SUPREME COURT OF QUEENSLAND

CITATION: *The Public Trustee of Queensland v Smith* [2008] QSC 339

PARTIES: **THE PUBLIC TRUSTEE OF QUEENSLAND**

(applicant)

AND

HELEN MARIE SMITH

(first respondent)

AND

KIM HELEN LUNDGAARD

(second respondent)

AND

MEGAN JODY RANDALL

(third respondent)

AND

ANDREW MACGREGOR SMITH

(fourth respondent)

AND

KRISTEN ELIZABETH McKENZIE

(fifth respondent)

AND

CHARLOTTE MARY ALLEN

(sixth respondent)

AND

ANTONIO SEAN D'ALESSANDRO McINTYRE

(seventh respondent)

AND

EMMA KATE RANDALL

(eighth respondent)

AND

AMY JULIETTE RANDALL

(ninth respondent)

AND

KATIE ALEXANDRA RANDALL

(tenth respondent)

AND

CALLUM HUGH McKENZIE

(eleventh respondent)

AND

KAITLIN PAIGE McKENZIE

(twelfth respondent)

FILE NO/S:	BS2228/08
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	19th December 2008
DELIVERED AT:	Brisbane
HEARING DATE:	21 July 2008
JUDGE:	Atkinson J

ORDERS:

1. **The court declares that upon a proper construction of the will of Hugh Joseph Mackay, deceased, dated 23 June 2003:**

   (a) the class of beneficiaries referred to in cl 6.02(vi) of that will:

   (i) is comprised of such of the grandchildren of the siblings of the deceased who survive the deceased and attain 23 years of age;

   (ii) includes only persons living at the date of the deceased's death;

   (iii) closes when the first beneficiary therein attains the age of 23 years;

   (b) the deceased's residuary estate is to be divided into six equal parts, with one such part passing to each of the beneficiaries named in sub-clauses 6.02(i) – (v) with the remaining part to be shared equally between the members of the class referred to in sub-clause 6.02(vi)

2. **The time for the making of an application for rectification of the will of Hugh Joseph Mackay (also known as Peter Joseph Mackay) be extended to 18 April 2008.**

3. **The application by the first to fifth respondents is otherwise dismissed.**

4. **The costs are to be paid on an indemnity basis from the estate of Hugh Joseph Mackay (deceased).**

CATCHWORDS: SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND THE EFFECT OF TESTAMENTARY DISPOSITIONS – GENERALLY – GENERAL PRINCIPLES OF CONSTRUCTION – ORDINARY AND GRAMMATICAL MEANING OF WORDS – whether the usual meaning rule was sufficient to resolve the construction of a provision of a will – whether the meaning of the words "as to one part" and "in each case" was clear in the context of the clause as a whole – whether there was need to go to extrinsic evidence – where the meaning of the words "to survive" was determined

SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND THE EFFECT OF TESTAMENTARY DISPOSITIONS – GENERALLY – GENERAL PRINCIPLES OF CONSTRUCTION – ADMISSIBILITY OF EXTRINSIC EVIDENCE – where section 33C *Succession Act 1991* sets out what extrinsic evidence is admissible in interpreting a will – where rules of construction continue to allow admission of extrinsic evidence whether extrinsic evidence could be admitted to aid in construction of this will

SUCCESSION – WILLS, PROBATE AND ADMINISTRATION – CONSTRUCTION AND THE EFFECT OF TESTAMENTARY DISPOSITIONS – GENERALLY – GENERAL PRINCIPLES OF CONSTRUCTION – GIFTS TO A CLASS – where the class of beneficiaries referred to was 'each of my great nieces and nephews …who survive me and live to be 23 years – whether this class had usual meaning – whether the class of beneficiaries was restricted to persons living at the date of the deceased's death – whether the class of beneficiaries included persons born after the testator's death but before the class closes

SUCCESSION – WILLS, PROBATE AND

ADMINISTRATION – CONSTRUCTION AND THE EFFECT OF TESTAMENTARY DISPOSITIONS – GENERALLY – CHANGING,TRANSPOSING OMITTING OR SUPPLYING WORDS – OMITTING WORDS – where s 33 *Succession Act 1991* is concerned with rectification of wills – where application was made to extend the time for making an application for rectification – whether a clerical error had been made – whether the will failed to give effect to the testator's instructions

Succession Act 1981 s 33, s 33C

Andrews v Partington (1791) 3 Bro CC 401; 29 ER 601, cited

Brennan v Permanent Trustee Co of NSW Ltd (1945) 73 CLR 404, cited

Crane v Crane (1950) 80 CLR 327, cited

Fell v Fell [1922] 31 CLR 268, cited

Knight v Knight (1912) 14 CLR 86, followed

Lehmann v Haskard unreported, NSWSC, 29August,1996, followed

Perrin v Morgan [1943] AC 399, applied

Ralph v Carrick (1879) 11 Ch D 87, applied

Re Bleckly [1951] Ch 741, cited

Re Bryden [1975] Qd R 210, cited

Re Murray [1963] ALR 68, cited

Re Ritchie [1949] St R Qd 90, cited

Re Tussaud's Estate (1878) 9 Ch D 363, cited

Re Wernher's Settlement Trusts [1961] 1 WLR 136, cited

Terence John McCorley and David John Lewis (as executors of the Will of Vera Rachel Pakleppa (deceased) v Norman Pakleppa [2005] QSC 83, considered

COUNSEL: R Whiteford for the applicant

J Otto for the first to fifth respondents

D Morgan as litigation guardian for the sixth to twelfth respondents

SOLICITORS: Public Trustee for the applicant

McCullough Roberston for the first to fifth respondents

MPN Lawyers for the sixth to twelfth respondents

[1] Hugh Joseph Mackay ("the testator"), who was also known as Peter, died on 13 June 2006. At the time of his death, he was aged 68 years and was domiciled in Queensland. He had never married and had no children.

[2] Mr Mackay was one of four children born to Hugh Maurice and Kathleen Garvey Mackay.[1] Their first child, Mary Lorraine, was born in 1934, the second, Doreen, was born in 1936. The testator was the third child, born in 1938. His youngest sister was Helen Marie, born in 1943. All of the testator's sisters survived him. Each of them married and had children.

[3] The oldest sister, Mary Lorraine,[2] had four children, only one of whom survived the testator.[3] Mary's surviving child is Graydon Anthony Allen who has two children, the first Charlotte Mary, born on 7 September 2005 prior to the death of the testator, and a second child born on 13 June 2008 after his death.

[4] Mr Mackay's second sister, Doreen,[4] had one child, Sean Alan Mackay McIntyre, born on 11 July 1971, who survived the testator and who has one child, Antonio Sean D'Alessandro McIntyre, born on 8 June 2006 before the death of the testator.

[5] The testator's youngest sister, Helen Marie,[5] had four children, Kim Helen Smith,[6] Megan Jody Smith,[7] Andrew McGregor Smith[8] and Kirsten Elizabeth Smith.[9] Of these children, only Megan and Kirsten have children. Megan's children are Emma Kate Randall,[10] Amy Juliette Randall,[11] and Katie Alexandra Randall.[12] Kirsten's children are Callum Hugh McKenzie,[13] and Kaitlin Paige McKenzie.[14]

[6] The testator's estate was valued at $642,707.83 at the date of his death and the residuary estate was valued at $457,635.57 as at 29 October 2007.

[7] The distribution of his estate is governed by a will drawn up by the Public Trustee and executed by Mr Mackay on 23 June 2003. The Public Trustee of Queensland has applied to the court for construction of clause 6.02(vi) of that will.

[8] Clause 6.02 provides:

> "6. I GIVE-
>
> …

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1 Both of the testator's parents predeceased him: his father on 13 August 1963 and his mother on 12 September 1984.

2 Mary's married surname is Allen. She is sometimes known as Lorraine.

3 The three other children who did not survive the testator were Shanneen, born on 12 October 1960, who died on 23 May 2001, without issue; Leisha, born 15 June 1964, who died on 11 August 2004, without issue; and Justin, born 4 July 1968, who died on 5 July 1995, without issue.

4 Doreen's married surname is McIntyre.

5 Helen's married surname is Smith.

6 Kim, who changed her surname to Lundgaard on 23 August 2006, was born in 1965.

7 Megan was born in 1967. Her married surname is Randall.

8 Andrew was born in 1969.

9 Kirsten was born in 1970. Her married surname is McKenzie.

10 Born on 15 January 1994.

11 Born on 3 August 1996.

12 Born on 18 May 1998.

13 Born on 8 October 2000.

14 Born on 4 August 2000.

02. The residue of my estate as follows:-
(i) as to one part TO my sister HELEN MARIE SMITH
(ii) as to one part TO my niece KIM SMITH
(iii) as to one part TO my niece MEGAN RANDALL
(iv) as to one part TO my nephew ANDREW SMITH
(v) as to one part TO my niece KIRSTEN MACKENZIE
(vi) as to one part in each case TO my Secondary Trustee's [*sic*] ON TRUST for each of my great nieces and great nephews (including EMMA RANDALL and AMY RANDALL and KATIE RANDALL and CALLUM MACKENZIE and KATELYN MACKENZIE) who survive me and live to be 23 years."

The secondary trustees named in the will are Helen Smith's husband, Alexander Smith, and Megan Randall's husband, Tony Randall.

[9] Specifically, the Public Trustee has applied to the Court for the following:

1. a declaration whether upon the proper construction of the will of Joseph Hugh Mackay, deceased, dated 23 June 2003 and in the events which have occurred:

a) the class of beneficiaries referred to in clause 6.02(vi) of that will:

(i) is comprised:

A. only of such of Emma Kate Randall, Amy Juliette Randall, Katie Alexandra Randall, Callum Hugh McKenzie and Kaitlin Paige McKenzie who survive the deceased and attain 23 years of age; or

B. of such of the grandchildren of the siblings of the deceased who survive the deceased and attain 23 years of age;

(ii) includes:

A. only persons living at the date of the deceased's death; or

B. persons born after the deceased's death but before the class closes;

(iii) closes when the first beneficiary therein attains the age of 23 years;

b) the deceased's residuary estate:

(i) is to be divided into 6 equal parts, with one such part passing to each of the beneficiaries named in clauses 6.02(i)-(v) with the remaining part to be shared equally between the members of the class referred to in clause 6.02(vi); or

(ii) is to be divided equally between all of the beneficiaries under clause 6.02 per capita.

[10] There is a cross-application by the first to fifth respondents for the rectification of the will and interpretation of it as rectified. The first respondent is the testator's youngest sister, Helen Marie Smith; the second to fifth respondents are her four children. The sixth to twelfth respondents, represented by a litigation guardian, are the seven great nieces and nephews who had been born by the time of the death of the testator and survived him: Charlotte Mary Allen, Antonio Sean D'Alessandro McIntyre, Emma Kate Randall, Amy Juliette Randall, Katie Alexandra Randall, Callum Hugh McKenzie and Kaitlin Paige McKenzie.

[11] The first to fifth respondents have applied to the court for:

1. an order that, pursuant to s 33(3) of the *Succession Act 1981* (Qld), the time for the making of an application for rectification of the will of Hugh Joseph Mackay (also known as Peter Joseph Mackay), deceased, be extended to 18 April 2008;

2. an order that, pursuant to s 33(1) of the *Succession Act*, the said will of the deceased be rectified:

    a) to delete the words "in each case" where they appear in clause 6.02(vi) thereof;

    b) to delete the words "my great nieces and great nephews" where they appear in clause 6.02(vi) thereof and insert in their place the words "the children of my nieces and nephews";

    c) to delete the words "survive me" where they appear in clause 6.02(vi) thereof and insert in their place the words "are living at the date of my death";

3. a declaration that, upon the proper construction of the said will of the deceased (as so rectified) and in the circumstances which have occurred:

    a) the beneficiaries entitled under clause 6.02(vi) thereof are the children of the second to fifth respondents who were living at the date of the deceased's death, who survived him for 30 days and who attain the age of 23 years;

    b) the beneficiaries entitled under clause 6.02(vi) thereof are entitled to an equal share of one-sixth of the deceased's residuary estate.

Family circumstances of the testator

[12] The testator's parents separated in about 1945 when the testator was approximately seven years old. The testator and his younger sister Helen lived with their mother, while his older sisters, Mary and Doreen, lived with their father in another part of Queensland. There was little contact between the testator and Doreen, whom he last saw in approximately 1953, and Mary, whom he last saw when he visited her in the early 1970s. As Mary's son Graydon was born in August 1970, it can be inferred that the testator was aware of his existence as a result of the visit to Mary.

[13] Thus at his death, the testator was survived by three sisters, three nephews and three nieces, two great-nephews and five great-nieces. One nephew and three of the nieces are the children of Helen Smith, one nephew is the child of Doreen McIntyre

and the remaining nephew is the child of Mary Allen. One of the great-nephews and four of the great-nieces are the children of Helen Smith's children. One great-nephew is the child of Doreen McIntyre's child and the remaining great-niece is the child of Mary Allen.

[14] Approximately two years after the testator's death another great nephew/niece was born to the child of Mary Allen.

The testator's wills

[15] The testator made three wills, a will dated 19 December 1960, a will dated 28 September 1990, and the last will dated 23 June 2003. Each will revoked and cancelled all former and earlier wills.

[16] The will of 19 December 1960 appointed the Public Trustee as executor. The will left "one half part or share thereof " of the deceased's estate to his mother and the other "one-half part or share thereof" to "such of my sisters, Lorraine Mackay, Doreen Mackay and Helen Mackay, as shall be living at the time of my death and if more than one in equal shares absolutely."

[17] The will dated 28 September 1990 also appointed the Public Trustee as executor. It left the testator's house and household effects to Helen Smith and his car to Helen Smith's son Andrew. He left "a ½ share to those of my nieces KIM SMITH, MEGAN SMITH and KIRSTEN SMITH and to my nephew ANDREW SMITH (children of my sister HELEN SMITH) as survive me and if more than one then equally." He left the other half share of the residuary estate to "those children of my sisters LORRAINE ALLEN and DOREEN MACKAY as survive me and if more than one then equally."

[18] The last will dated 23 June 2003 ("the will") again appointed the Public Trustee as executor. On 8 September 2006, the Public Trustee obtained an order to administer that will. Clause 6.01 of the will gave the testator's house and household effects, other than motor vehicles, to Helen Smith. Clause 6.02 devised his residuary estate. It is cl 6.02(vi) which has come before the court for construction and possible rectification.

[19] It is convenient first to consider the question of construction of the will before determining whether or not it should be rectified.

Construction of the will

[20] The task of a court of construction is to discover the testator's intention by examination of the words used in the will.[15] Judicial construction involves having "regard to any rules of construction which have been established by the courts, and subject to that, [such courts] … are bound to construe the will as trained legal minds would do."[16]

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15 *Perrin v Morgan* [1943] AC 399 at 406 per Viscount Simon; LJ Hardingham, MA Neave, HAJ Ford, *Wills and Intestacy* (2nd ed) [1101]; DM Haines, *Construction of Wills in Australia* [5.2]; K Mackie and M Burton, *Outline of Succession* (2nd ed) [7.4] – [7.6].

16 *Ralph v Carrick* (1879) 11 Ch D 873 at 878 per Cotton LJ, cited with approval by Isaacs, J in *Fell v Fell* [1922] 31 CLR 268 at 273.

[21] The general principle governing construction of a will is the "usual meaning rule." This rule finds its source in the classic work by Sir James Wigram, *Admission of Extrinsic Evidence in Aid of the Interpretation of Wills*, first published in 1831.[17] It is expressed by Hardingham, Neave and Ford as:

> "The basic principle, to which several qualifications must later be made, is that the court interprets the words of the will, in the context in which they appear, according to their usual or primary meaning.[18] If the words of the will are clear, and are capable of application by reference to extrinsic circumstances, the court will not admit evidence to demonstrate that the testator used the words in something other than their ordinary sense.[19]"

It is only where the usual meaning rule is insufficient to resolve the construction of a provision of a will that the court may consider extrinsic evidence to resolve its meaning.

[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:

> "(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 the surrounding circumstances.

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17 LJ Hardingham, MA Neave, HAJ Ford, *Wills and Intestacy* (2nd edition) [1102].

18 Wigram's propositions I and II are as follows:

I. A testator is always presumed to use the words in which he expresses himself, according to their strict and primary acceptation, unless, from the context of the will, it appears that he has used them in a different sense, in which case the sense in which he thus appears to have used them, will be the sense in which they are to be construed.

II. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered: *Extrinsic Evidence in Aid of Interpretation of Wills* (5th ed., 1914), 16-8.

19 Underhill and Strahan, *Principles of the Interpretation of Wills and Settlements* (3rd ed., 1927), pp 4-6; *Doe d. Oxenden v. Chichester* (1810) 3 Taunt 147; 3 E.R. 1091; *Hardwick v. Hardwick* (1873) L.R. Eq. 168; *Robinson v. Gould* (1886) 8 A.L.T. 38; *Re Bennet* (1901) 21 N.Z.L.R. 133; *Higgins v. Dawson* [1902] A.C. 1; *Re Goodes* [1902] S.A.L.R. 86 at 91 per Way C.J.; *Re McKay* (1958) 17 G.L.R. 571; *Re Grazebrook* [1928] V.L.R. 75; *Re Petersen* [1920] St. R. Qd 42; *Pearce v. Wright* (1926) 26 S.R. (N.S.W.) 515; *Gilmour v. MacPhillamy* [1930] A.C. 713 at 716 per Lord Tomlin; *Re Robertson* [1942] V.L.R. 137 (this was a probate case); *Perpetual Trustee Co. Ltd v. Archbold* (1946) 46 S.R. (N.S.W.) 327; *Hulks v. Wills* (1949) 50 S.R. (N.S.W.) 74; *Re Rowland* [1963] 1 Ch. 1; *Re Edwards* [1964] V.R. 551 at 553 per Herring C.J.; *Re Hackett* [1966] V.R. 232; *Re Bell* [1969] V.R. 597; *Re Jones* [1971] N.Z.L.R. 796; *Re Rowlands* [1973] V.R. 225; *Re Atkinson* [1978] 1 W.L.R. 586 at 590; *Re Cuthbertson* [1979] Tas. S.R. 93; *Re Allen* [1988] 1 Qd R. 1.

(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."

[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 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"[20] 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.[21]

(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."[22] This rule is sometimes referred to as the "latent ambiguity rule" where there are, for example, two legatees of the same name.[23]

(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.[24]

[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.

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20 LJ Hardingham, MA Neave, HAJ Ford, *Wills and Intestacy* (2nd edition) [1103].

21 LJ Hardingham, MA Neave, HAJ Ford, *Wills and Intestacy* (2nd edition) [1103].

22 QLRC Miscellaneous Paper 29 at p 68.

23 In *Re Tussaud's Estate* (1878) 9 Ch D 363 at 374.

24 In *Re Tussaud's Estate* at 373-375.

(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.

[26] It follows from the forgoing discussion that the court of construction should start with the words of the will. If their usual meaning is clear, the will will be given that construction. If not, the court may have regard to such extrinsic evidence as allowed by the rules of construction traditionally applied by the courts with the addition of the aids to construction found in s 33C of the Act.

[27] The Public Trustee submitted that there were four questions to be answered by the court when construing clause 6.02(vi) of Mr Mackay's will: the meaning to be attributed to "as to one part" and "in each case"; whether the class of beneficiaries is restricted to the children of the second to the fifth respondents or includes all of the deceased's great nephews and great nieces who survived him and live to be twenty-three years; whether the class of beneficiaries is restricted to persons living at the date of the deceased's death, or includes persons born after his death but before the class closes; and finally whether the class of beneficiaries closes when the first beneficiary thereunder attains twenty-three years of age.

The meaning to be attributed to "as to one part" and "in each case".

[28] The Public Trustee has posed the question to be decided in this way:

Under clause 6.02, is the residuary estate to be divided:

(1) into six equal parts with the beneficiaries under sub-clause (vi) being entitled to an equal share of one-sixth; or

(2) equally between all beneficiaries named therein?

[29] In interpreting the meaning to be given to clause 6.02, the first question is what is its primary or usual meaning. In determining what is meant by the repeated phrase "as to one part", one looks at the structure of the clause. It can readily be seen that this phrase introduces each of six subclauses dealing with a separate distribution of each of six parts of the residue. It is clear from the wording and the structure of the clause that the beneficiary, or the beneficiaries collectively, under each subclause is entitled to one-sixth of the residue. Each of the first five subclauses refers to one beneficiary, each of whom is entitled to one-sixth of the residue. The sixth subclause provides for a one-sixth share to be divided equally among all of the beneficiaries who fall within the group of beneficiaries referred to in that subclause. The equality of sharing within that group is ensured by the phrase "in each case" to refer to each of the beneficiaries with that group.

[30] In light of the meaning of the words "as to one part" and "in each case" being clear once they are understood in the context of the clause as a whole, there is no need to go to any extrinsic evidence. The residuary estate is to be divided into six equal parts with the beneficiaries under subclause (vi) being entitled to an equal share of one-sixth.

Is the class of beneficiaries referred to in clause 6.02(vi) restricted to the children of the second to the fifth respondents or does it include all of the deceased's great nephews and great nieces who survived him and live to be twenty-three years?

[31] The class of beneficiaries referred to is "*each of my great nieces and great nephews (including EMMA RANDALL and AMY RANDALL and KATIE RANDALL and CALLUM MACKENZIE and KATELYN MACKENZIE)* who survive me and live to be 23 years." (emphasis added).

[32] Does this class have a usual meaning? The Oxford English Dictionary notes that the adjective "great" may be "prefixed to certain terms denoting kinship (viz uncle, aunt, nephew, niece …), to form designations for persons one degree further removed in ascending or descending relationship." Mr Mackay had three sisters, each of whom had children. Each of his sisters' children was the niece or nephew of Mr Mackay. Some of Mr Mackay's nieces and nephews have themselves had children and those children are one degree further removed from Mr Mackay in a descending relationship and so are his great nephews or great nieces. The class is not restricted to the children of some of his nieces or nephews nor to the grandchildren of only one of his sisters, notwithstanding that it is only the children of his nieces Megan Randall and Kirsten McKenzie, who are both daughters of Mr Mackay's sisters, Helen Smith, whose names are found in the inclusive list.

[33] This interpretation is strengthened by the use of the word "including" before the listed names. The word "including" denotes that the listed people are not necessarily the only members of the class. Had the testator wished to restrict this class to only the grandchildren of Helen Smith, he could easily have used words apt for that purpose. There is no reason to construe the words "great nieces and great nephews" as having anything other than their usual meaning. Accordingly, it is not necessary to go to extrinsic evidence.

[34] The class of beneficiaries referred to in clause 6.02(vi) includes all of the deceased's great nephews and great nieces who survived him and live to be twenty-three years.

Is the class of beneficiaries referred to in clause 6.02(vi) restricted to persons living at the date of the deceased's death, or does it include persons born after his death but before the class closes?

[35] The class of beneficiaries is "each of my great nieces and great nephews (including EMMA RANDALL and AMY RANDALL and KATIE RANDALL and CALLUM MACKENZIE and KATELYN MACKENZIE *who survive me* and live to be 23 years" (emphasis added). The question is what the phrase "who survive me" means in this context. The usual meaning of "survive" is to "outlive". This is particularly so when the verb is transitive. The beneficiary must "survive me"; that is be living at the death of the testator. This is in accordance with the Oxford English Dictionary definition of meaning of the word "survive" as a transitive verb i.e. "to continue to live after, outlive; to remain alive after the death of another."[25] In order to survive another, the survivor must be alive both before and after the death of the

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25 See *Knight v Knight* (1912) 14 CLR 86 at 96-97 per Barton J, 105-107 per Isaacs J.

person who is survived. There is nothing in the will to suggest that any other meaning was intended.[26]

[36] The class of beneficiaries referred to in clause 6.02(vi) is restricted to persons living at the date of the deceased's death.

Does the class of beneficiaries under clause 6.02(vi) close when the first beneficiary thereunder attains twenty three years of age?

[37] The relevant rule is set out in *Lehmann v Haskard*[27] by Young J (as his Honour then was):

> "Under the class closing rules…when one has a qualification as to age, the class closes when the first member of the class becomes entitled to a distribution of his or her share. If this rule applies, then as soon as a grandchild attains twenty-one years, the class will close and only grandchildren who are alive at that time will qualify.

[38] As was submitted by the first to fifth respondents and the Public Trustee, the class will close when the first member of the class turns 23 years of age. This means that the class will close when the oldest of Mr Mackay's surviving great nieces and great nephews turns 23 and becomes entitled to his or her share. The earliest possible date is 15 January 2017 when Emma Randall reaches the age of 23. If Emma does not survive to the age of 23, then the class will close when the oldest of the remaining great-nieces or great-nephews reaches the age of 23.

[39] The class of beneficiaries under clause 6.02(vi) will close when the first beneficiary thereunder attains twenty-three years of age.

Rectification of the will

[40] Subdivision 5 of Division 4 of Part 2 of the Act is concerned with rectification of wills. Relevantly, s 33 states:

> "(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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[26] cf *Brennan v Permanent Trustee Co of NSW Ltd* (1945) 73 CLR 404; *Re: Andrews* [1985] 2 Qd R 161 at 162-163.

[27] Unreported, NSWSC, 29 August,1996, see also *Andrews v Partington* (1791) 3 Bro CC 401; 29 ER 601; *Re Ritchie* [1949] St R Qd 90; *Crane v Crane* (1950) 80 CLR 327 at 335; *Re Bleckly* [1951] Ch 741; *Re Wernher's Settlement Trusts* [1961] 1 WLR 136; *Re Murray* [1963] ALR 68.

Extension of time

[41] The application for rectification sought an order extending the time for making the application to 18 April 2008 when the application was filed. The time for making the application pursuant to s 33(2) expired on 13 December 2006, six months after the death of the testator.

[42] Prior to the introduction of s 33 from 1 April 2006, the time for making an application for rectification was six months from the date of the grant of probate. The National Committee for Uniform Succession Law recommended the date from which time begins to run should be changed from six months from the date of the grant of probate to six months from the date of death to recognise that with the greater occurrence of informal administrations, a grant of probate will often not be sought, thereby making the period within which to rectify a will uncertain.[28] The time limit is, however, accompanied by a relatively liberal capacity in the court to extend time whenever appropriate so long as the final distribution has not been made.

[43] The application to extend time should be granted in this case. It is appropriate since it enables the court to consider the application for rectification at the same time as the questions of construction, avoiding a multiplicity of hearings. The final distribution of the estate has not been made while the questions of construction have been pending.

Rectification

[44] The legal principles relating to s 31, the relevant section under the Act prior to its amendment in 2006, were summarised by Fryberg J in *Terence John McCorley and David John Lewis (as executors of the Will of Vera Rachel Pakleppa (deceased) v Norman Pakleppa* [2005] QSC 83 at [6]. The first four rules and principles were as set out by Dunn J in *Re Bryden* [1975] Qd R 210 at 212-213.

[45] These principles are:

> "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 these words which arise from the due execution 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 fraud;
>
> Once those who seek to have the 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

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28 QLRC Miscellaneous Paper 29 at p 60.

> 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 which appear in a will where the omission will cause other words of the will to produce a different result from that which was within the knowledge and approval of the testator;
>
> Where the draughts[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 facts 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 completion of the will."

[46] As with s 33C, the introduction of s 33 of the Act gave effect to a recommendation made by the National Committee for Uniform Succession Laws in Chapter 5 Part 3 of the *Consolidated Reports to the Standing Committee of Attorneys General on the Law of Wills*. It was intended to widen the operation of the relatively narrow provision with regard to rectification of wills previously found in s 31 of the Act. The court is no longer bound by the principles set out in *McCorley and Lewis v Pakleppa* or *Re Bryden*, although they may be applied where relevant to the circumstances set out in s 33 of the Act.

[47] Under s 33, if it is alleged that the will does not carry out the testator's intentions, the court engages in a four stage process:

(1) has a clerical error been made?

(2) does the will fail to give effect to the testator's instructions?

(3) if either or both of the above has occurred, has this caused the will not to carry out the testator's intentions?

(4) if so, then the court may make an order to rectify a will to carry out the testator's intentions.

Has a clerical error been made?

There is no evidence to suggest that any purely clerical errors have been made.

Does the will fail to give effect to the testator's instructions?

[48] The testator's will was drawn up by a wills officer employed by the Public Trustee of Queensland. She had been taking instructions for wills when she started in the Public Trustee's Office in 1989. She became an administrative officer with the Public Trustee in 1990 and became a wills officer in 2002. As a full-time wills officer, she would have five or six appointments about wills per day.

[49] In June 2003, when the testator's will was being drawn up, a computerised will making system known as Chameleon was used to draw up wills, unless there was something that needed checking with a solicitor or something that could not be done in Chameleon. If the Chameleon system was not used, then instructions were normally recorded in handwriting which was read back to the client.

[50] The usual practice was to have any previous wills made by the testator on the desk in packets, although they were not usually referred to because instructions were taken from the testator as a whole as though the testator had never been before to the Public Trustee. The wills officer could not remember specifically whether or not she had the testator's will packets on her desk when she took his instructions for his third will.

[51] The wills officer took instructions from Mr Mackay on 19 June 2003. These instructions were taken in handwriting.

[52] The handwritten notes record the information that the testator lived at 116 Charles Street North Rockhampton, that he was a retired meatworker, that he was single, had never married and had no children. His assets were listed and it was noted that PT, which presumably was shorthand for the Public Trustee, was the executor and primary trustee, while secondary trustees were Tony Randall described as "niece's husband" and Alex Smith described as B-I-L. Mr Smith was the testator's brother-in-law. In brackets under the names of the secondary trustees it was noted "(for the money for great nephew's [*sic*] and Nieces under 23 years)." A specific bequest was listed as being "H&L & contents to my sister Helen Marie Smith."

[53] The next part of the file note read "R & Residue" to:

> "Helen Marie Smith-sister
>
> and Kim Smith-niece
>
> and Megan Randall-niece
>
> and Andrew Smith-nephew
>
> and Kirsten Mackenzie-niece
>
> and to those children of my nieces and nephews living at my death (including, Emma Randall, Amy Randall, Katie Randall & Callum Mackenzie and Katelyn Mackenzie) if they live to be 23 years."

[54] The file note ended with instructions about repayment of a debt owed by Alexander Smith.

[55] The wills officer had little recollection of Mr Mackay or of the instructions he gave her. However there was no reason to conclude that she did not record his instructions accurately and follow her usual practice of reading those instructions back to him.

[56] It was also standard practice to give the typewritten version of the will to the client to read before it was executed. Although the wills officer no longer has recollection of whether or not she followed this practice with the deceased on 23 June 2003, there is nothing about the circumstances of this will which would have caused her not to follow this practice. It would be so unusual for a client to execute a will without first reading it, and if this had occurred a note would have been made with the reasons recorded. No such note was made.

[57] I am satisfied that it is more likely than not that the instructions taken from Mr Mackay were read back to him and that the will was read to him before it was executed.

[58] There are several differences between Ms Hamilton's handwritten file notes and the testator's executed will.

[59] Each sub-clause in cl 6.02 of the will commences with the words "as to one part" which is not in the handwritten instructions. The handwritten instructions divided the six individuals or groups of beneficiaries of the residue into separate parts, each listed on a separate line. This list divided them into six separate individuals or groups. This suggests six parts. Accordingly, in this respect, the will gives effect to the testator's instructions.

[60] Clause 6.02 (vi) in the will commences with the words "as to one part in each case" yet the handwritten notes do not contain the words "in each case". The wills officer could not recall why the words "in each case" were not in her instructions, and assumed this was because the testator didn't know how many were in this class and he wanted them to share along with the others. In this case the will does not fail to give effect to the testator's instructions.

[61] Clause 6.02(vi) of the will refers to the great nieces and great nephews "who survive me", whereas the handwritten instructions note "to those children of my nieces and nephews living at my death". The wills officer could not explain why the different words were substituted, however said that it could have been because the template in 'Word' would 'call in' the appropriate clause as she typed the will. It might be thought the testator, having just specifically listed three nieces and a nephew, might have been referring to their children so that the reference in his will to his great nieces and great nephews failed to give effect to his instructions. However, his instructions were to give this share of the residue to the children of his *nieces* or *nephews* which must have included at least one other nephew in addition to the one named. Accordingly the use of the words great nieces and great nephews gives effect to his instructions.

[62] The words "who survive me" found in the will have the same meaning as "living at my death" recorded in the handwritten instructions. Accordingly, the will did not fail to give effect to the testator's instructions.

[63] No clerical error was made and the will did not fail to give effect to the testator's instructions. As these are the only circumstances in which the court can enquire

whether the will has failed to carry out the testator's intentions, no further enquiry can be made into the testator's intentions. The evidence given by Alexander Smith as to conversations he had with the testator about his testamentary intentions was in the circumstances irrelevant to any question to be decided on this application.

Orders

1. The court declares that upon a proper construction of the will of Hugh Joseph Mackay, deceased, dated 23 June 2003:

    (a) the class of beneficiaries referred to in cl 6.02(vi) of that will:

        (i) is comprised of such of the grandchildren of the siblings of the deceased who survive the deceased and attain 23 years of age;

        (ii) includes only persons living at the date of the deceased's death;

        (iii) closes when the first beneficiary therein attains the age of 23 years;

    (b) the deceased's residuary estate is to be divided into six equal parts, with one such part passing to each of the beneficiaries named in sub-clauses 6.02(i) – (v) with the remaining part to be shared equally between the members of the class referred to in sub-clause 6.02(vi)

2. The application for the time for the making of an application for rectification of the will of Hugh Joseph Mackay (also known as Peter Joseph Mackay) to be extended to 18 April 2008 is granted.

3. The application by the first to fifth respondents is otherwise dismissed.

4. The costs are to be paid on an indemnity basis from the estate of Hugh Joseph Mackay (deceased).