SUPREME COURT OF QUEENSLAND

CITATION:	*In the Will of Thomas Henry Finch (dec'd)* [2018] QSC 16
PARTIES:	**In the Will of THOMAS HENRY FINCH (dec'd)**
FILE NO/S:	BS No 10273 of 2014
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 February 2018
DELIVERED AT:	Brisbane
HEARING DATE:	16 November 2017
JUDGE:	Lyons SJA
ORDERS:	**Orders:** **1. Pursuant to Section 33(3) *Succession Act 1981*, the time for the making of an application for an order to rectify the Will of Thomas Henry Finch, deceased dated 29 October 2012 is extended to allow this Application to be heard.** **2. Pursuant to Section 33(1) *Succession Act 1981*, clause 4(a) of the Will of the said deceased dated 29 October 2012 is rectified by deleting therefrom the words "Any real property owned by me at the date of my death" and inserting in lieu the words "My house".** **3. Pursuant to Section 33(4) *Succession Act 1981*, a certified copy of this Order be attached to the Letters of Administration with the Will of the said deceased granted to the Administrator on 11 May 2017.** **4. The Court declares that , upon the proper construction of the Will of the said deceased, as rectified by this Order, the deceased's relocatable home at 21 Regency Street, Gold Crest Manors, 17 Pappas Way West, Nerang passes under the gift in clause 4(a) of the Will.** **5. I will hear the parties as to costs.**
CATCHWORDS:	SUCCESSION – application for extension of time for rectification – where the deceased died over three and a half years ago – whether it is just and proper for the court to

exercise its statutory discretion to extend time – whether the application is necessary to resolve the distribution of the estate

SUCCESSION – MAKING OF A WILL – STATUTORY POWER OF RECTIFICATION – where the deceased owned a relocatable home – where the deceased owned no real property – where the Will referred to 'real property' - whether the Will as executed carries out the intentions of the deceased

SUCCESSION – MAKING OF A WILL – construction of a will– where the deceased owned a relocatable home – where the deceased owned no real property – where the Will referred to 'real property' - whether upon the proper construction of the Will the relocatable home passes under the gift in clause 4(a) of the Will

Succession Act 1981 (Qld) s 33, s 33C, s 33I

Bird v Bird [2002] QSC 202

Dore (as executor of the will of W H B Chenhall dec'd) [2006] QCA 494

Fell v Fell (1922) 31 CLR 268

McBride v Hudson (1962) 107 CLR 604

Palethorpe v The Public Trustee of Queensland & Ors [2011] QSC 335

Perrin and Others v Morgan and Others [1943] AC 399

The Public Trustee of Queensland v Smith [2009] 1 Qd R 26

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

Haines, *Construction of Wills in Australia* (2007)

Preece, *Lee's Manual of Queensland Succession Law*, 7th ed (2013)

COUNSEL: R T Whiteford for the applicant
D J Morgan for Joy Maree Bazley
L J Nevison for Gregory Peter Finch, beneficiary

SOLICITORS: McCullough Robertson for the applicant
Donovan Knapp Lawyers for the respondent

Wonderley & Hall Solicitors for interested party Gregory Peter Finch, beneficiary

This application

[1] Thomas Henry Finch died on 1 May 2014 and his last Will is dated 29 October 2012. Probate of the Will was granted to the executors Gregory Peter Finch, Joy Maree Bazley and Michelle Kay Jeffress on 3 December 2014.

[2] Disputes arose between the executors including different views about the construction of Clause 4(a) of the deceased's Will, and in particular whether the clause should be rectified. Consequently on 20 April 2017 Ms Bazley brought an application for the appointment of an independent administrator.[1] In an affidavit in support of that application, Ms Bazley also indicated her intention to bring an application for rectification of Clause 4(a)[2] which left real property to her in circumstances where the deceased owned a relocatable home but was not the registered proprietor of any freehold property at the time of his death or at the time when he gave instructions for his Will.

[3] By consent orders made on 3 May 2017, Dalton J revoked the Grant of Probate, removed the executors appointed under the Will and appointed Mr Timothy Whitney as administrator of the estate.[3] Letters of Administration were granted on 11 May 2017.[4]

[4] Mr Whitney as administrator seeks the following orders pursuant to an application filed on 5 October 2017;

(i) Pursuant to s 33(3) of the *Succession Act* 1981 (Qld) ('the Act') an order that Court extend time for making an application for rectification of the Will dated 29 October 2012;

(ii) Pursuant to s 33(1) of the Act the Court rectify clause 4(a) of the Will dated 29 October 2012 by deleting the words "Any real property owned by me at the date of my death" and inserting in lieu the words "My house";

(iii) Pursuant to s33(4) of the Act an order that the Court direct that a certified copy of the Will as rectified be attached to Letters of Administration with the Will granted to the Administrator on 11 May 2017;

(iv) A declaration that on the proper construction of the Will dated 29 October as rectified, the deceased's relocatable home passed under the gift in clause 4(a) of the Will dated 29 October 2012;

(v) Alternatively declarations as to whether by reason of s 33I of the Act the deceased's interest in the sublease of a unit in Toowoomba and the exit entitlement payable under clause 19.2 of the sublease passed under the gift in clause 4(a).

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1 Court Document 5.
2 Court Document 6.
3 Court Document 16.
4 Court Document 20.

[5] As already noted at the time of his death the deceased owned no real property and the major assets of the estate consist of a relocatable home and an exit entitlement payable under the sublease of a unit he resided in at a retirement village/nursing home in Toowoomba. The issue therefore is whether the Will should be rectified so that relocatable home passes to Ms Bazley under clause 4(a) and if not rectified, whether the exit entitlement was "real property" under that clause.

[6] As there are a number of other claims against the estate, the current application is necessary to clarify whether the Will should be rectified (and construed) in the way sought by Ms Bazley. The outcome of this application will determine how the estate is to be ultimately distributed.

[7] I note that there is an underage beneficiary named in Clause 5 of the Will and that a litigation guardian has not been appointed. However, the child's mother has been served and I was satisfied that arguments for or against the interests of the child beneficiary would be fully canvased by counsel at the hearing of this matter. I was therefore satisfied that it was in the interests of the child beneficiary for the matter to proceed without the appointment of a litigation guardian, taking into account the cost of appointing a litigation guardian and the overall amount involved in the estate. I indicated at the outset that I was satisfied the matter should proceed without the appointment of a litigation guardian and all counsel endorsed that approach.

Background

[8] Whilst the deceased did not own any real property at the time of his death in about 2007 he and his wife Thelma purchased a relocatable home for approximately $411,593.84 (**the relocatable home**) which was located in a street at an estate called Golden Crest Manors at Nerang on the Gold Coast. Thelma died on 26 October 2011 but he continued to live in that relocatable home until 2013 when he moved into a retirement village/nursing home unit which he leased up to his death in May 2014.

[9] The total value of deceased's estate at the time of his death was in the order of $666,000 and is made up of two significant assets: the relocatable home, and an exit entitlement worth $203,078 payable to the estate under the retirement village unit lease (**the exit entitlement**).

[10] All of the assets of the estate have been converted to cash which is held on term deposit. Apart from the specific gifts referred to in the Will no distributions have been made to the beneficiaries.

The Wills

The 2011 Will

[11] On 15 December 2011 the deceased gave instructions to then trainee solicitor Paul Stockley[5] for a new Will. The deceased gave Mr Stockley a copy of an earlier Will made

[5] Court Document 24.

at a different firm on which there were handwritten notes of the changes he wanted to make and Mr Stockley used that as instructions to him for his new Will. One of the handwritten amendments read:

> "(3) HOUSE – JOY MAREE BAZLEY".[6]

[12] Mr Stockley prepared the new Will based on those instructions, which was executed on 19 December 2011.[7] Relevantly the Will did not leave the deceased's 'house' to Ms Bazley but rather stated:

> "I give the following:
>
> (a) Any real property owned by me at the date of my death to my Daughter JOY MAREE BAZLEY…"

[13] In his affidavit sworn 18 October 2017,[8] Mr Stockley deposed that he did not know why the 2011 Will was drafted to read "real property" rather than "house", but noted that it had always been his practice to tell clients wanting to leave specific gifts in their Will that "the gift will fail if they don't own that asset when they die". Mr Stockley goes on:

> "I may have advised [the deceased] that the clause should be more generally worded than "my house" to guard against the gift failing by sale of one residence and to the purchase of another."

[14] At the time the 2011 Will was made the deceased was residing at the relocatable home at Nerang and did not have any other address. In his affidavit Mr Stockley also refers to the fact that he called on Mr Finch at his home in the estate at Nerang more than once.

The Last Will of 29 October 2012

[15] In October 2012 the deceased again instructed Mr Stockley to make a new Will. A new Will was executed on 29 October 2012 which altered the residuary beneficiaries of the 2011 Will. No other changes were made.[9] At the time the 2012 Will was made he was residing at the relocatable home at Nerang and did not have any other address.

[16] By this last Will dated 29 October 2012, the deceased appointed two of his children (Gregory Finch and Joy Bazley) and a grandchild (Michelle Jeffress) as his executors. Probate was granted to them on 3 December 2014.

[17] Relevantly, the deceased's last Will provided:

> "4. I give the following:
>
> (a) Any real property owned by me at the time of my death to my Daughter JOY MAREE BAZLEY;
>
> (b) Any car owned by me at the time of my death to MICHELLE KAY JEFFRESS;

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6 Court Document 24: Exhibit "PS-2".
7 Court Document 24: Exhibit "PS-5".
8 Court Document 24.
9 Court Document 24: Exhibit "PS-6".

(c) My massage chair to KEVIN ZISKIE;

(d) Any jewellery owned by me at the time of my death to THELMA BLUTCHER and SHIRLEY GAGE.

5. My Trustees shall hold the rest and remainder of my Estate on trust to be divided equally between ANDREW PETER FINCH, MICHELLE KAY JEFFRESS, KATIE LOUISE FINCH, JAMIE STUART FINCH, BRADLEY SCOTT BAZLEY, MATTHEW ROSS BAZLEY, STUART JAMES FINCH, JORDAN ALEX JEFFRESS and GREGORY PETER FINCH as tenants in common in equal shares to be given to them upon their attaining the age of 18."

Issues

[18] There are essentially four raised by the application;

1. Whether the application for an extension of time for the making of the application for rectification pursuant to s 33(3) of the Act should be granted;

2. Whether the application pursuant to s 33(1) of the Act in relation to the rectification of the Will should be granted in the terms sought;

3. If the application for rectification is granted in the terms sought, whether the construction of clause 4(a) means the relocatable home and/or exit entitlement passes to Ms Bazley pursuant to clause 4(a);

4. If the application for rectification of clause 4(a) is not successful in the terms sought, whether pursuant to s33I of the Act the sublease and the Exit Entitlement payable under the sublease passes to Ms Bazley under the gift in clause 4(a).

[19] I will deal with each issue separately but it is convenient at this point to consider the relevant legislation.

Relevant law

[20] The starting point in relation to an application for rectification is of course is s 33 of the *Succession Act 1981* (Qld) which makes it clear that a condition precedent to the exercise of the power in the section is that the Will does not carry out the deceased's intentions. This can only be based on one of two grounds namely; that there is a clerical error or that the Will does not give effect to the deceased's instructions. Section 33 reads as follows:

"33 Court may rectify a will

(1) The court may make an order to rectify a will to carry out the intentions of the deceased if the court is satisfied that the will does not carry out the deceased's intentions because—

(a) a clerical error was made; or

(b) the will does not give effect to the deceased'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 deceased.

> (3) However, the court may, at any time, extend the time for making an application under *subsection (2)* if—
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> (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."

Issue 1: Extension of time pursuant to s 33(3) of the Act

[21] Section 33(2) of the Act requires that an application for rectification should be made within six months of the date of death of the deceased but the Court may extend time if it considers it appropriate. Whilst the current administrator has brought the application expeditiously given his recent appointment the deceased died over three and a half years ago. Counsel for Mr Gregory Finch argues that this is not an appropriate case within which to extend time because Ms Bazley was one of the original executors appointed by the Will and she joined in propounding the original Will.

[22] It is argued that Ms Bazley is the only person to benefit from the application and it is to the detriment of the other beneficiaries. Counsel further argues that Ms Bazley had legal advice at the time and understood her right to bring an application. Despite such advice and her intimation that she would bring an application she did not do so and has not sworn an affidavit explaining her delay. It is also argued that there has been prejudice to all the beneficiaries because of the delay and the beneficiaries have been locked out of their inheritance and costs have been incurred. In this regard Counsel relies on the statements in *Bird v Bird*[10] by White J that time limits in statutes are there for a good reason and that they are substantive provisions laid down in the Act itself and that "The burden on the applicant is thus, I think, no triviality: the applicant must make out a substantial case for it being just and proper for the court to exercise its statutory discretion to exten[d] the time".

[23] In the circumstances of this case it would seem clear from the affidavit material that the estate is not large and that as Counsel for Ms Bazley points out "the estate is tied up with every possible dilemma" because apart from the construction problem there were also three possible family provision applications as well as a claim against the estate in relation to a debt. It would also seem that there were attempts to resolve the impasse without resort to litigation in the Courts. There was clearly a difference of opinion amongst the executors and it would seem a difference of opinion as to the need to bring an application for construction and/or rectification as that is one of the very issues which prompted the need for the appointment of the independent administrator.

[24] There is no evidence before me of any actual prejudice to any particular person. The estate has not been administered but rather has been converted to cash and it would seem appropriately invested. As Counsel for the administrator points out there is no evidence that anyone altered their position believing they had received something under the Will.

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[10] [2002] QSC 202 at [22].

As Atkinson J noted in *The Public Trustee of Queensland v Smith*[11] the time limit in s 33 is "accompanied by a relatively liberal capacity in the court to extend time whenever appropriate so long as the final distribution has not been made."

[25] I am satisfied that the application is clearly required and is necessary to resolve the issue about the appropriate interpretation of clause 4(a) of the Will. The dispute clearly involves the administration of the estate and the administrator had no option but to bring the application. As White J also acknowledged in *Bird v Bird*[12] it is well known that "there can be delays of many years and yet an extension of time has been granted" and that a particularly relevant factor being the "likelihood of the success of the application." Given the clear evidence that the deceased wished to leave his 'house' to Ms Bazley I consider that the application for rectification in the terms proposed by the administrator is indeed arguable and may well succeed.

[26] Accordingly the time for making an application for an Order to rectify the Will of Thomas Henry Finch (deceased) is extended to allow the Application filed on 5 October 2017 to be heard.

[27] In addition to the application for rectification there is also an application for construction of the Will. In this regard it is necessary to consider the provisions of s 33C of the Act as follows;

> **"33C Use of evidence to interpret a will**
>
> (1) In a proceeding to interpret a will, evidence, including evidence of the deceased'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 deceased'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."

The admissibility of Ms Bazley's affidavit

[28] At the hearing an issue arose as to the admissibility of the entire affidavit sworn by Ms Bazely on 10 November 2017,[13] which Counsel for Ms Bazley sought to rely on in support of the application for rectification and the application for construction of Clause 4(a) of the Will. Whilst the entire affidavit is objected to by Counsel for Mr Gregory

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11 [2009] 1 Qd R 26 at [42].
12 [2002] QSC 202 at [24].
13 Court Document 25.

Finch, who is one of the original executors appointed under the Will, the essence of the objection relates to paragraphs 8 – 16 of that affidavit and specifically relates to the rectification application. In this regard Counsel argues that the law prior to the 2006 amendments in relation to rectification is set out in the decision of *Terence John McCorley and David John Lewis (as executors of the Will of Vera Rachel Pakleppa deceased) v Norman Pakleppa & Ors*[14] where Fryberg J referred to the relevant principles and stated that where it is established that a deceased has read the will the presumption that the deceased knew and approved the contents of the will is a very strong one and can only be rebutted by the clearest evidence. Counsel argued that decision stated that the best evidence in support of an application for rectification is confined to the actual instructions given to the deceased's solicitor and held that "It is not appropriate for a court to entertain general evidence of the deceased's actual intentions at earlier stages or subsequently to the completion of the will."[15]

[29] Accordingly Counsel argues therefore that the post-testamentary intention of the deceased and the subsequent expression of his desire that Ms Bazley should inherit the relocatable home are not admissible. The paragraphs in contention were objected to on the basis of relevance. In particular it is argued that in relation to the rectification application they are merely the opinion of Ms Bazley as to the intention of the deceased, and have "nothing to do with the instructions provided by the Deceased for his Will"[16] as required by s 33(1)(b) of the Act.

[30] As I understand the oral argument for Counsel for Gregory Finch it is submitted that whilst significant changes were brought in by the 2006 amendments to the Act, the use of extrinsic evidence relates to the construction of the Will and is constrained by the requirements of s 33C of the Act. In this regard it is argued that the extrinsic evidence sought to be relied upon does not conform with those requirements because evidence as to the deceased's intention as set out in Ms Bazley's affidavit has nothing to do with the construction application and cannot therefore be used. It is argued that whilst extrinsic evidence can be used as an aid to construction that relates to issues with respect to the construction of the Will. It is argued this is what s33C is aimed at given that the section is headed "Use of evidence to interpret a will" and is contained in a separate division of the *Succession Act* which relates to the interpretation of wills.

[31] Counsel further argues that even if extrinsic evidence pursuant to s 33C was able to be called in aid of the rectification argument then s 33C(1)(c) provides that the Court can receive the evidence of a deceased's intention where the language of the Will is ambiguous in light of surrounding circumstances however that ability is heavily conditioned by the requirements of s 33C(2) of the Act. This provides that evidence of a deceased's intention is not admissible to establish any of the circumstances mentioned in subsection 33C(1)(c). In the present case Counsel argues that the paragraphs are relied upon to support an argument by Counsel for Ms Bazley that they are evidence of the deceased's intention which go to an ambiguity in the language of the Will. In this regard Counsel for Gregory Finch argued that he supported the submissions of counsel for the applicant administrator, that there is no ambiguity in the language of the Will.[17]

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[14] [2005] QSC 83.

[15] *Terence John McCorley and David John Lewis (as executors of the Will of Vera Rachel Pakleppa deceased) v Norman Pakleppa & Ors* [2005] QSC 83 at [6].

[16] Outline of Submissions filed on behalf of Gregory Finch on 16 November 2017 at [10].

[17] T1-16: 35-38.

[32] I need therefore to turn to the contentious paragraphs of Ms Bazley's affidavit which are as follows,

> "**Nerang Property**
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> 8. In or about 2007 Dad and Thelma purchased a home to live in situated at 21 Regency Street, Golden Crest Manors, 17 Pappas way West, Nerang (**the Nerang Property**).
>
> 9. After Dad died, I was informed that the Nerang Property was a relocatable home. I was not aware of this before Dad died. [Note: at paragraph 14 below I refer to circumstances in which I was provided with documents for a transfer of an interest in the Nerang Property to me. The paperwork refers to the home being a 'Manufactured Home'. Until explained to me after Dad died, I did not know that another name for a manufactured home was a relocatable home.]
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> 10. I was surprised to learn that the Nerang Property was a relocatable home because it was unlike any relocatable home I had seen before. I have always thought relocatable homes to typically be basic, small, demountable/cabin-style homes in caravan park-type precincts. The Nerang Property did not fit this typical style of a relocatable home. Some of the features of the Nerang Property included:
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> a. the home was part of the Golden Crest Manor complex which was advertised as an over 50's gated-community with resort lifestyle;
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> b. the size of the residence was quite large, at approximately 163 square metres (under roof);
>
> c. it contained 2 bedrooms, 2 bathrooms, separate laundry, double lock up garage and under-roof wrap around verandah.
>
> 11. There are a number of different styles of homes within the Golden Crest Manors complex. The Nerang Property was known as a 'Buckingham' style home. On 9 November 2017, Mr Wade McKinnon, who I believe to be employed by Golden Crest Manor, provided me with:
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> a. the floor plans of the 'Buckingham' style home (although, I recall that Dad varied the house design for the Nerang Property to provide for a single wrap around deck/verandah); and
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> b. a sales brochure prepared by Golden Crest Manor in about 2015 to market the Nerang Property for sale.
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> Indexed and marked **Exhibit JB-1** to this Affidavit is a true copy of the floor plan and sales brochure given to me by Mr McKinnon on 9 November 2017. I recognise the pictures in the sales brochure as the Nerang Property.
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> 12. On a number of occasions after Thelma's death, Dad asked me to move in with him into the Nerang home. I declined Dad's offer, telling him that I enjoyed living in Brisbane and had a job and a number of friends who lived close to my home.

13. After Thelma died, Dad said to me, on a number of occasions, in words to the effect, "*Joy, I want you to have a home of your own. Your brothers Greg and Stuart both have their own homes. I understand you want to live in Brisbane. That is fine by me, but I want you to have my Nerang home when I die. You don't have to live here. You can sell it and use the money to buy your own place in Brisbane.*"

14. On or before about 14 November 2011 Dad said to me, in words to the effect, "*I've spoken to Golden Crest Manors* [i.e. the manager of the Nerang retirement village in which the Nerang Property was located] *and I have had them draw up papers so that your name can be put on the title.*" I received an undated letter from Golden Crest Manors in about November 2011 informing me that my brother Gregory Finch and Dad had asked for transfer documents to be prepared to transfer a half share of the Nerang Property to me. Indexed and marked **Exhibit JB-2** to this Affidavit is a true copy of the letter from Golden Crest Manors.

15. I recall that Dad and I signed the transfer papers for the Nerang Property that had been provided to me with the letter from Golden Crest Manors. Not long after that, I said to Dad, in words to the effect, "*Thanks Dad. I really do appreciate you wanting to give me the Nerang home, but I need to be careful that putting my name on the title doesn't affect my Centrelink payments*".

Indexed and marked **Exhibit JB-3** to this affidavit is a true copy of the transfer papers signed by Dad and I. test

16. On one or two other occasions, Dad informed me in words to the effect, "*Joy, I've changed my will to make sure you get my Nerang property when I die.*" I never saw the will he referred to."

[33] For the purpose of this ruling it is necessary to remember that different rules apply in relation to the admissibility of evidence with respect to the application for rectification and the application for construction. This is due to historical factors and the fact that a court considering the construction of a will was generally restricted to considering the contents of the will in order to ascertain the intention of the deceased whereas the court sitting in its probate jurisdiction investigates the intention of a deceased particularly in relation to testamentary capacity and may consider evidence of a deceased's intention as part of that function. The history is conveniently summarised by AA Preece in *Lee's Manual of Queensland Succession Law:*[18]

> **"Judicial separation of the construction function from the probate function:** The jurisdiction of the court exercising its interpretative function has an entirely different history from the jurisdiction of the court exercising its probate function. Those two jurisdictions are now merged in the Queensland Supreme Court. In early medieval times they were both the preserve of the ecclesiastical courts. Later, however, for many centuries it was the Court of Chancery which performed the interpretative function, and the ecclesiastical courts the probate function. Those centuries of separate jurisdiction and function gave rise to marked differences of judicial attitude. In particular the probate court developed a more rigid approach towards matters of form than the Court of Chancery and a less rigid approach to the admissibility of extrinsic evidence."

[18] Preece, *Lee's Manual of Queensland Succession Law*, 7th ed (2013) p 353. Citations removed.

[34] Accordingly, whilst extrinsic evidence could be relied upon in rectification applications, a more rigid approach applied in relation to construction applications. A construction court was not concerned with extrinsic evidence of intentions except if it came within one of the exceptions at common law. As Preece noted "Until 2006, no significant attempt had been made to codify the general rules of construction of wills".[19] In 2006 a new s 33C was inserted in the *Succession Act* which set out some general rules but as Preece noted the new provisions were not meant to detract from any existing means of interpretation, noting that the section;

> "….relates only to the admission of extrinsic evidence, including direct evidence of the intention of the deceased, something that has traditionally been very restricted, and makes it clear that this section is not intended to subtract from any existing means of interpretation. Furthermore it adds comparatively little in the way of new means of interpretation. Admission of direct evidence under para (1)(b) is already permitted under the principle of *equivocation* or *latent ambiguity*. Admission of direct evidence under para (1)(c) is already permitted under the *armchair rule*, or a combination of it and the preceding rule. Para (1)(a) appears to break new ground. However, subs (3) ensures that the 'floodgates' remain firmly closed to the application of extrinsic evidence to contradict the words of the will."[20]

[35] However as Preece makes clear, "the Court of Construction may always admit evidence of persons, things or circumstances affected by the provisions of the will".[21] As David Haines QC points out in his text *Construction of Wills in Australia*[22] evidence of circumstances surrounding the will is always admissible and added;

> "It seems that there is confusion as to whether the Armchair Rule applies only to circumstances where there is an ambiguity in a will. This is not so. It may be used both in circumstances where the will is clear as to the intentions of the deceased or there is an ambiguity in a will. Evidence permitted under this rule is always admissible to explain what the deceased has written and show the meaning of his or her words and this evidence is 'totally distinct from evidence sought to be applied to prove the deceased's intention as an independent fact' in cases of ambiguity."

[36] Having considered Ms Bazley's affidavit I consider that paragraphs one to seven are of only marginal relevance but nonetheless are admissible as are the more contentious sections of the affidavit in paragraphs eight to sixteen. It would seem to me that the affidavit is admissible in both the application for rectification and the application for construction on the basis of the armchair principle. That principle permits the court to sit in the armchair of the deceased and take account of his or her family, property, friends and acquaintances in order to determine what was meant by the words in the Will. In this regard it has been consistently held that evidence is necessarily admissible to show facts and circumstances corresponding as far as possible with those referred to in the Will in order to show that the persons and property actually existed. As Lord Atkin said in *Perrin and Others v Morgan and Others*[23] "No will can be analysed *in vacuo*. There are material surroundings such as I have suggested in every case, and they have to be taken into account. The sole object is, of course, to ascertain from the will the deceased's intention".

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19 Preece, *Lee's Manual of Queensland Succession Law*, 7th ed (2013) p 355.
20 Preece, *Lee's Manual of Queensland Succession Law*, 7th ed (2013) p 355. Citations removed.
21 Preece, *Lee's Manual of Queensland Succession Law*, 7th ed (2013) p 364.
22 Haines, *Construction of Wills in Australia* (2007) p 64.
23 [1943] AC 399 as referred to by Brown AJ in *Re Shaw* [1955] St R Qd 284 at 289.

[37] In my view the evidence contained in paragraphs 8-16 is relevant and can be relied upon in the application for rectification in relation to the argument as to whether the applicant has overcome the presumption that the deceased knew and approved the contents of his Will. In relation to the construction application there can be no doubt that the provisions of s 33 and s 33C added to the principles that then existed as to the admissibility of evidence but that the "armchair rule" referred to above has not been altered. In this regard I agree with Counsel for Ms Bazley that the statement of principle is as set out in David Haines text as follows;[24]

> "5.4 Evidence which enables a court, when construing a will, to place itself in the position of a deceased has always been admissible. The court may consider all material facts and circumstances known to the deceased 'with reference to which he [or she] is to be taken to have used the words in the will.' **Any evidence which explains what a deceased has written is admissible as it may clarify the meaning of his or her words. This is so because the words used in a will by a deceased may not be appreciated nor the deceased's intention as expressed by those words ascertained without the court having some knowledge of his or her property, family members or persons and charities which he or she would be expected to benefit**. Particulars of friends if they are concerned with a disposition are also admissible. Evidence of a deceased's matrimonial and litigious history with his or her spouse are admissible as it will inform the court of the matrimonial situation as it was known to the deceased. Having conducted such an inquiry, the court must state that which is the intention expressed by the deceased's words and with reference to his or her circumstances and not the intentions as expressed by the words in the abstract.
>
> 5.5 Evidence of surrounding circumstances is a form of extrinsic evidence which a court will always admit; it relates to the circumstances of a deceased at the date of the will but not to his or her dispositive intentions. There seems to be controversy as to whether a court should read a will first and then consider the circumstances surrounding the deceased in coming to a construction of the document. Accord between English and Canadian authorities is far from clear on this point. Some guidance about the appropriate procedure can be gleaned from authoritative Canadian decisions. In *Haidl v Sacher*, the Saskatchewan Court of Appeal considered this point in light of the House of Lords' decision of *Higgins v Dawson* and declined to follow it. The House of Lords had held that a court must consider the words of the will before it considers circumstances surrounding the deceased. Reference was made by the Saskatchewan Court of Appeal to the decision of the Supreme Court of Canada in *Marks v Marks* where Idington J said that the deceased's circumstances should be considered by the court before it considers the ordinary meaning of the words to be applied in light of those circumstances. That approach was adopted in *Haidl v Sacher* and followed by the Court of Appeal of Nova Scotia subsequently in *Re Estate of Murray.* It is submitted that both approaches are correct. *It matters not which fact is presented to the court first as long as the will is read and the court has knowledge of the surrounding circumstances and that it considers both matters together. Evidence of the deceased's circumstances should be put before the court in the form of affidavits in all matters involving the construction of a will."* (my emphasis)

[24] Citations removed.

[38] I also accept the force of the submissions by Counsel for the applicant and Counsel for Ms Bazley that the affidavit is admissible. As Counsel for the applicant administrator helpfully put it, the issue I first must determine in relation to the rectification application is to identify the instructions and intentions of the deceased. I must then determine the effect of the Will and compare the two and ascertain whether the Will gives effect to the instructions or intentions. I accept therefore that the affidavit of Ms Bazley contains evidence which I can take into account in determining those issues. In particular it is relevant to the issue as to whether I should draw an inference that the deceased wanted specifically to give Ms Bazley the relocatable home and not real property. In my view the affidavit specifically refers to the surrounding circumstances of the deceased at the date of the Will. In *Palethorpe v The Public Trustee of Queensland & Ors*[25] Philippides J examined the requirements of s 33 of the Queensland Act and referred to identical provisions in New South Wales and Victoria as follows;

> "[18] In *Vescio v Bannister* [2010] NSWSC 1274, Barrett J explained at [12]-[15] the need, in context of the identical New South Wales provision, for the court to be satisfied that the will, as properly construed, does not carry out the deceased's intentions:
>
> > "Implicit in [the section] is an assumption that the deceased gave 'instructions' as to the content of the will. 'Instructions' are, of their nature, communicated by one person to another with a view to compliance or obedience by that person …
> > Having ascertained 'the deceased's instructions', the court must construe the will as executed and compare its effect, according to its proper construction, with those instructions … Only if some discrepancy appears can an order be made under [the section]; and the only permissible order is one that causes the will to be in a form that carries out the deceased's 'intentions'.
> > It follows that the court must also make findings about the 'intentions' of the deceased – necessarily, of course, the 'intentions' existing when the will was made. It is those 'intentions' that any rectifying order must reflect. *Although the legislation does not expressly say so, it must, I think, be inferred that the 'intentions' of the deceased correspond, as to content, with the 'deceased's instructions'. I say this because, in the ordinary course, a deceased's intention is that his will should implement the instructions he gives for its preparation. It is with that intention that [the section] is concerned. This seems to have been assumed in … Lawlor v Herd [2010] QSC 281."* (emphasis added)
>
> [19] Likewise, in *Hamlet*, Pagone J said at [3] in respect of the Victorian legislation that it "requires the Will to be construed and to be found upon its proper construction not to give effect to the instructions of the deceased."
>
> [20] The remarks made in *Vescio v Bannister* and *Hamlet* are apposite in relation to s 33 of the *Succession Act* 1981."

[39] Indeed the reliance on such extrinsic evidence was endorsed by the Court of Appeal in *Dore (as executor of the will of W H B Chenhall dec'd)*[26] where Jerrard JA (Holmes JA and Philip McMurdo J agreeing) referred to extrinsic evidence which had been relied

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[25] [2011] QSC 335
[26] [2006] QCA 494.

upon by the primary judge and held "The learned trial judge, when concluding that knowledge and approval of the contents of the will had been affirmatively established, considered that the evidence led provided more than adequate support for the substance of Mr Dore's evidence about the events of 27 and 30 June 2003, and I agree".[27]

[40] It would also seem clear that the affidavit is then relevant to the issue as to the construction of the Will as it is necessary to know what property was in the estate when the deceased died so there a determination can be made as to whether the property left in fact matches the property described in the Will. Whilst a will may speak from the date of death about property left by the will but in otherwise ascertaining the correct interpretation of the description of a specific bequest to a beneficiary then one looks at the facts that existed at the date the will was executed to ascertain whether there may be a "specific description of the subject of the gift to show that what was intended to pass…was a particular thing in existence as at the date of the will."[28]

[41] I am satisfied therefore that the affidavit of Joy Bazley sworn is admissible. I turn then to the substance of the application for rectification.

Issue 2- The Application for rectification

[42] The pivotal issue therefore is whether the Will as executed carries out the intentions of the deceased. Section 33 of the current Act was also introduced to widen the operation of the previous section of the Act which related to the Court's power to rectify a will. This power was previously hampered by a longstanding difficulty whereby a Court of Probate was only permitted to delete provisions made by mistake but was not allowed to insert or add provisions in lieu. The operation of the new s 33 was helpfully summarised by Atkinson J in *The Public Trustee of Queensland v Smith*:[29]

> "[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 deceased knew and approved its contents;
> >
> > The onus is on those who seek to have probate granted with words omitted to rebut the presumption of knowledge and approval of those words which arises from the due 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 deceased, the presumption that the deceased 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,

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27 [2006] QCA 494 at [39].
28 *McBride v Hudson* (1962) 107 CLR 604 at 616.
29 [2009] 1 Qd R 26 at [44] – [46].

> however, a conclusive presumption, and may be rebutted by adequate proof of mistake or of fraud;
>
> Once those who seek to have words omitted have led evidence of mistake which displaces, on the balance of probabilities, the presumption, there is an evidentiary onus on those who seek to have the words retained in the will to establish that the will was read by or to the deceased in order for them to have the benefit of the very strong presumption that the deceased 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 deceased;
>
> Where the drafts[person] has never really applied his or her mind to words introduced or omitted and never adverted to their significance and effect there is a mere clerical error on his or her part;
>
> A deceased'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 deceased'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 deceased's actual intentions at earlier stages or subsequently to the 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 Report 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 deceased'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 deceased's instructions?

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

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

[43] In terms of the provisions of s33(1) I do not consider that there is evidence of a clerical error as described in *Palethorpe v The Public Trustee of Queensland & Ors*[30] because there is no evidence that there was an *inadvertent* error in the course of recording or transcribing the deceased's intended words. It would seem that as was the case in *Palethorpe*[31] that Mr Stockley intended to use the term chosen, which in this case was "real property". The affidavit evidence also indicates that the deceased read and signed the Will. The presumption that he therefore approved the contents of the Will is a indeed a very strong one.

[44] Given that the requirements of s 33(1)(a) have not been made out the only other basis upon which the Will can be rectified pursuant to s33 is if the requirements of s 33(1)(b) have been satisfied. The real issue in this regard is whether the Will fails to give effect to the deceased's instructions? If that is proved to be the case on the balance of probabilities then s 33 allows the court to make an order to rectify the Will to give effect to the deceased's intentions.

Does the Will fail to give effect to the deceased's instructions?

[45] The Will clearly states at clause 4(a) that there is a gift of real property to Ms Blazley. The deceased however was not the registered proprietor of any freehold property at the time of his death or at the time when he gave instructions for his earlier Will on 15 December 2011, when he signed his earlier Will dated 19 December 2011, on 15 October 2012 when he gave instructions to make changes to his earlier Will or on 29 October 2012 when his signed his last Will.

[46] There is uncontested evidence that the deceased went to see his solicitor Mr Stockley with a document which was his earlier will upon which the word 'house' was clearly written. Whilst the writing could be that of the deceased it is Ms Blazley's view that it is Gregory Finch's writing. In my view it is of no real significance who actually wrote the word as there is no doubt that the word 'house' was on the document the deceased gave to Mr Stockley. That document clearly contained his instructions for the Will as it set out his wishes as to the distribution of his estate after his death. Indeed Mr Stockley's diary note for 15 December 2011 reads "He gave me a copy of his last Will which he's written out what he wants changed on it".[32] There was no reference to real property on that document. When one looks at the handwritten insertions on the earlier Will it is clear that the list is a list of 'things' as it refers to 'massage chair', ' car', 'jewellery' and 'house'.

[47] Mr Stockley in his affidavit makes it clear that he does not recall the specifics of drafting the 2011 Will and can give no explanation as to why the word 'house' does not appear in the Will. He stated in his affidavit that "It has always been my practice when instructed by clients to leave gifts of specific assets in their Will to tell them that the gift will fail they done own that asset when they die. I may have advised Tom that the clause should be more generally worded than "my house" to guard against the gift failing by sale of one residence and the purchase of another." I accept that it may well be Mr Stockley's

30 [2011] QSC 335.
31 [2011] QSC 335 at [54].
32 Court Document 24: Exhibit "PS-1".

longstanding practice to give that advice but given he was a trainee solicitor of only six months experience when he took the deceased's instructions I cannot infer that he had sufficient experience in Wills and Estates at that point in time to have adopted that practice at the outset or that he gave the specific advice he now gives in relation to ademption. I am not satisfied therefore that Mr Stockley gave specific advice in relation to ademption and that the deceased accordingly agreed to change the gift from house to real property on the basis of that advice.

[48] I consider that this conclusion is supported by the fact that immediately before he signed the 2011 Will the deceased wanted to transfer the actual relocatable home to Ms Bazley and indeed had taken steps to transfer that house to her. Copies of the signed documentation doing so are exhibited to Ms Bazley's affidavit sworn 10 November 2017. He clearly wanted to give her the house he was residing in when he signed his 2011 Will as the "Form 8- Form of Assignment (transfer)" document which he signed on 14 December 2011 specifically refers to transferring the house at 21 Regency Street Nerang to Ms Baxley. The transfer did not proceed due to concerns by Ms Bazley that she may have lost her pension. The deceased then gave instructions for his Will the next day on 15 December which referred to the word house and he signed the Will on 19 December 2011.

[49] In my view the written document which contained the deceased's instructions said 'house' but the Will did not reflect his instructions and said real property. It is no doubt unusual for a house not to be attached to a parcel of land and be relocated particularly when it did not have wheels or look at all like a caravan or mobile home. Furthermore it was a substantial dwelling which consisted of two bedrooms, two bathrooms and included wraparound verandahs. It also cost in excess of $400,000 when purchased in 2007 and is situated in a residential estate in a suburban street. There is evidence that Mr Stockley attended on the deceased at his home and that street address is recorded in the Will. There is no note on the file recording the fact that the deceased lived in a relocatable home and that it was a chattel. I consider that if the solicitor fully understood that the deceased's assets included a house which was a chattel there would be a notation on the file recording such an unusual circumstance.

[50] Neither is there any record in the diary note that any advice was given about the reason for changing the gift of the house to a gift of real property. I consider that the available inference is that Mr Stockley assumed that the house stood on real property owned by the deceased and he inserted the term 'real property' in the Will on that basis believing that such a description would thereby include the house. The deceased would understandably have presumed that the solicitor would have put the correct legal wording for the gift of the house into his Will as per his written instructions. There was therefore a fundamental misunderstanding by the solicitor in transferring the deceased's instructions into the words in the Will. It was an understandable misunderstanding but a misunderstanding by the solicitor none the less. It was a mistake which meant the Will did not reflect the deceased's instructions. If there had been specific evidence that the solicitor did understand the true nature of the deceased's assets (that it was a chattel) and then gave wrong advice (that the chattel was real property) which the deceased accepted and gave instructions to change his Will based on that advice, that would not necessarily prevent rectification of the Will given the decision by Mullins J in *McPherson v Byrne & Ors*[33] Given there is no such evidence I do not need consider that particular aspect.

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[33] [2012] QSC 394.

[51] To rectify the Will in the terms sought the Court must be satisfied on the balance of probabilities, not only of the negative proposition that the deceased did not intend to leave Ms Bazley his real property as the Will states but also must be satisfied on the balance of probabilities that he clearly wanted her to receive the gift of the relocatable home under the Will. I am satisfied that the deceased did not intend to leave Ms Bazley his real property as he did not possess any at the time he made the Wills in 2011 or 2012. Furthermore the evidence in Ms Bazley's affidavit sworn 10 November 2017 clearly indicates that the deceased believed that the 2011 Will he signed had left the 'house' to her because he told her shortly afterwards that that was what he had done by his new Will. The wording of the Will clearly did not accord with those instructions. I am therefore satisfied that the provisions of s 33(1)(b) have been satisfied and that the Will does not carry out the deceased's intentions because it does not give effect to the deceased's instructions.

[52] Accordingly pursuant to s 33(1) of *Succession Act* 1981, clause 4(a) of the Will of the deceased dated 29 October 2012 is rectified by deleting therefrom the word "Any real property owned by me at the date of my death" and inserting in lieu the words "My house". Pursuant to s33(4) of *Succession Act* 1981, a certified copy of this Order is to be attached to the Letters of Administration with the Will of the said deceased granted to the Administrator on 11 May 2017.

Issue 3: Application for construction

[53] Having rectified the Will I now turn to the issues in relation to the construction of the Will as rectified. The relevant principles are well known and the task of the court is to interpret the words in the Will and to give the Will a construction according to the plain English meaning of the words and sentences contained in the Will.[34]

[54] As already noted the Court of Construction may have regard to the factual matrix pursuant to the armchair rule discussed above. In addition s 33C also allows recourse to extrinsic evidence in certain circumstances.

[55] Counsel for Mr Gregory Finch argues that the term "My house" has a residential context but the deceased did not reside in the Nerang house at the time of his death but rather his residence was in Toowoomba at the retirement village. Accordingly it is argued that the deceased had two houses and the Nerang property was no longer his house property, in a residential context, from the date he left Nerang. Counsel therefore argues that "My house" at the date of the deceased death was where he lived in the Toowoomba unit.

[56] Whilst the deceased was residing in a unit in Toowoomba at the time of his death it could not in my view be his house. He had a house at the time of his death and it was at Nerang. The house at Nerang remained his house even though he was not residing there and although it was no longer his home it was still his house. In my view there is no ambiguity in the words "My house". It is a building in which one can reside but the fact that one does not reside there does not detract from the fact it is still ones house.

[57] Accordingly the Court declares that, upon the proper construction of the Will of the said deceased, as rectified by this Order, the deceased's relocatable home at 21 Regency

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[34] Per Isaacs J *Fell v Fell* (1922) 31 CLR 268 at 273.

Street, Gold Coast Manors, 17 Pappas Way West, Nerang passes under the gift clause in clause 4(a).

Issue 4: The Alternative Applications for Construction

[58] If the application for rectification of clause 4(a) was not successful in the terms sought, the applicant sought in the alternative declarations as to whether, pursuant to s33I of the Act, the sublease and the Exit Entitlement payable under the sublease passes to Ms Bazley under the gift in clause 4(a).

[59] The sub-lease of the deceased's unit at the retirement village commenced on 25 March 2013 and was to expire on 29 June 2017 or on the death of the lessee. Pursuant to the sub-lease, the deceased was required to pay an Ingoing Contribution. A collateral agreement called the Loan Agreement then loaned that contribution to the retirement village operator. The agreement then provided that, after the death of the deceased, the deceased's personal representatives were to co-operate to relet the unit and an Exit Entitlement was then to be paid within 14 days of the unit be relet. The Exit Entitlement was the Ingoing Contribution minus some fees and charges.

[60] Counsel for Ms Bazley advised the Court that Ms Bazley did not wish to be heard on that aspect of the case and as I understand it Counsel for Mr Gregory Finch did not support declarations in the terms sought.

[61] In this regard Counsel for the Applicant Administrator submitted that at common law a gift of real estate can pass a leasehold interest if the deceased died without freehold property. Furthermore s 33I of the Act also provides that subject to a contrary intention in the Will "A general disposition of land, or of land in a particular area, includes leasehold land whether or not the deceased owns freehold land." Counsel advised that there is a conflict in the authorities as to whether the section applies only if the Will contains a gift of "land" as opposed to a gift of "real estate".

[62] Ultimately, however, Counsel for the applicant submitted that it was unnecessary to resolve that issue as neither the common law rule nor s33I, if it applied, operates to pass the exit entitlement to Ms Bazley under clause 4(a) because the sub-lease terminated on the deceased's death and therefore no proprietary interest in the unit remained in the estate to pass pursuant to clause 4(a). Furthermore the Exit Entitlement although calculated pursuant to the sub lease, is a debt recoverable by the estate and is not an interest in property.

[63] Accordingly, it would seem to me that no party is arguing for the alternative declaration and it is unnecessary to consider such a declaration given the orders I have already made in terms of the proper construction of clause 4(a).

ORDERS

(i) Pursuant to Section 33(3) *Succession Act 1981,* the time for the making of an application for an order to rectify the Will of Thomas Henry Finch, deceased dated 29 October 2012 is extended to allow this Application to be heard.

(ii) Pursuant to Section 33(1) *Succession Act 1981,* clause 4(a) of the Will of the said deceased dated 29 October 2012 is rectified by deleting

therefrom the words "Any real property owned by me at the date of my death" and inserting in lieu the words "My house".

(iii) Pursuant to Section 33(4) *Succession Act 1981*, a certified copy of this Order be attached to the Letters of Administration with the Will of the said deceased granted to the Administrator on 11 May 2017.

(iv) The Court declares that, upon the proper construction of the Will of the said deceased, as rectified by this Order, the deceased's relocatable home at 21 Regency Street, Gold Crest Manors, 17 Pappas Way West, Nerang passes under the gift in clause 4(a) of the Will.

[64] I will hear the parties as to costs.