SUPREME COURT OF QUEENSLAND

CITATION:	*Hinds v Collins* [2005] QSC 362
PARTIES:	**FRANCIS HARRY HINDS (as executor of the estate of FREDERICK EDWARD LOWIN)** (applicant) v **IDA ELIZABETH RUTH COLLINS** (respondent)
FILE NO/S:	BS 9406 of 2005
DIVISION:	Trial Division
PROCEEDING:	Application for rectification of will
ORIGINATING COURT:	Brisbane
DELIVERED ON:	6 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	22 November 2005
JUDGE:	McMurdo J
ORDER:	**1. In the event that the will of the late Frederick Edward Lowin dated 11 March 2005 is admitted to probate, the probate copy of the will be rectified by adding a clause in the following terms:** **"5(a) The balance of any monies, after the above bequests have been made, is to be bequested to Gisela Helene McMillan of 53 Sarah Street, Deagon"** **2. The respondent have her costs on an indemnity basis paid from the estate**
CATCHWORDS:	SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CHANGING, TRANSPOSING, OMITTING OR SUPPLYING WORDS – CHANGING WORDS – where the testator died leaving the applicant as executor – where the applicant seeks rectification of the will prior to admission to probate – whether s 31 of the *Succession Act* 1981 (Qld) allows for rectification of a will prior to admission to probate – where the solicitor prepared will on the written instructions of the testator – where the solicitor read through the instructions with the testator – where the solicitor subsequently read through the draft will with the testator prior to execution – where the written instructions provided that the "balance of any monies" were to be left to Ms McMillan – where the executed will did not

make provision for who was to take the "balance of any monies" – where under the will, the balance monies would be paid to the next of kin, namely the three siblings of the testator – where one the testator's siblings, Ms Collins, resisted the application for rectification – whether the testator intended to insert the words leaving the "balance of any monies" to Ms McMillan

Succession Act 1981 (Qld), s 31
Succession Amendment Bill 2005 (Qld), cl 33

Rawack v Spicer [2002] NSWSC 849, distinguished
Trimmer v Lax (unreported, Supreme Court of New South Wales, Hodgson J, 9 May 1997), distinguished

COUNSEL: D J Morgan for the applicant
C F O'Meara for the respondent

SOLICITORS: Gill & Lane for the applicant
Paul Pattison Solicitors for the respondent

[1] **McMURDO J:** This is an application for rectification of a will. The testator, Mr F E Lowin, died on 7 May this year, aged 88 years. The will is dated 11 March 2005 and names the applicant as executor. He intends to prove the will but now he applies for an order that it be rectified by adding certain words which, he says, were words which Mr Lowin intended to include. His application is opposed by the testator's sister, Mrs Collins, who would receive about $15,000 if the will remains in its present terms (and is proved), but nothing if it is rectified.

The facts

[2] The will was prepared by Mr G E Lane, a solicitor practicing at Sandgate. On 9 March 2005 he attended the residence of Mr Lowin at Deagon. He was met by the applicant, Mr Hinds and taken to a bedroom where Mr Lowin was seated. He says that Mr Lowin was alert and engaged freely in light conversation with him and Mr Hinds before Mr Hinds handed to Mr Lane a typed document, saying it represented Mr Lowin's instructions for the preparation of a will.

[3] Mr Hinds offered to leave the room whilst Mr Lane discussed the document with Mr Lowin, but Mr Hinds stayed on Mr Lowin's insistence. According to Mr Lane, he then read aloud this document to Mr Lowin who acknowledged and agreed with each point relevant to the preparation of the will as it was read.

[4] Mr Lane returned to his office and at some time within the next 48 hours, drafted a will, which was executed by Mr Lowin when Mr Lane went back to his house on 11 March. On that occasion Mr Lowin was given a copy of the will and Mr Lane read the will to him. Mr Lowin appeared to read his copy as Mr Lane read it.

[5] Mr Lane exhibits to his affidavit a copy of this document which he says constituted his instructions and which he went through, item by item, with Mr Lowin on 9 March. It is a document prepared by Mr Hinds and addressed to Mr Lowin, and it purports to set out the effect of their previous discussions as to what Mr Lowin

wished his will to provide. According to this document, the testator's house and contents (excluding the contents of the garage/workshop) were to be left to Ms G H McMillan, the contents of the garage/workshop to Mr R T McMillan, $25,000 was to be left to another beneficiary, $1,000 to a further beneficiary, and after payment of debts, funeral expenses, the cost of administering the estate, and the cost of a certain memorial, "the balance of any monies, … is to be bequested to Gisela Helene McMillan of 53 Sarah Street, Deagon."

[6] Except in one respect which is insignificant,[1] the will which Mr Lowin executed corresponded with that document in relation to the specific bequests. But it departed from the document in that the will makes no provision for who is to take "the balance of any monies". According to the express terms of this will, there is no provision as to that balance, with the result that there is a partial intestacy and the balance monies would be paid to the next of kin. There is a likely balance of about $45,000. The persons who would be entitled upon intestacy are three siblings of the testator, including the respondent who resists this application, Mrs Collins. The other siblings have been served with the application but did not appear in response to it, and presumably have no wish to resist it.

[7] By this application the executor seeks an order for the insertion of a provision in terms of the document's reference to the balance of any monies, which I have set out above at [6].

[8] Mr Lane was extensively cross-examined. Ultimately counsel for Mrs Collins was critical of Mr Lane's evidence, suggesting that much of it was reconstruction, not recollection. He referred to some matters which Mr Lane said in cross-examination which were not in his affidavit. In no case did this strike me as indicating some want of credibility or reliability on the part of Mr Lane. Some of these matters would not have been admissible in the applicant's case in evidence-in-chief.

[9] There was a further submission to the effect that the evidence of Mr Lane should not be persuasive absent evidence from the executor, Mr Hinds. According to Mr Lane, Mr Hinds was present when Mr Lane took his instructions. Yet Mr Hinds has not sworn an affidavit. But he has made this application and tendered Mr Lane's evidence in support of it. By that means he has adopted the evidence of Mr Lane. He might have sworn an affidavit which did so, but the absence of that affidavit is not fatal to this application. For Ms Collins, it was submitted that it was incumbent upon an executor to present to the court all evidence going to the question of intention, for which was cited *Rawack v Spicer* [2002] NSWSC 849 and *Trimmer v Lax* (unreported, Supreme Court of New South Wales, Hodgson J, 9 May 1997). I do not read those authorities as requiring, in every case, an executor to call every witness who could give evidence of a relevant occasion or conversation. Accepting that the executor must place all relevant information before the court, I do not accept that it as a rule that such information be proved by each and every available witness, regardless of the weight which should be given to the evidence of a witness who is called or the weight of the documentary evidence. Ultimately the applicant for rectification of the will must discharge a heavy burden, to rebut the presumption which arises from the due execution of the will and the fact of testamentary capacity, that the will contains the words, and only the words, which the testator

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1 Contents of the testator's house, for which the will, upon one interpretation at least, provides that they are to be left to Ms McMillan but by another clause that they are to be left to Mr McMillan

intended. In a particular case, the failure to call a witness could be fatal to the discharge of that onus; in another case it need not be. Ultimately the question is a factual one, which is whether it is demonstrated, on the balance of probabilities, that the testator intended to insert certain words which do not appear in the will. In this context, there is a difference between the ascertainment of the testator's intention as to the effect of the will, and the ascertainment of his intention as to what words should or should not appear in the will. It is the latter inquiry which is relevant.[2]

[10] I see no reason to doubt the evidence of Mr Lane. It is the case that he has no diary note of the receipt of the instructions for this will. But as he explained, that was unnecessary in the particular circumstances here because the written document which was handed to him contained clear and unambiguous instructions, which did not have to be rewritten within his own file note. The will was executed only two days after he received these instructions, thereby lessening the prospect that in the interim, Mr Lowin had changed his mind and decided to make no provision for the payment of the balance monies. Mr Lane's evidence is entirely credible. The document prepared by Mr Hinds, I find, accurately sets out the instructions Mr Lane received. He was instructed to draw a will in the terms to which the executor says this will should now be rectified. I also find that there was no change to Mr Lane's instructions between that meeting of 7 March 2005 and the execution of the will. This will does not accord with the instructions Mr Lane received. To make it accord with those instructions it would have to be rectified, as this application seeks, by adding a clause as follows:

> "5(a) The balance of any monies, after the above bequests have been made, is to be bequested to Gisela Helene McMillan of 53 Sarah Street, Deagon."

[11] The effect of these findings is that the *apparent* intention of Mr Lowin was to include this clause in his will. If this will had been proved already, it would be necessary to rectify the probate copy. But it is yet to be proved, and there may be a challenge to Mr Lowin's testamentary capacity. Within the issue of testamentary capacity would be a question of Mr Lowin's capacity to form the specific intention to include these words in his will. In the present application, Mr Lowin's testamentary capacity is not in issue; nor does the executor seek to prove that he had the capacity to form what was his apparent intention. Assuming that he did have that capacity, I would find that his actual intention was to insert these words.

A rectification order before probate?

[12] Section 31 of the *Succession Act* 1981 (Qld) provides as follows:

> "**Power of court to rectify wills**
>
> **31.(1)** As from the commencement of this Act the court shall have the same jurisdiction to insert in the probate copy of a will material which was accidentally or inadvertently omitted from the will when it was made as it has hitherto exercised to omit from the probate copy of a will material which was accidentally or inadvertently inserted in the will when it was made."

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2 *Re Hess* [1992] 1 Qd R 176, approving *Re Allen* [1988] 1 Qd R 1

[13] The court's power is to insert material in the probate copy of a will. This reflects the origin of the corresponding jurisdiction to omit material wrongly included in a will, which is the jurisdiction of a court of probate. Equity would not rectify a will for its failure to reflect the testator's intention.[3] According to s 31, the power is to affect the content of that which is admitted to probate. That jurisdiction might be exercised at the time of the original grant of probate or subsequently. What this application seeks is an order that, if and when the will is admitted to probate, this clause be inserted within the probate copy.

[14] In some jurisdictions, the corresponding statute is in different terms. For example, in Victoria,[4] the court's power is to rectify "a will". In its *Consolidated Report to the Standing Committee of Attorneys-General on The Law of Wills*,[5] the National Committee for Uniform Succession Laws recommended a provision in those terms, but requiring the application to be made within a certain period of the testator's death, because of a recognition that with the growing occurrence of informal administrations, a grant of probate will often not be sought. A provision in those terms is proposed by cl 33 of the *Succession Amendment Bill* 2005.

[15] This application does not seek an order that the will be rectified before probate is granted. It seeks an order that in the event of a grant of probate of this will, the probate copy be rectified. In my conclusion, the order sought is consistent with the terms of s 31. There is power to make this order and the remaining question is whether it is now appropriate to do so, having regard to the potential for a contest as to the testator's capacity.

[16] There may be no contest as to capacity. This is a relatively small estate, and the factual issues involving Mr Lane's instructions and his explanation for the omission of this clause have been fully investigated. It would be unfortunate if those factual questions had to be relitigated. If capacity is proved, or need not be proved, this order would avoid that relitigation. Alternatively, if the executor is required to prove a will in solemn form, and cannot do so, then the order which is sought will have no effect. In the circumstances, it is appropriate that the order be made. It should be clear from this judgment that it involves no determination of the question of Mr Lowin's testamentary capacity, or more specifically, his capacity to form his apparent intention to insert these words in his will.

Conclusion

[17] It will be ordered that in the event that the will of the late Frederick Edward Lowin dated 11 March 2005 is admitted to probate, the probate copy of the will be rectified by adding a clause in the following terms:

> "5(a) The balance of any monies, after the above bequests have been made, is to be bequested to Gisela Helene McMillan of 53 Sarah Street, Deagon."

[18] The executor submits that the respondent should have her costs on an indemnity basis paid from the estate and that there should be no other order. The respondent submits that Mr Lane should be ordered to pay them. In my view the order should

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3 See Meagher, Gummow and Lehane's *Equity Doctrines & Remedies* (4th ed) at (26-005)
4 Section 31 of the *Wills Act* 1997 (Vic)
5 Queensland Law Reform Commission Miscellaneous Paper No 29 December 1997

provide for the estate to bear them, *vis a vis* the respondent. Whether the estate recoups them from Mr Lane is not a matter which could be fairly considered within this application, when Mr Lane is the solicitor instructing counsel for the executor.