construction of Wills in Australia* at 118 [11.2].

- (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 of 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.”

[31] There is no suggestion a clerical error was made in the present case. Accordingly, any power to rectify can only arise pursuant to s 33(1)(b) of the *Succession Act* 1981 (Qld). In exercising that power, it is necessary for the Court to first be satisfied that the Codicil was so expressed that it failed to carry out the deceased's intentions and, further, what it was that the deceased did intend concerning the Codicil. The applicant must establish what was the deceased's actual intention. Whilst the standard of proof is on the balance of probabilities, clear and convincing proof is required in order to succeed in the application for rectification.²¹

[32] Whilst an applicant for rectification has to discharge a heavy burden of rebutting the presumption that the Will “contains the words, and only the words, which the testator intended”,²² if the Codicil, on its proper construction, had not provided for the construction of the house property at Laura Close, I would have been satisfied that Codicil failed to give effect to the deceased's instructions and this caused the Will not to carry out the deceased's intention.²³

[33] The deceased's express instructions to Mr Baker were that the house at Laura Close was to be “paid for from the proceeds of Gordon”²⁴ and that Mrs Ashton was to get “the house and 2/10th of residue – guarantee house is finished”. The Codicil does not provide, expressly, that Mrs Ashton was to inherit “the completed Laura Close house property” and does not provide the executors were to utilise the “proceeds of the sale of ‘Gordon’” to guarantee the house was completed.

[34] I would also have been satisfied it was appropriate to extend the time to bring the application for rectification. The final distribution of the estate had not been made and there was a genuine dispute which required determination as to the proper interpretation of the Codicil. Further, the executors did not file their application in relation to the proper interpretation of the Codicil until 25 March 2010 some nine months after probate had been granted to them.

[35] For the abovementioned reasons, had I determined the first question in the negative, I would have ordered rectification of the Codicil as follows:

²¹ See, generally, *ANZ Trustees Ltd v Hamlet* [2010] VSC 207.

²² *Hinds v Collins* [2006] 1 Qd R 514 at 515-516 [9].

²³ See *Public Trustee of Queensland v Smith* [2009] 1 Qd R 26 at 37 [47].

²⁴ Transcript 1-9/20.

- (a) By omitting from clause 2.1 of the Codicil the words “It is my intention that the house be fully constructed and paid for out of the residue of my estate”.
- (b) By inserting in clause 2.1 of the Codicil in lieu of those words, the words:
 “I DIRECT my trustees to:
 - (a) sell my property ‘Gordon’;
 - (b) hold the net proceeds of the sale of ‘Gordon’ on trust, first, for my wife GAYLE BARBARA ASHTON, to pay for the full construction of the house on the land that we own at Laura Close, Parkhurst in accordance with the house plans submitted to Rockhampton Building Services in or about February 2009 and in accordance with the quotation obtained from Hooper Constructions dated 6 February 2009 and, secondly, as to the net proceeds of the sale of ‘Gordon’ remaining after the full construction of the said house above, on the trust established by clause 3.1(g) of my Will dated 10 November 2008.”

Conclusion

The proper interpretation of the Will and its Codicil is:

- (a) The executors of the estate of the deceased are required to allow the construction of a house on the property situated at Lot 5, Laura Close, Parkhurst in the State of Queensland, more particularly described as Lot 5 on SP 112057, County of Livingstone, Parish of Murchison, Title Reference 50253837, to proceed;
 - (b) The construction of that house is to be in accordance with the plans dated 20 February 2009 that were submitted for approval to Rockhampton Building Services in or about late February or early March 2009;
 - (c) The cost to the estate is in accordance with fees rendered by the builder, Benjamin Ray Hooper of Hooper Constructions, for the construction of the house property in accordance with the said plans, the building work to include those specified items contained in the quote from Hooper Constructions dated 6 February 2009;
- (First Question)
- (d) The motor vehicles, namely, a Toyota Landcruiser registered number LRA-01, a Holden SS Commodore Utility registered number LRA and a Toyota Landcruiser Trayback Utility registered number LRA-02 are “contents” within the meaning of clause 2.2 of the said codicil.
- (Second Question)
- (e) The proceeds of sale of certain goods, chattels and effects sold at auction in July 2009 by the Callide Dawson Machinery Club, which items are more particularly described in exhibit RWB6 to the affidavit of Roger Walter Baker filed on 25 March 2010, form part of the residue of the estate of the deceased;
- (Third Question)

[36] The costs of the applicants and of each of the respondents to be agreed, or failing agreement to be assessed on the indemnity basis, be paid out of the estate of the deceased.