SUPREME COURT OF QUEENSLAND

CITATION:	*McPherson v Byrne & Ors* [2012] QSC 394
PARTIES:	**GRAHAM ROSS McPHERSON** **(applicant)** **v** **JAMES RODERICK BYRNE and NOEL HERBERT SMITH as Executors of the Estate of MAY McPHERSON** **(first respondents)** **ANGUS McPHERSON, STEWART McPHERSON, FIONA McPHERSON and JENNIFER McPHERSON** **(second respondents)**
FILE NO:	BS7682 of 2012
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	10 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2012
JUDGE:	Mullins J
ORDER:	**1. It is declared that upon the proper construction of the will of the late May McPherson dated 10 November 1995 (the will), the second respondents are entitled to the gift of shares in clause 4 of the will.** **2. The time for making the application to rectify the will is extended to 15 October 2012.** **3. Pursuant to s 33(1) of the *Succession Act* 1981, clause 5 of the will is rectified by deleting the words "such of" and the words "as shall survive me and if more than one in equal shares as tenants in common".**
CATCHWORDS:	SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – STATUTORY RULES OF CONSTRUCTION – LAPSE WHERE BENEFICIARY DOES NOT SURVIVE TESTATOR BY SPECIFIED PERIOD – plain meaning of the words in the clause giving shares to the son who predeceased the testator – where the other gift in the will of the residue was to the survivor of both sons of the testator and if more than one in equal shares – whether qualifying words to the gift of the residue should be imported into the clause giving the shares when reading the will as a whole – whether there was a contrary intention in the will to displace the application of s 33N(2) *Succession Act*

1981 (Qld) to the gift of the shares

SUCCESSION – MAKING OF A WILL – STATUTORY POWER OF RECTIFICATION – where evidence of the solicitor who took the testator's instructions showed that the will as executed did not reflect the testator's intentions for the residuary gift, despite the testator's approval of the words used in the residuary clause – whether order rectifying the will should be made

Succession Act 1981, s 33, s 33B, s 33C, s 33N

Re Allen [1988] 1 Qd R 1, considered
Fell v Fell (1922) 31 CLR 268, considered
Hinds v Collins [2006] 1 Qd R 514, considered
Kavanagh v Reardon [2012] VSC 174, considered
Re the Will of Macaudo [1993] 2 Qd R 269, considered
Palethorpe v Public Trustee of Queensland [2011] QSC 335, considered
Public Trustee of Queensland v Jacob [2007] 2 Qd R 165, followed
Public Trustee of Queensland v Smith [2009] 1 Qd R 26, considered
Vescio v Bannister [2010] NSWSC 1274, considered

COUNSEL: A C Barlow for the applicant
R T Whiteford for the first respondents
R N Traves SC and C A Brewer for the second respondents

SOLICITORS: ClarkeKann for the applicant
Hillhouse Burrough McKeown for the first respondents
de Groots for the second respondents

[1] Mrs McPherson died on 12 December 2009 leaving her last will dated 10 November 1995. She had two children, Donald McPherson (Donald) who predeceased her and the applicant Graham McPherson.

[2] The first respondents who are respectively a solicitor and an accountant are the executors of Mrs McPherson's will for which probate was granted on 9 March 2010. The second respondents are the children of Donald.

The will

[3] The will is in simple terms. Clause 1 is the revocation clause. Clause 2 is the appointment of the first respondents as executors. The balance of the will provides:

> "3. **I GIVE** my shares in Geo W McPherson Nominees Pty Ltd ACN 010 001 368 to MAY McPHERSON NOMINEES PTY LTD ACN 010 000 567 as trustee for the May McPherson Family Trust.

4. **I GIVE** my shares in May McPherson Nominees Pty Ltd ACN 010 000 567 to my son DONALD BRUCE McPHERSON.
5. **I GIVE** the rest and residue of my estate to such of GRAHAM ROSS McPHERSON and the said DONALD BRUCE McPHERSON as shall survive me and if more than one in equal shares as tenants in common."

The issues

[4] The applicant seeks declarations in the following terms:

"(a) Section 33N(2) of the Succession Act 1981 ('the Act') does not apply to the gift referred to in clause 4 of the last Will and Testament ('the Will') of May McPherson, dated 10 November 1995, there being a contrary intention, for the purposes of s.33(N)(3) of the Act, expressed in clause 5 of the Will;

(b) The Applicant, Graham Ross McPherson, is the rightful owner of the gift referred to in clause 4 of the Will, namely shares in May McPherson Nominees Pty Ltd; and

(c) The Applicant, Graham Ross McPherson, is entitled to the whole of the residue of the estate of May McPherson pursuant to clause 5 of the Will."

[5] The first respondents do not oppose the declaration sought in paragraph (c) but submit that, on the proper construction of the will, the second respondents are entitled to the gift of the shares in clause 4 of the will. The second respondents support the first respondents' position on clause 4 of the will, but their approach to the construction of clauses 4 and 5 of the will depends on whether the evidence of the solicitor who took instructions for the will, Mr Rudz, was admissible for the purpose of the construction of the will.

[6] On 15 October 2012 the second respondents filed a cross-application in this proceeding seeking rectification of the will pursuant to s 33 of the *Succession Act* 1981 (the Act) by deleting the words "as shall survive me and if more than one in equal shares as tenants in common" from the end of clause 5 of the will. The cross-application is opposed by the applicant. The first respondents make no submission in respect of the cross-application.

[7] The second respondents also seek an extension of time for the making of the cross-application, but that is not opposed.

The estate

[8] Mrs McPherson's estate at the date of her death comprised:

(a) two shares in Geo W McPherson Nominees Pty Ltd (GWM) which is the trustee for the Geo W McPherson Trust;

(b) two shares in May McPherson Nominees Pty Ltd (MMN) which is the trustee for the May McPherson Family Trust;

(c) her home at Chermside and adjoining premises; and

(d) 100 shares in Australian Oil and Gas Limited.

[9] The McPherson family business was commenced by the applicant's grandfather, George McPherson in 1898 and is operated by Australian Monofil Co Pty Ltd. Most of the shares in that company are held by GWM as the trustee for the Geo W McPherson Trust. Of the four issued shares in GWM, one share is held by the applicant, one share is held by the second respondents and two shares are held by MMN as trustee for the May McPherson Family Trust. Prior to Mrs McPherson's death, of the four shares in MMN, one share was held by the applicant, one share was held by the second respondents and two shares were held by Mrs McPherson (which were the shares that were the subject of the gift in clause 4 of the will).

[10] After the deceased's death, the first respondents considered that the effect of s 33N of the Act was that the second respondents were entitled to any benefits left to Donald under the will. The first respondents therefore transferred the two shares in MMN that was the subject of clause 4 of the will to the second respondents. The practical effect of the transfer of these two shares to the second respondents was to give them control of Australian Monofil Co Pty Ltd.

[11] It was not until June 2012, when the applicant was checking documents relating to MMN, that the applicant re-read Mrs McPherson's will and sought legal advice about whether or not the two shares in MMN should have been transferred to the second respondents. As a result of the advice that was obtained, the applicant commenced this proceeding. The sale of the Chermside property was completed in July 2012, but the net proceeds have not been distributed, pending this proceeding.

Construction of the will

[12] Interpretation of wills is regulated by Division 5 of Part 2 of the Act. Section 33B of the Act applies as Donald did not survive Mrs McPherson for 30 days:

> "**33B Beneficiaries must survive testator for 30 days**
> (1) If a disposition of property is made to a person who dies within 30 days after the testator's death, the will takes effect as if the person had died immediately before the testator.
> (2) Subsection (1) does not apply if a contrary intention appears in the will.
> (3) A general requirement or condition that a beneficiary survive the testator is not a contrary intention."

[13] Section 33B is referred to as a lapse provision. Its application, however, is modified by s 33N of the Act which is described as an anti-lapse provision:

> "**33N Dispositions not to fail because issue have died before testator**
> (1) This section applies if—
> (a) a testator makes a disposition of property to a person, whether as an individual or as a member of a class, who is issue of the testator (an *original beneficiary*); and
> (b) under the will, the interest of the original beneficiary in the property does not come to an end at or before the original beneficiary's death; and

(c) the disposition is not a disposition of property to the testator's issue, without limitation as to remoteness; and

(d) the original beneficiary does not survive the testator for 30 days.

(2) The issue of the original beneficiary who survive the testator for 30 days take the original beneficiary's share of the property in place of the original beneficiary as if the original beneficiary had died intestate leaving only issue surviving.

(3) Subsection (2) does not apply if—

(a) the original beneficiary did not fulfil a condition imposed on the original beneficiary in the will; or

(b) a contrary intention appears in the will.

(4) A general requirement or condition that issue survive the testator or reach a specified age does not show a contrary intention for subsection (3)(b).

(5) A disposition of property to issue as joint tenants does not, of itself, show a contrary intention for subsection (3)(b)."

[14] The longstanding principles applicable to the construction of a will are referred to in many cases and texts. They were usefully summarised by Isaacs J in *Fell v Fell* (1922) 31 CLR 268, 273-276.

[15] The principles have been supplemented (and modified in some respects) by Division 5 of Part 2 of the Act. The circumstances in which extrinsic evidence may be used to interpret the will are now found in s 33C of the Act:

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

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

(a) meaningless; or

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

(c) ambiguous in the light of surrounding circumstances.

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

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

[16] Atkinson J summarised the effect of s 33C of the Act in *Public Trustee of Queensland v Smith* [2009] 1 Qd R 26 at [24]-[26] that, in addition to the circumstances provided for in s 33C(1) in which extrinsic evidence may be used to interpret the will, s 33C preserved the existing rules governing recourse to extrinsic evidence which are referred to as the armchair principle, the equivocation exception and the equitable presumption rule.

[17] The first step therefore in construing clause 4 of Mrs McPherson's will is to apply the second principle of construction referred to in *Fell* at 273-274 and construe the plain meaning of the words in the context of the will as a whole. The relevant scheme of the will is that there is the gift of the shares in MMN in clause 4 and the remainder of the estate is given under clause 5.

[18] There is no difficulty whatsoever with the plain meaning of the words that have been used in clause 4. Clause 4 of the will contains a straight gift of the shares in MMN to Donald which lapsed, because of Donald's death. There is no gift over in clause 4 itself, but the circumstance of Donald's predeceasing Mrs McPherson may be accommodated by the application of s 33N of the Act. This is where the applicant's submissions differ from those of the first and second respondents.

[19] The applicant submits that the gift of the shares in clause 4 fails and the shares fall into residue, as the anti-lapse provision of s 33N(2) does not apply, if there is a contrary intention in the will. The applicant points to the contrary intention expressed in clause 5 and submits that Mrs McPherson must have intended that also to apply to clause 4, when the will is read as a whole.

[20] It is common ground that the effect of the interpretation given in *Public Trustee of Queensland v Jacob* [2007] 2 Qd R 165 to the gift of the reside to five named children of the deceased qualified by the words "as shall survive me for a period of thirty (30) days that those words and if more than one in equal shares" that those words "if more than one in equal shares" cannot be surplusage and amount to a contrary intention for the purpose of excluding the operation of the then anti-lapse provision of s 33(1) of the Act determines the construction of clause 5 of Mrs McPherson's will. I respectfully adopt the analysis of the authorities undertaken by White J in *Jacob* and apply that decision to conclude that the words that qualify the gift in clause 5 of the will amount to a contrary intention for the purpose of s 33N(3) of the will in relation to the gift of the residue in clause 5.

[21] The applicant therefore submits that Mrs McPherson has shown a general intention by clause 5 of her will not to benefit the issue of either the applicant or Donald and that qualification should not be confined to the gift in clause 5, but extend to the gift in clause 4 of the will.

[22] The first and second respondents contend that it does not follow from the fact that clause 5 expresses a contrary intention for the purpose of s 33N(3) of the Act, it should be determined that clause 4, in the absence of the same qualifying words, should be read as being subject to the same qualifying words. Putting to one side one difference in the approach of the second respondents from the first respondents (on the admissibility of the evidence of Mr Rudz on the construction of clause 4), the first and second respondents submit that there is nothing in clause 4 or the rest of the will that demonstrates a contrary intention pursuant to s 33(N)(3)(b) of the Act. It is submitted that there is a basic difference between the respective gifts in clauses 4 and 5 that explain why the qualifying words to clause 5 could not safely be implied into clause 4: the gift in clause 4 is to one named beneficiary, whereas the gift in clause 5 is to two named beneficiaries.

[23] Reference was made to other cases where qualifying words in one clause were not implied into another clause in the same will where the gift was to the same class of beneficiary.

[24] In construing two clauses of a will, where one provided expressly for a gift in substitution, but the other clause did not, Derrington J observed in *Re the Will of Macaudo* [1993] 2 Qd R 269 at 273:

> "… it cannot be said that because substitution is expressed in respect of one gift it must necessarily be intended to apply to a totally different gift, for it is quite reasonable that a testator may have diverging intentions in respect of the two gifts."

[25] The decision in *Kavanagh v Reardon* [2012] VSC 174 concerned a will where one clause gave the deceased's real property to her son who predeceased her. There were no qualifying words to that clause and the children of the deceased's son claimed they were entitled to the real property on the basis of the application of the Victorian equivalent of s 33(N) of the Act. The residuary clause gave the residue to the deceased's son and daughter and repeated as qualifying words the anti-lapse provision from the Victorian equivalent to s 33(N) of the Act. The deceased son's children were unsuccessful in arguing that there was no contrary intention in the will to displace the operation of the anti-lapse provision in their favour in respect of the real property. Habersberger J found at [31] that the contrary intention was found in the residuary clause which suggested that the deceased had turned her mind to the question of what was to happen to the residue should any of her two children predecease her, but as no such provision was contained in the clause that gave the real property, the principle of *expressio unius exclusion alterius* was applicable.

[26] The respondents describe *Kavanagh* as the obverse factual situation to the will in this proceeding and that it follows that, as clause 5 expresses the contrary intention to displace the anti-lapse provision, there is no the contrary intention in the will applicable to clause 4, in the absence of any qualifying words in clause 4 itself.

[27] *Prima facie* the plain meaning of the words in clause 4 of the will read in conjunction with the anti-lapse provision of s 33N of the Act means that the gift under clause 4 passes to the issue of Donald as he predeceased Mrs McPherson. Having regard to the scheme of the will and reading the will as a whole, there is no warrant for altering the effect of clause 4 by importing into clause 4 the qualifying words from clause 5. They are two separate gifts which the will has dealt with in separate clauses with different words.

[28] As an alternative approach, the second respondents suggested that if there were an ambiguity on the face of the will in relation to the construction of clause 4, then extrinsic evidence would be admissible to construe clause 4 pursuant to s 33C(1)(b) of the will. The threshold requirement of ambiguity is not met, because of the plain meaning of the words in clause 4 which triggers the application of s 33N which gives an effect to clause 4 which is explicable and not contradicted by the balance of the will or the scheme of the will. The evidence of Mr Rudz as to the instructions of Mrs McPherson for her will is therefore not admissible on the construction issue.

[29] It follows that the applicant has failed on the construction that he contends for clause 4 of the will. Subject to one reservation, it appears that the conclusion that I have reached on the construction of clause 4 of the will makes it appropriate to declare that the second respondents are entitled to the gift of shares in clause 4 of the will.

[30] The one reservation that I have is that I have construed clause 4 of the will by reference to the terms of the will, as executed, including the qualifying words of clause 5, where there is an existing cross-application to rectify clause 5 by deleting those qualifying words. It seems prudent therefore to re-visit the question of the construction of clause 4, if the cross-application succeeds.

[31] Applying *Jacob*, clause 5 of the will should be construed in the circumstances of Donald's pre-deceasing Mrs McPherson as giving the applicant the entitlement to the whole of the residue of Mrs McPherson's estate. It is therefore necessary to consider the cross-application for the rectification of clause 5 of the will.

Evidence of Mr Rudz

[32] The evidence of Mr Rudz on Mrs McPherson's instructions in respect of the will is admissible on the application for rectification of clause 5 of the will.

[33] Mr Rudz spent an hour taking instructions from Mrs McPherson on 27 October 1995. Mrs McPherson had been referred to Mr Rudz by one of the first respondents, Mr Noel Smith, who had seen Mr Rudz in 1994 on behalf of Donald in a dispute between Donald and the applicant related to Australian Monofil Co Pty Ltd. After the meeting with Mrs McPherson, Donald and Mr Smith joined Mrs McPherson and Mr Rudz for about 15 minutes to discuss the family business and the associated entities.

[34] Mr Rudz made a diary note of his attendance on Mrs McPherson on 27 October 1995 which recorded:

> "May McPherson 498 Rode Rd Chermside
> Executors: Noel Smith & James Byrne
> Leave my estate to Graham & Don if they predecease then their children
> House
> 2 shares in Geo McPherson Noms
> 2 shares in May McP Nominees."

[35] Mr Rudz recalls that Mrs McPherson said words to the effect that Graham had done "alright for himself" both professionally and financially and she wanted Don to have control of the business and its controlling entities free of any restrictions or interference from Graham.

[36] Mr Rudz recalls putting forward a proposal to Mrs McPherson that might achieve her instructions that she wanted to confer control of the business on Donald which was that she leave her shares in GWM to MMN and her shareholding in MMN to

Donald. Mr Rudz obtained an authority from Mrs McPherson addressed to the applicant for the release of a copy of the May McPherson Family Trust deed.

[37] Mr Rudz also recalls that Mrs McPherson instructed him in relation to the remainder of her estate that it was to be bequeathed to her sons equally, but if either of them predeceased her, to their children. She specifically instructed that her will was to contain no reference to any grandchildren, because she did not want them drawn into the difficulties which existed between the applicant and Donald. Mrs McPherson said words to the effect that she did not want Graham to read the will, as if Don's children were preferred to him.

[38] At the time that Mr Rudz took Mrs McPherson's instructions, he was aware of the anti-lapse provision in s 33 of the Act which then provided:

> "**Statutory substitutional provisions in the event of lapse**
> **33.(1)** Unless a contrary intention appears by the will, where any beneficial disposition of property is made to any issue of the testator (whether as an individual or as a member of a class) for an estate or interest not determinable at or before the death of that issue and that issue is dead at the time of the execution of the will or does not survive the testator for a period of 30 days, the nearest issue of that issue who survive the testator for a period of 30 days shall take in the place of that issue and if more than 1 nearest issue so survive, shall take in equal shares and the more remote issue of that issue who survive the testator for a period of 30 days shall take by representation.
> (2) A general requirement or condition that such issue survive the testator or attain a specified age is not a contrary intention for the purpose of this section.
> (3) This section applies only to wills executed or republished after the commencement of this Act."

[39] Mr Rudz also recalls explaining to Mrs McPherson, in lay terms, how the anti-lapse provision under the Act operated. At that time Mr Rudz understood that the effect of s 33 of the Act was that the anti-lapse provision applied, even if the words that he ultimately used in clause 5 of the will "as shall survive me and if both in equal shares as tenants in common" were included, on the basis that phrase did not express a contrary intention for the purpose of s 33 of the Act. Mr Rudz obtained instructions from Mrs McPherson to proceed in the manner that he suggested which was to let s 33 of the Act speak for itself, so that grandchildren would not be mentioned in the will.

[40] The applicant provided the May McPherson Family Trust deed to Mr Rutz on 31 October 1995. Mr Rudz prepared a diagram which is on the file relating to Mrs McPherson's instructions for her will that sets out the structure of the companies and the trusts associated with the McPherson family business. Although he does not have a separate file note for a further attendance to obtain instructions, it is apparent from the memorandum of fees that was rendered on the file that there was a second attendance on Mrs McPherson to discuss the terms of her will which was the meeting at which Mr Rudz used the flowchart of the business and associated entities for the purpose of explaining how the terms of Mrs McPherson's will gave effect to

her instructions. At this meeting, Mr Rudz recalls that Mrs McPherson provided instructions that confirmed she wanted to leave her shares in GWM to MMN, she wanted to leave her shares in MMN to Don, and she wanted her shares in MMN to pass to Don's children if he predeceased her. She also instructed that Graham and Don were to share in the residue equally, but if either of them did not survive her, the children of the deceased son were to take their father's share.

[41] Following this further meeting, Mr Rudz prepared the final version of the will in the terms that were executed. He intentionally drafted the will without naming substitutionary beneficiaries in clauses 4 and 5, because he believed that s 33 of the Act would operate as an anti-lapse provision, if necessary, in respect of the gifts under each of the clauses. He therefore expressed the opinion in his affidavit filed in this proceeding that clause 5 was "drafted precisely" in accordance with Mrs McPherson's instructions.

[42] Mr Rudz attended on Mrs McPherson on 10 November 1995 at the Westpac District Commercial Centre at Kedron for the purpose of having her sign the will. Mr Rudz made a diary note of the attendance. He asked her whether the deed constituting her family trust had been amended and Mrs McPherson responded that she was "quite certain" it had not been amended. The diary note records that Mrs McPherson read through her will aloud in Mr Rudz' presence and was happy with the contents. Mr Rudz cannot recall whether he discussed again the effect of the anti-lapse provision in benefiting the children of any son who predeceased her.

[43] Not surprisingly, there was no challenge to Mr Rudz' evidence which was consistent with contemporaneous diary notes and credible. His evidence allows the conclusion that, in relation to the gift to Donald under clause 5 of the will, Mrs McPherson intended to benefit the second respondents, if Donald predeceased her. The explanation for the terms of the will not dealing expressly with that gift over to Donald's children on Donald's death (if he predeceased Mrs McPherson), is that Mrs McPherson accepted and acted on Mr Rudz' advice as to his understanding of the effect of s 33 of the Act in the terms as it then stood when she gave her instructions and when she signed her will.

Rectification of the will

[44] Before statutory reform, there was very limited jurisdiction to rectify a will by deleting provisions which could be shown to have been made by mistake, as explained in *Re Allen* [1988] 1 Qd R 1, 3. The first reform in Queensland was the insertion in the Act, as enacted in 1981, of s 31. Section 31(1) provided:

> "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."

[45] The limited reform achieved by s 31(1) of the Act was referred to in *Allen* at 3 and *Re Hess* [1992] 1 Qd R 176, 186 and 191.

[46] Section 31 of the Act was replaced by s 33 which was introduced by the *Succession Amendment Act* 2006:

> "**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."

[47] According to its terms, it is a much broader rectification power, than had previously existed. The *Succession Amendment Act* 2006 implemented recommendations of the National Committee for Uniform Succession Laws regarding the law of wills (QLRC MP29) as modified by the departures from the model legislation recommended by the Queensland Law Reform Commission which are found in QLRC Report 52. These reports confirm that the intention of the reform that is reflected by the words of s 33(1) of the Act was to confer a broader rectification power than had previously in Queensland, although it remains a power that is subject to the limits prescribed by s 33(1) of the Act. The authorities on the rectification power that was displaced by s 33 of the Act must be viewed in the light of the broader rectification power that is now conferred by s 33 of the Act. This was noted by Atkinson J in *Smith* at [46].

[48] In this proceeding, before the court may exercise the power conferred by s 33(1) of the Act, as it is not a case of clerical error, the court must be satisfied:

> (a) that the will does not carry out Mrs McPherson's intentions; and
> (b) the reason that the will does not carry out her intentions is because the terms of the will do not give effect to her instructions.

[49] The applicant relies on the summary of principles applicable to the exercise of the power to rectify a will set out by Philippides J in *Palethorpe v Public Trustee of Queensland* [2011] QSC 335 at [22], and in particular that the inquiry which is relevant is ascertaining the testator's intention as to whether the words should or should not appear in the will, relying on *Hinds v Collins* [2006] 1 Qd R 514, 516. The applicant contends that, even if the court were satisfied on the basis of Mr Rudz' evidence that Mrs McPherson may have believed that clause 5 of the will operated in a way that enabled the anti-lapse provision to apply, that is not a circumstance which enables the court to rectify the will, as Mrs McPherson approved the words in her will which included all the words that are in clause 5 and clause 5 therefore gave effect to her instructions.

[50] The second respondents submit that they are able to discharge the heavy burden (as described in *Hinds* at 216) of showing that there is clear and convincing proof of Mrs McPherson's actual intention which was not reflected by the terms of clause 5 of the will, as executed. They submit that what is required of the court by s 33(1) of the Act is to ascertain Mrs McPherson's instructions in order to make findings about her intentions, construe the will as executed and compare its effect with those instructions: *Vescio v Bannister* [2010] NSWSC 1274 at [14]. They therefore submit that the summary of principles in *Palethorpe,* to the extent they do not reflect the wording of s 33(1) of the Act, should not be applied.

[51] The approach required by s 33(1) of the Act in considering whether there is power to rectify the will is different to that which applied prior to the enactment of s 33(1) in the form in which it currently stands. The applicant's submissions have failed to embrace that difference, whereas the second respondents' submissions do reflect the requirements of s 33(1).

[52] On the basis of Mr Rudz' evidence, I am satisfied that the second respondents have discharged the burden of showing that Mrs McPherson's instructions for clause 5 of the will were that, if a son predeceased her, she wanted that son's issue to take the son's share, and that clause 5 does not carry out Mrs McPherson's intentions, because clause 5 does not give effect to her instructions. Even though the words used in clause 5 of the will were approved literally by Mrs McPherson when she signed the will, it was on the basis of the advice given to her by Mr Rudz as to the application of the anti-lapse provision which advice proved to be mistaken. At that time Mrs McPherson believed clause 5 would implement her instructions to benefit the issue of any son who predeceased her. The fact that clause 5 of the will was drafted in that manner as a result of Mr Rudz' advice that was proved incorrect is not a reason to refuse rectification of the will. It is therefore appropriate to exercise the power conferred by s 33(1) of the Act to rectify clause 5 of the will, so that it carries out Mrs McPherson's intentions.

[53] Although the cross-application seeks only the deletion of the words at the end of clause 5 "as shall survive me and if more than one in equal shares as tenants in common," the second respondents also seek to delete the words "such of" in clause 5 on the same ground as the deletion of the other words is sought. The applicant did not oppose deletion of "such of", if the court were satisfied that clause 5 of the will should otherwise be rectified by deleting the qualifying words at the end of clause 5.

[54] I am also satisfied that the deletion of the words in clause 5 by way of rectification of the will does not alter the conclusion that I had otherwise reached on the construction of clause 4 of the will, and reinforces it.

Orders

[55] In view of the fact that the making of the application to rectify the will was responsive to the applicant's application seeking construction of clause 5 of the will, and the distribution of the estate has not been completed, it is appropriate pursuant to s 33(3) of the Act to extend the time for the making of the application for rectification to the date the cross-application was filed on 15 October 2012.

[56] As the cross-application has succeeded, it is not necessary to make the declaration as to the proper construction of clause 5 of the will, before rectification.

[57] It follows that the orders which should be made are:

1. It is declared that upon the proper construction of the will of the late May McPherson dated 10 November 1995 (the will), the second respondents are entitled to the gift of shares in clause 4 of the will.
2. The time for making the application to rectify the will is extended to 15 October 2012.
3. Pursuant to s 33(1) of the *Succession Act* 1981, clause 5 of the will is rectified by deleting the words “such of” and the words “as shall survive me and if more than one in equal shares as tenants in common”.

[58] I will hear the parties on the question of costs. I will also hear the parties on whether the court should make an order pursuant to s 33(4) of the Act that a certified copy of the order rectifying the will should be attached to the will. Attaching a certified copy of an order rectifying a will to the will itself is of much greater significance when the rectification is ordered before any application for a grant of probate or administration is made in respect of the will. In this matter there is already a grant of probate and all parties affected by the order for rectification of clause 5 of the will are parties to this proceeding. Subject to any submissions that the parties wish to make, I am inclined to consider that all that is necessary is to direct the first respondents to file a copy of the sealed order made in this proceeding on the file in which the grant of probate was made which was BS1870 of 2010.