SUPREME COURT OF QUEENSLAND

CITATION:	*Re Estate of Maree Kaye McLennan* [2011] QSC 331
PARTIES:	**IVAN PETE VACHER** (Applicant) **and** **MAREE KAYE MCLENNAN** (Deceased)
FILE NO:	3594/11
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	3 May 2011 (extemporaneous)
DELIVERED AT:	Brisbane
HEARING DATE:	3 May 2011
JUDGE:	Philippides J
ORDER:	**Order in terms of the draft**
CATCHWORDS:	APPLICATION – SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – jurisdiction and discretion of the Court – statutory powers under s 33(1) *Succession Act* 1981 to rectify will to reflect testamentary intentions – where Will provided a period of survivorship of the two named beneficiaries of 30 years – where testator's instructions were that the period of survivorship be 30 days – whether clerical error made *Succession Act* 1981 (Qld), s 33(1), s 33C *ANZ Trustees Ltd v Hamlet* [2010] VSC 207 *Burman v Burman & Anor* [1998] QCA 250 *Public Trustee of Queensland v Smith* [2008] QSC 339 *Re Brydon* [1975] Qd R 210 *Re May* [2010] NSWSC 989 *Re Morris* [1971] P 62 *Re Segelman* [1996] Ch 171 *Re Williams* [1985] 1 All ER 964
COUNSEL:	CM Tam for the applicant
SOLICITORS:	MRH Lawyers for the applicant

HER HONOUR: This application brought pursuant to section 33(1) of the Act seeks an order rectifying clause 5 of the deceased's Will to carry out the intentions of the deceased. Clause 5 of the Will provides:

> "**5. I GIVE, DEVISE AND BEQUEATH** the whole of my estate both real and personal unto and to the use of my trustee upon trust that he shall sell call in and convert into money the whole or such part thereof as shall not consist of money and shall out of the moneys then in his hands pay my just debts, funeral and testamentary expenses and shall stand possessed of the residue upon trust for my children including **RENEE IVENE McLENNAN** and **LEITH AARON McLENNAN** as shall survive me for a period of thirty (30) years and shall attain or shall have attained the age of twenty-five (25) years and if both as tenants in common in equal shares."

Section 33 of the Act 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.

(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."

Clause 5 of the Will provides a period of survivorship of the two named beneficiaries of 30 years. The applicant, as executor and trustee of the deceased's estate, submitted that the Will should be construed so that the period of survivorship is 30 days in lieu of 30 years.

I note that an extension of time to bring the application is not required, the application having been filed on 21 April 2011 being within the relevant period.

The applicant submitted that, on the basis of the authorities which have been referred to in the submissions of the applicant, the appropriate course is for the Court firstly, to consider whether the Will carries out the testator's intention

and then, if the answer is, no, to identify whether the error is a clerical error.

In relation to the applicable principles of construction, reference was made to the decision in *The Public Trustee of Queensland v Smith* [2008] QSC 339, where Atkinson J helpfully set out the principles concerning the task of a Court of construction. After considering the relevant provisions of the Act and, in particular, s 33C concerning the admissibility and use of extrinsic evidence for purposes of construction, her Honour noted that the Court of construction should start with the words of the Will, and that if their usual meaning is clear, the Will is to be given that construction.

It was submitted on behalf of the applicant that the words in the deceased's Will presently under consideration are themselves unambiguous. However, it was also submitted that properly construed, the Will did not carry out the testator's intentions due to a clerical error.

The affidavit material sworn by the applicant and the solicitor responsible for drafting the Will indicated that the solicitor responsible for drafting the Will was given instructions in relation to the period of survivorship being 30 days and not 30 years and that the deceased therefore intended the period of survivorship to be 30 days.

Concerning relevant principles, I also note that in *Smith*, Justice Atkinson, in referring to principles governing the

operation of the predecessor to section 33 of the Act, summarised pertinent considerations as follows:

> "The due execution of a will raises a presumption that the testator knew and approved its contents;
>
> The onus is on those who seek to have probate granted with words omitted to rebut the presumption of knowledge and approval of those words which arises from the due exception of the will. The degree of proof required is proof on the balance of probabilities;
>
> Where it is established that a will has been read to or by a testator, the presumption that the testator knew and approved the contents of the will is a very strong one and can be rebutted only by the clearest evidence. It is not, however, a conclusive presumption, and may be rebutted by adequate proof of mistake or of fraud;
>
> Once those who seek to have words omitted have led evidence of mistake which displaces, on the balance of probabilities, the presumption, there is an evidentiary onus on those who seek to have the words retained in the will to establish that the will was read by or to the testator in order for them to have the benefit of the very strong presumption that the testator knew and approved of those words;
>
> A Court of Probate cannot omit a word or words of the will to produce a different result from that which was within the knowledge and approval of the testator;
>
> Where the drafts[person] has never really applied his or her mind to words introduced or omitted and never adverted to

their significance and effect there is a mere clerical error on his or her part;

A testator's instructions to his [or her] solicitor to prepare a will, or evidence of facts and circumstances immediately preceding the writing of the will, may provide evidence sufficient to satisfy a court as to the requisite standard that material was accidentally or inadvertently omitted from (or inserted into) the will;

The best evidence in support of an application pursuant to section 31 of the Act is confined to the actual instructions given to the testator's solicitor or to the fats and circumstances immediately preceding the writing of the will. It is not appropriate for a court to entertain general evidence of the testator's actual intentions at earlier stages or subsequently to the completion of the will."

The applicant submitted that there is sufficient evidence before the Court to displace the presumption that the testator knew and approved of the Will's contents. It was submitted that the clerical error relied upon suggested that the draftsperson "never really applied...his mind to the words introduced...and never adverted to their significance and effect." (*Re Brydon* [1975] Qd R 210) Accordingly, the applicant submitted that the Court should be satisfied that clause 5 of the Will did not carry out the testator's intention.

I note the authorities referred to which describe this as a condition precedent to the exercise of power in s 33 of the

Act. In that regard, reference was made to *ANZ Trustees Limited v Stanley Hamlet* [2010] VSC 207 where Pagone J considered the operation of an equivalent provision in Victorian legislation and made the following observations:

> ”[N]ot appropriate for a court simply to assume that the power to order rectification ‘obviates the need for an interpretational construction of the document’. 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 courts power depends must be satisfied. In some cases, the error will be so apparent that the condition will easily be satisfied making it unnecessary to seek orders construing the will’.” (Footnotes omitted).

The applicant submitted that the present case was of the type adverted to by Pagone J where the "error is so apparent" that the rectification is appropriate. I accept those submissions as correct and as applicable in the present circumstances.

I also accept the submissions on behalf of the applicant that the identified error is a “clerical error” within the meaning of the Act. In relation to that issue, counsel was unable to refer the Court to any Australian authority directly on point in relation to what constitutes a clerical error in the present context, but referred to other pertinent authorities where clerical errors have been found such as *Re May* [2010] NSWSC 989, *Burman v Burman & Anor* [1998] QCA 250 and *Re*

Segelman [1996] Ch 171 where Chadwick J considered the meaning of "clerical error" in the context of comparable UK legislation.

In relation to *Segelman*, Chadwick J referred to a passage from *Mortimer's Probate Practice* (1927, 2nd ed at 91-92), which was cited with approval by the Court in *Re Morris* [1971] P 62, as follows:

> "*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." (Footnote omitted)

Counsel for the applicant noted that Chadwick J referred to *Re Morris* and the observation therein that the clerical error on the part of the solicitor was a mere slip. His Honour also

referred to comments of Nicholls J in *Re Williams* [1985] 1 All ER 964 that a testator writing out his own will can make a clerical error just as much as someone else writing out a will for him.

In those circumstances and on the basis of the authorities referred to, the applicant submitted that the Court should conclude, on the evidence, that the Will did not give effect to the testator's intentions in its present form. Additionally, the condition precedent to the exercise of section 33 is satisfied. A clerical error ought to be found to have been made in the preparation of the Will within the meaning of section 33(1)(a) of the Act.

I am satisfied that the submissions made on behalf of the applicant ought to be accepted in the circumstances of the present case and that orders in terms of the draft should be made. I note that both beneficiaries have been served with the relevant material in relation to the application and consent to the orders sought.

I make an order in terms of the draft which I have initialled and that will be placed with the Court file.
