SUPREME COURT OF QUEENSLAND

CITATION:	*In the Estate of Trevor William McMahon (deceased)* [2022] QSC 236
PARTIES:	**MICHELLE CORILLO OCHEA** (applicant) **v** **SANDRA LEE PERCIVAL** (first respondent) **NATHAN TERVOR McMAHON** (second respondent)
FILE NO/S:	BS No 11908 of 2022
DIVISION:	Trial
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 November 2022
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2022
JUDGE:	Cooper J
ORDERS:	**1. The originating application filed 4 October 2022 is dismissed.** **2. Michelle Corillo Ochea (also known as Michelle Corillo McMahon) be passed over as executor of the last will and testament of the deceased, Trevor William McMahon, dated 22 July 2021.** **3. Subject to the formal requirements of the Registrar, a grant of letters of administration with the will dated 22 July 2021 annexed be made to Sandra Lee Percival as administrator.** **4. It is declared that the estate is to be distributed in accordance with the rules of intestacy.** **5. By 4 pm on 9 November 2022 the applicant is to deliver to McNamara Law, the solicitors for the administrator, all files and documents relating to the estate that are in her possession or control.** **6. By 4 pm on 9 November 2022 the applicant is to arrange for all estate funds in her possession or control to be transferred to the trust account of McNamara Law.**

7. **The administrator's costs of the proceeding be reimbursed to the administrator from the estate of Trevor William McMahon (deceased) on the indemnity basis.**

8. **The administrator's costs of the proceeding be paid by the applicant to the estate on the standard basis.**

CATCHWORDS: SUCCESSION – CONSTRUCTION AND EFFECT OF TESTAMENTARY DISPOSITIONS – CONSTRUCTION GENERALLY – ASCERTAINMENT OF TESTATOR'S INTENTION – where the deceased filled out a will form appointing the applicant as executor but did not name any beneficiaries – where the applicant had been in a domestic relationship with the deceased for a period of approximately 13 years – where the applicant has applied for orders under s 33 of the *Succession Act 1981* (Qld) for rectification of the will – where the first respondent has cross-applied, inter alia, for a declaration that the estate of the deceased be distributed in accordance with the rules of intestacy – whether the deceased intended to leave the whole of his estate to the applicant – whether the applicant should be removed as executor due to the conflict of her being executor and an applicant for further family provision of the estate – whether the estate should be distributed in accordance with the rules of intestacy

Uniform Civil Procedure Rules 1999 (Qld), r 603
Succession Act 1981 (Qld), s 33

ANX Trustees Ltd v Hamlet [2010] VSC 207, cited
Ashton v Ashton [2010] QSC 326, cited
Brownrigg v Pike (1882) 7 PD 61, cited
Fell v Fell (1922) 31 CLR 268, cited
Hinds v Collins [2006] 1 Qd R 514, cited
In The Goods of Jordan (1868) LR 1 P & D 555, cited
Lockrey v Ferris [2011] NSWSC 179, cited
Long v Long; Estate of Ethel Edith Long [2004] NSWSC 1002, cited
Magarry v Kiely (Supreme Court of Queensland, Thomas J, 13 July 1990), cited
Marley v Rawlings [2014] UKSC 2, cited
Monty Financial Services v Delmo [1996] VR 65, cited
O'Brien v McCormick [2005] NSWSC 619, cited
Palethorpe v The Public Trustee of Queensland [2011] QSC 335, cited
Public Trustee of Queensland v Roberts [2004] QSC 199, cited
Public Trustee of Queensland v Smith [2009] 1 Qd R 26, cited
Reilly v Reilly [2017] NSWSC 1419, cited
Rose v Tomkins [2017] QCA 157, cited
Terence John McCorley and David John Lewis (as executors

of the Will of Vera Rachel Pakleppa deceased) v Norman Pakleppa & Ors [2005] QSC 83, cited
Vescio v Bannister [2010] NSWSC 1274, cited

COUNSEL: D J Topp for the applicant
C A Brewer for the first respondent
A L Schmidt (solicitor) for the second respondent

SOLICITORS: Peter Chappel Solicitors for the applicant
McNamara Law for the first respondent
Kennedy Spanner Lawyers for the second respondent

[1] Trevor William McMahon died on 18 August 2021. His last will was made on 22 July 2021. There has been no grant of probate or letters of administration.

[2] Clause 2 of the will appointed the applicant as executor of the will and trustee of Mr McMahon's estate. At the time Mr McMahon executed the will, he and the applicant had been in a domestic relationship for a period of approximately 13 years. They were married on 16 August 2021.

[3] The applicant has applied for orders under s 33 of the *Succession Act 1981* (Qld) (**the Act**) for rectification of the will and that a grant of probate of the will, as rectified, be made to her. In the alternative to such relief, the applicant originally sought an order under s 18 of the Act that a statutory declaration sworn by Mr McMahon on 10 March 2016 forms the last will of Mr McMahon. That alternative claim for relief was abandoned during the hearing in circumstances where no party disputed the validity of the will made on 22 July 2021 and, by cl 1 of that will, Mr McMahon revoked all previous wills and testamentary dispositions.

[4] The first and second respondents are adult children of Mr McMahon from his earlier marriage.

[5] The first respondent has cross-applied for relief which includes:

(a) a declaration that the estate of Mr McMahon be distributed in accordance with the rules of intestacy;

(b) an order that the applicant be passed over as executor of the will;

(c) an order that, subject to the formal requirements of the Registrar, a grant of letters of administration with the will annexed be made in favour of the first respondent as administrator.

[6] The second respondent supported the first respondent's cross-application but did not make separate submissions.

Mr McMahon's will

[7] Mr McMahon prepared the will himself by filling in a will form.

[8] Clauses 4 and 5 are the subject of the rectification application.

[9] Clause 4 provides as follows (with the italicised words having been handwritten by Mr McMahon):

> "4. Special Gifts
>
> I make the following special gifts (legacies, bequests and devises):
>
> *Two houses 1. 142 Woodend Rd, Woodend Qld 4305*
>
> *House 2. 144 Woodend Rd, Woodend Qld 4305 of which $13,132.67 is still owing to Bendigo Bank. Rent is paying off the remainder. Any moneys in my bank to cover funeral costs + any expenses – rates – insurances etc*
>
> *1. Toyota – Coaster Campervan + 1. Toyota Corolla*
>
> *1. Twin Cab – Nissan Ute*"

[10] Clause 5 provides as follows (with the italicised words having been handwritten by Mr McMahon):

> "5. Residuary / Residue of my Estate
>
> I direct my Executor(s) to pay all my debts and then I give the residue of my estate to *SAME.*
>
> *I want cremation – cheapest possible. No funeral.*
>
> *1. Ford Tractor-Slasher*
>
> *1. Toyota Forklift & 12 tin boat on trailer"*

[11] As will be obvious, the will prepared by Mr McMahon is deficient because neither cl 4 nor cl 5 names a beneficiary.

Proposed rectification

[12] The applicant seeks to have the will rectified as follows:

(a) by deleting all the words written by Mr McMahon in cl 4 and replacing them with the words *"Left blank intentionally"*;

(b) by deleting all the words written by Mr McMahon in cl 5 and replacing them with the words *"Michelle Corillo Ochea also known as Michelle Corillo McMahon"*.

[13] The effect of the rectification would be to bequeath the whole of Mr McMahon's estate to the applicant. The applicant submits that this was Mr McMahon's intention when he executed the will and that the will as executed fails to give effect to that intention.

Extension of time

[14] The originating application was filed on 4 October 2022, outside the period of six months from the testator's death specified in s 33(2) of the Act. The court has power under s 33(3) of the Act to extend the time for making the application if it considers it appropriate and the final distribution of the estate has not been made.

[15] The applicant submitted that it was appropriate to extend the time for making the application in circumstances where the second respondent has brought a family provision claim against Mr McMahon's estate in the District Court. A mediation of that claim will take place early next year. The outcome of the applicant's rectification application is likely to impact the parties' positions in that family provision proceeding.

[16] I accept that it is appropriate to extend the time for making the applicant's rectification application. The respondents did not oppose the extension of time and the final distribution of the estate has not been made.

The law in relation to the rectification of wills

[17] Section 33(1) of the Act provides:

> "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."

[18] It is a condition precedent to the exercise of the rectification power under s 33(1) that the court be satisfied that the will does not carry out the testator's intentions and that this satisfaction be based on one of the two specified reasons: either that a clerical error was made or that the will does not give effect to the testator's instructions.[1]

[19] Only the first of these two reasons could apply to the present case where Mr McMahon prepared the will himself. Mr McMahon did not give any instructions as to the content of the will. Instructions comprise a communication from the testator to another person as to the matters the testator wishes to have included in the will.[2]

[20] A clerical error may occur when someone, who may be the testator himself, or the testator's solicitor, or a clerk or a typist, writes something in the will which he or she did not intend to insert or omits something which he or she intended to insert.[3] The introduction of a clause which is inconsistent with the testator's intentions in circumstances in which the person drafting the will fails to apply his or her mind to its significance or effect may also be a clerical error.[4]

[21] Consequently, for the rectification claim to succeed, the applicant must establish, first, that the will does not carry out Mr McMahon's intentions and, second, that this is because Mr McMahon made a clerical error.

[22] The court must make findings about Mr McMahon's intentions because, until it does, it cannot be satisfied that the will does not carry out those intentions. The applicant for rectification must establish what it was that the testator intended concerning the

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1 *Palethorpe v The Public Trustee of Queensland* [2011] QSC 335 at [16], citing *ANX Trustees Ltd v Hamlet* [2010] VSC 207 at [3]; *Rose v Tomkins* [2017] QCA 157 at [33].

2 *Palethorpe v The Public Trustee of Queensland* [2011] QSC 335 at [18], citing *Vescio v Bannister* [2010] NSWSC 1274 at [12].

3 *Marley v Rawlings* [2014] UKSC 2 at [71].

4 *Palethorpe v The Public Trustee of Queensland* [2011] QSC 335 at [49] – [51].

part of the will that is sought to be rectified. What must be shown is Mr McMahon's actual intention, not what his intention probably would have been had he thought about the matter which is the subject of the rectification application.[5]

[23] Mr McMahon's intentions must be considered at the date he made the will.[6] Evidence of statements made by Mr McMahon earlier or later than the making of the will is generally inadmissible.[7]

[24] The due execution of the will raises the presumption that Mr McMahon knew and approved of its contents.[8] That presumption is, in my view, stronger in circumstances where Mr McMahon prepared the will himself. To rebut this presumption the applicant must discharge a heavy burden by means of clear and convincing proof of Mr McMahon's actual intention at the time he made the will.[9] This requires that the applicant satisfy the court, according to the balance of probabilities, of two propositions:[10]

(a) that Mr McMahon did not intend the will to be in the form it eventually took (a negative proposition); and

(b) that Mr MacMahon's actual intention when he made the will was that it be in the form for which the applicant contends (a positive proposition).

Mr McMahon's intention when he executed the will

[25] The effect of the applicant's submissions was that when Mr McMahon wrote the word *"SAME"* into cl 5 of the will, he intended to identify the applicant.

[26] On the applicant's submission, this follows from the fact that she was the only person named in the will (in cl 2 where she was appointed executor) and the Macquarie Dictionary definition of the word "same" which includes: *"1. Identical with what is about to be or has just been mentioned … 5. The same person or thing."*

[27] The applicant relied on the following matters as constituting clear and convincing proof of Mr McMahon's intention:

(a) evidence of the applicant's domestic relationship with Mr McMahon, culminating in their marriage less than a month after Mr McMahon executed the will;

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5 *Rose v Tomkins* [2017] QCA 157 at [35] (citing *Lockrey v Ferris* [2011] NSWSC 179 at [67]) and [38](a).

6 *Rose v Tomkins* [2017] QCA 157 at [34], citing *Vescio v Bannister* [2010] NSWSC 1274 at [15]; *Lockrey v Ferris* [2011] NSWSC 179 at [68].

7 *Palethorpe v The Public Trustee of Queensland* [2011] QSC 335 at [22](d), citing *Public Trustee of Queensland v Smith* [2009] 1 Qd R 26 at [64], *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] (***McCorley v Pakleppa***) and *Public Trustee of Queensland v Roberts* [2004] QSC 199 at [6].

8 *Palethorpe v The Public Trustee of Queensland* [2011] QSC 335 at [22](b), citing *Re Bryden* [1975] Qd R 210 at 212-3, *Public Trustee of Queensland v Roberts* [2004] QSC 199 and *McCorley v Pakleppa* [2005] QSC 83 at [6].

9 *Palethorpe v The Public Trustee of Queensland* [2011] QSC 335 at [22](c), citing *Hinds v Collins* [2006] 1 Qd R 514 at 516 and *Ashton v Ashton* [2010] QSC 326 at [31]; *Rose v Tomkins* [2017] QCA 157 at [38](e).

10 *Rose v Tomkins* [2017] QCA 157 at [37], citing *Long v Long; Estate of Ethel Edith Long* [2004] NSWSC 1002 at [9]-[10].

(b) evidence of Mr McMahon's relationship with the applicant's two children from her former marriage who moved in with the applicant and Mr McMahon in 2012, remained living with them until Mr McMahon's death and continue to live with the applicant;

(c) evidence of very limited contact between Mr McMahon and each of the respondents, an absence of any contact between Mr McMahon and his third adult child from his previous marriage and a breakdown in the relationship between Mr McMahon and the second respondent;

(d) the statutory declaration which Mr McMahon made on 10 March 2016, in which he stated that his two houses at 142 and 144 Woodend Road were to be left to the applicant, and identified a number of other testamentary dispositions;

(e) evidence from the applicant that Mr McMahon told her that he only wanted the applicant to claim in his estate due to the low levels of contact he had with the respondents and none from his third adult child; and

(f) the principle that a person who makes a will does not intend to die intestate.[11]

[28] Evidence of the nature of the relationship between Mr McMahon and others does not, in my view, constitute evidence of his intention when he executed the will. It might provide an explanation as to why Mr McMahon held a particular intention and, on that basis, be relied upon as a basis to contend that some evidence of actual intention should be more readily accepted by the court. It is not, however, of itself evidence of Mr McMahon's state of mind at the relevant time.

[29] Having regard to the principle set out in [23] above, I am not prepared to give any weight to the statements made by Mr McMahon in the statutory declaration (which was made more than five years before he executed the will) or the applicant's evidence of a statement made by Mr McMahon as to his testamentary intention at an unspecified time.

[30] The principle that Mr McMahon did not intend to die intestate goes some way to establishing the negative proposition referred to in [24] above: that Mr McMahon did not intend the will to be in the form it eventually took (because that form fails to dispose of his estate to any beneficiary). The principle does not provide support, however, for the positive proposition that the applicant must establish: that Mr McMahon's actual intention was to leave his entire estate to her.

[31] It seems to me that the only evidence of Mr McMahon's intention at the relevant time is the form of the will itself. The fact that Mr McMahon named the applicant as executor of the will is consistent with an intention that she be the recipient of a significant bequest.[12] Further, Mr McMahon's use of the word *"SAME"* in cl 5, in completing a direction which referred expressly to the executor of his will, is some evidence that he intended to identify the applicant as beneficiary of the gift in cl 5. That is, that Mr McMahon intended to gift the residue of his estate under cl 5 to the executor of his will (the applicant).

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11 *Fell v Fell* (1922) 31 CLR 268 at 275-6.

12 For example see *Reilly v Reilly* [2017] NSWSC 1419 at [65].

[32] However, I am not persuaded that those matters provide clear and convincing proof that Mr McMahon's actual intention was to leave the whole of his estate to the applicant.

[33] Such an intention is not consistent with Mr McMahon's reference to numerous items of property in cl 4 which provides for specific testamentary bequests (albeit without any reference to a beneficiary). Had Mr McMahon intended to leave his entire estate to the applicant there would have been no need for him to have specified any item of property in cl 4. The rectification sought by the applicant is consistent with this proposition as it would delete all of the words which Mr McMahon wrote into cl 4.

[34] Although Mr McMahon's use of the word *"SAME"* in cl 5 (rather than the applicant's name) might perhaps be described as an inadvertent error, I do not think the same can be said of his reference to numerous items of property in cl 4. There is no evidence to support a finding that when he executed the will Mr McMahon had no intention of making specific gifts of the property items identified in cl 4. Likewise, there is no evidence that when he executed the will Mr McMahon intended to gift each of the items referred to in cl 4 to the applicant.

[35] For these reasons I am not satisfied that Mr McMahon's intention when he executed the will was to leave his entire estate to the applicant. Accordingly, the court has no power to make an order to rectify the will in the terms sought by the applicant.

[36] The application to rectify Mr McMahon's will must be dismissed.

Status of the will

[37] Despite its deficiencies, none of the parties disputed the validity of the will. In particular, no party raised any issue as to Mr McMahon's testamentary capacity when he executed the will.

[38] The issue then arises as to the status of the will in circumstances where it contains no effective dispositive provisions.

[39] I accept the submission of the first respondent that a will that contains no dispositive provisions, but which merely appoints an executor, is admissible to probate.[13] By appointing an executor, the estate vests in that person. In circumstances where the dispositive provisions of the will are not effective the executor must distribute the estate "as the law directs":[14] that is, in accordance with the rules on intestacy.

[40] The applicant accepted that if the will was not rectified then the rules on intestacy would apply.[15] Notably, the applicant did not advance any argument that, absent rectification, the will could be construed as bequeathing the whole of Mr McMahon's estate to the applicant.

[41] In the circumstances I am satisfied it is appropriate to order that a grant of letters of administration with the will dated 22 July 2021 annexed be made, and to declare that the estate is to be distributed in accordance with the rules of intestacy.

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13 *Magarry v Kiely* (Supreme Court of Queensland, Thomas J, 13 July 1990), citing *In The Goods of Jordan* (1868) LR 1 P & D 555 and *Brownrigg v Pike* (1882) 7 PD 61.

14 *Brownrigg v Pike* (1882) 7 PD 61 at 65.

15 See paragraph 5 of the Originating Application dated 4 October 2022 (Court document 1).

The applicant's position as executor

[42] The applicant deposed in her affidavit that if Mr McMahon's estate is to be distributed in accordance with the rules on intestacy she will seek greater provision from the estate than she would receive under the intestacy formula.[16]

[43] On that basis, the first respondent submits that the applicant is in a position of conflict. For the applicant to remain as executor while applying for further provision of the estate would mean that she would be both applicant and respondent in the family provision proceeding.

[44] It is not every conflict of duty and interest which should result in removal of an executor. The intention of Mr McMahon that the applicant should be executor should not be set aside lightly. However, removal may be warranted where the conflict will involve an executor having to decide whether to accept or reject his or her own claim against the estate.[17] That appears to be the case here.[18]

[45] The first respondent submitted that the applicant had indicated through her conduct of the proceeding that she does not intend to comply with her duties as executor. This submission was based on the applicant's own evidence as to concerns she has about the prospect of having to leave the house she shared with Mr McMahon if title to the property is transferred to a different administrator of the estate, or about having to pay rent to remain in the house. The first respondent submits that the applicant's intention to remain in the house without paying rent is consistent with her favouring her own interests (and those of her adult children who are not beneficiaries under Mr McMahon's estate but continue to live rent free in the house) over those of the other intestacy beneficiaries. There is force in those submissions.

[46] For those reasons, I am satisfied that the applicant should not remain as executor of Mr McMahon's estate.

[47] Under r 603 of the *Uniform Civil Procedure Rules 1999* (Qld), the first respondent as one of the intestacy beneficiaries, is next entitled in the descending order of priority of persons to whom the court may grant letters of administration with the will.

[48] The first respondent is willing to administer the estate and there is no suggestion that she would be precluded from acting by the sort of conflict which affects the applicant.

[49] Further, the second respondent, also an intestacy beneficiary, supports the first respondent's appointment as administrator.

[50] In the circumstances, I am satisfied that it is appropriate to order that the grant of letters of administration be made to the first respondent as administrator and that ancillary orders for the delivery of files and the transfer of estate funds to be made.

Conclusion

[51] The orders will be:

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16 Affidavit of Michelle Corillo Ochea filed 4 October 2022 at [36] (Court document 2).

17 *Monty Financial Services v Delmo* [1996] VR 65 at 83.

18 See also *O'Brien v McCormick* [2005] NSWSC 619 where the court removed one of two executors who was an applicant for family provision.

1. The originating application filed 4 October 2022 is dismissed.

2. Michelle Corillo Ochea (also known as Michelle Corillo McMahon) be passed over as executor of the last will and testament of the deceased, Trevor William McMahon, dated 22 July 2021.

3. Subject to the formal requirements of the Registrar, a grant of letters of administration with the will dated 22 July 2021 annexed be made to Sandra Lee Percival as administrator.

4. It is declared that the estate is to be distributed in accordance with the rules of intestacy.

5. By 4 pm on 9 November 2022 the applicant is to deliver to McNamara Law, the solicitors for the administrator, all files and documents relating to the estate that are in her possession or control.

6. By 4 pm on 9 November 2022 the applicant is to arrange for all estate funds in her possession or control to be transferred to the trust account of McNamara Law.

7. The administrator's costs of the proceeding be reimbursed to the administrator from the estate of Trevor William McMahon (deceased) on the indemnity basis.

8. The administrator's costs of the proceeding be paid by the applicant to the estate on the standard basis.