Authorised report: 12 ACTLR 258

# SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

| | |
|---|---|
| **Case Title:** | **In the Estate of Rummer** |
| **Citation:** | **[2017] ACTSC 277** |
| **Hearing Date:** | 18 July 2017 |
| **Decision Date:** | 22 September 2017 |
| **Before:** | McWilliam AsJ |
| **Decision:** | See [132] |
| **Catchwords:** | **SUCCESSION – WILLS, PROBATE AND ADMINISTRATION** – **RECTIFICATION** – construction and effect of testamentary disposition – whether gifts of amounts as directed to executor fail for uncertainty – whether rectification of will should be made so as to give effect to testator's probable intention |
| **Legislation Cited:** | *Administration of Justice Act 1982* (UK) c 53, s 20<br>*Statute Law Amendment Act 2007* (ACT) item 3.555<br>*Succession Act 1981* (Qld) s 33<br>*Succession Act 2006* (NSW) s 27<br>*Wills Act 1936* (SA) s 25AA<br>*Wills Act 1968* (ACT) 11, 12A, 12B, 14A<br>*Wills Act 1997* (Vic) s 31<br>*Court Procedures Rules 2006* (ACT) rr 1700, 1721, 1732<br>Wills (Amendment) Bill 1991 (ACT) |
| **Cases Cited:** | *Allgood v Blake* (1873) LR 8 Exch 160<br>*Application of Spooner: Estate JJ Davis* (Unreported, New South Wales Supreme Court, Hodgson J, 28 July 1995)<br>*Congregational Union of NSW v Thistlethwayte* (1952) 87 CLR 375<br>*Donnolley v Clarke* [2008] NSWSC 522<br>*Elders Trustee & Executor Co Ltd v Easter* [1963] WAR 36<br>*Estate of Cross* (Unreported, New South Wales Supreme Court, McLelland CJ in Eq, 9 May 1996)<br>*Estate of Varley (decd); Estate of Veldhuis, Re* [2007] SASC 420<br>*Fairbairn v Varvaressos* [2010] NSWCA 234; 78 NSWLR 577<br>*Fell v Fell* (1922) 31 CLR 268<br>*In the estate of Love* [2017] ACTSC 5<br>*In the Will of Beveridge* (1935) 6 SR (NSW) 125<br>*IW v City of Perth & Ors* (1997) 191 CLR 1<br>*Kovacs v Fogarty (No 2)* [2007] ACTSC 40<br>*NSW Trustee & Guardian v Halsey; Estate of Von Skala* [2012] NSWSC 872<br>*Parkes v Parkes* (1936) 3 All ER 653<br>*Perpetual Trustee Co Ltd v Wright* (1987) 9 NSWLR 18<br>*Coorey v George* (Unreported, Supreme Court of New South Wales, Powell J, 27 February 1986) |

| | |
|---|---|
| | *Perrin v Morgan* [1943] AC 399<br>*Public Trustee of Queensland v Smith* [2008] QSC 339; [2009] 1 Qd R 26<br>*Rawack v Spicer* [2002] NSWSC 849<br>*Re Barden; Florence v Shekelton-Bardon* (Unreported, Supreme Court of New South Wales, Holland J, 19 December 1983)<br>*Re Buckton* [1907] 2 Ch 406<br>*Re Estate of Epheser (decd)* [2008] SASC 311; 1 ASTLR 112<br>*Re Harrison* (1885) 30 Ch D 390<br>*Re Thomson (as trustees of the trusts established pursuant to the will of Shine (deceased))* [2010] QSC 167<br>*Rose v Tomkins & Ors* [2017] QCA 157<br>*Treacey v Edwards* [2000] NSWSC 846; 49 NSWLR 739<br>*Trenberth v Trenberth* [2014] SASC 50<br>*Wesley v Wesley* (1998) 71 SASR 1<br>*Yunghanns v Candoora No 19 Pty Ltd* [2000] VSC 387 |
| **Texts Cited:** | Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 19 September 1991<br>Australian Capital Territory, *Parliamentary Debates,* Legislative Assembly, 22 October 1991<br>Explanatory Memorandum, Wills (Amendment) Bill 1991 (ACT)<br>Rowland, C.J. 'The Construction or Rectification of Wills – Part II' (1993) 1 *Australian Property Law Journal* 193<br>New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills*, Report No 85 (1998)<br>Queensland Law Reform Commission, *Consolidated Report to the Standing Committee of Attorneys-General on the Law of Wills*, Miscellaneous Paper No 29 (1997) |
| **Parties:** | Sue Whittaker as executor of the Will of George Rummer, deceased (Plaintiff)<br>Judith Allison (Defendant) |
| **Representation:** | **Counsel**<br>Mr R Williams (Plaintiff)<br>Mr D Jenkins (Defendant)<br>**Solicitors**<br>Dobinson Davey Clifford Simpson (Plaintiff)<br>Howes Kaye Haplin (Defendant) |
| **File Number:** | P 582 of 2016 |

**McWilliam AsJ:**

1. This matter concerns the proper construction and proposed rectification pursuant to s 12A of the *Wills Act 1968* (ACT) (**Act**) of the will of the late George Rummer (**the testator**), dated 20 August 2015 (**Will**) and a codicil to the Will dated 4 December 2015 but in fact signed by the testator on 5 December 2015 (**Codicil**).

2. The testator died on 5 December 2015, in Jindalee Aged Care Residence, Narrabundah in the Australian Capital Territory, aged 66 years.

3. On 29 March 2017 and by consent, probate was granted to the plaintiff in respect of both the Will and the Codicil.

## The parties and potential beneficiaries

4. The plaintiff is the executor named in the Will and brings the proceedings in her capacity as the personal representative of the testator. The testator was divorced with no children.

5. The defendant was a close friend of the testator and is a named beneficiary under the Will.

6. Other named beneficiaries under the Will and the Codicil include the testator's half-sister, Ms Rita Berman, and two friends of the testator, being Mr Pat Italiano and Mr Peter Clack, the latter being in a de facto relationship with the plaintiff. Evidence before the Court (Exhibit A in these proceedings) confirms that each was aware of these proceedings but had chosen not to separately participate. Indeed, the Court was informed that Messrs Italiano and Clack were present in the Courtroom during the hearing.

7. The Will also included a monetary gift to Mr Roy Shepherd, a known friend of the testator who also previously held a joint power of attorney for the testator. The Codicil subsequently excluded Mr Shepherd. In these proceedings, part of the file of the solicitors who were previously engaged by the testator, and then subsequently engaged by the plaintiff until 16 November 2016, was tendered by the defendant and became Exhibit 2 (**the Solicitor's File**). It contains a letter dated 18 August 2016 from Mr Lucas (the solicitor then acting for the plaintiff) to Mr Shepherd, confirming Mr Shepherd's communicated intention to abide by any decision of the Court. I am accordingly satisfied that all potentially interested persons are on notice of these proceedings.

## The Will and the Codicil

8. The terms of the Will relevant to the issues in dispute in these proceedings were as follows:

> 10. IF MY SUPERANNUATION TRUSTEES have given my superannuation death benefit to my Executor to distribute under my will, I give the sum of $150,000 to my half-sister Rita Berman who lives in Israel. If my superannuation trustees have given my superannuation death benefit to Rita Berman, I give her $45,000 from my estate.
>
> 11. I GIVE MY FRIEND ROY SHEPHERD the sum of $25,000.
>
> 12. I GIVE ALL THE REST AND RESIDUE OF MY ESTATE to my friend JUDITH ALLISON of [XXX] Bexley NSW 2207, and I direct that my Executor may satisfy this gift or part thereof by using all or part of the rest and residue of my estate to purchase an annuity or similar financial product designed to provide JUDITH ALLISON with a regular income.
>
> 13. I DIRECT that my body be cremated.

9. In the early hours of the morning on the day that he died, being 5 December 2015, the testator dictated amendments to the Will to the plaintiff, who was sitting by his bedside. The handwritten amendments to the Will, purport to strike through paragraphs 11, 12 and 13 of the Will, set out above. The amendments are in the following terms (underlining in original):

(11.) DELETE

11. ~~12.~~ I GIVE MOST OF THE REST AND RESIDUE OF MY ESTATE to my friend JUDITH ALLISON .... ... with a regular income;

AND AMOUNTS AS DIRECTED TO MY EXECUTOR TO MY FRIENDS PAT ITALIANO of [XXX] GRIFFITH (PH 04[XX XXX XXX])

AND PETER CLACK of [XXX] HOSKINSTOWN (PH 04[XX XXX XXX])

12. ~~13.~~ I DIRECT THAT MY BODY BE CREMATED.

10. These amendments constitute the Codicil. It is not in contest that the testator signed those amendments on 5 December 2015 (notwithstanding the date recorded on the document is 4 December 2015) and that his signature was witnessed by a registered nurse.

## The grant of probate and the estate

11. The grant of probate was achieved through the application of s 11A of the Act, which in broad summary provides a mechanism for the Court to approve the validity of amendments to a will notwithstanding their informality.

12. Testamentary capacity was not disputed by the defendant at that time.

13. At the time of the grant of probate, the estimated gross value of the testator's estate was $678,873. At the hearing of this subsequent application, the Court was informed that, following the payment into the estate of the testator's superannuation death benefit, the net value of the testator's estate is approximately $800,000, with the principal asset being the proceeds of sale of the testator's former residence in Narrabundah.

## The present application

14. The application filed on 20 April 2017 seeks the following substantive relief:

    (a) That, pursuant to section 12A(1) of the *Wills Act 1968* (ACT), the Will dated 20 August 2015 of George Rummer, testator as amended by the Codicil dated 4 December 2015 be rectified by:

        (i) Deleting from clause 11 the words 'most of the rest and residue' and inserting in their place the words 'one half of the rest and residue'; and

        (ii) Deleting from clause 11 the words 'amounts as directed to my executor' and inserting in their place the words 'the remainder in equal shares'.

    (b) In the alternative to paragraph (a) above, that on the proper construction of the Will dated 20 August 2015 of George Rummer, testator as amended by the Codicil dated 4 December 2015, the rest and residue of the testator's estate remaining after the gift made by clause 10 of the Will, is gifted:

        (i) as to one half thereof to the defendant; and

        (ii) as to the remainder thereof in equal shares to Pat Italiano and Peter Clack.

    (c) That the costs of the plaintiff of this application be paid from the testator's estate on a solicitor-client basis.

15. As will be apparent from the relief sought in the application, the key issues in these proceedings are the proper construction of the words 'most of the rest and residue', and 'amounts as directed to my executor' in clause 11 of the Will, as amended by the Codicil.

16. The plaintiff contends that, because of conversations she had with the testator at the time he was dictating amendments to her (discussed below), the testator meant to gift to the defendant only half of the residue of the estate, and that the other half of the residue was to be divided in equal shares between Messrs Italiano and Clack.

17. The defendant contends that notwithstanding the insertion of the word 'most', the proper construction of clause 11 of the Will is that she is entitled to the residue, save as to the gifts to Ms Berman, and Messrs Italiano and Clack. If any of those gifts fail for whatever reason, then they are to be incorporated into the residue.

18. The defendant's further submission is that the gifts to Messrs Italiano and Clack *do* fail for uncertainty.

19. After the hearing, the parties were invited to make further written submissions on the question of the application of s 12A(2) of the Act, and this additional round of submissions was completed on 10 August 2017.

**Summary of Findings**

20. For the reasons that follow, I have concluded that on the proper construction of the Will, the testator did not intend the defendant to only receive half of the residue of the estate. Rather, the testator intended the defendant to receive the residue of the estate. Additionally, the testator intended to gift two further amounts of equal value to Messrs Italiano and Clack, with the result that the defendant would only receive 'most' of what had previously been 'the residue'.

21. Regrettably, I have also concluded that the stated gifts to Messrs Italiano and Clack do fail for uncertainty as to amount, so that rectification under s 12A(1) of the Act ought not be granted in the terms sought.

22. However, the testator's expressed intention was at least that Messrs Italiano and Clack would each receive a sum of money. The testator clearly did not appreciate the legal effect of the words he had dictated on his death bed, nor did he know what the ultimate net proceeds of his primary asset would be.

23. In such circumstances, I am satisfied that the power under s 12A(2) of the Act is enlivened, so that the Court can, in the exercise of its discretion, give effect to the *probable* intention of the testator to give monetary gifts to two of his friends.

24. Having invited and received further submissions from the parties on the question of the application of s 12A(2) of the Act, on the evidence before the Court, I have determined that this is a case where it is appropriate to exercise the Court's discretion to rectify the Will to give effect to the testator's probable intention, with the result that Messrs Italiano and Clack will receive a gift in an amount of $35,000 each.

## Relevant Legislative Provisions

25. The power of the Court to grant relief by way of rectification is found in s 12A of the Act, the relevant parts of which are in the following terms:

**12A Rectification**

(1) If the Supreme Court is satisfied that the probate copy of the will of a testator **is so expressed that it fails to carry out his or her intentions**, it may order that the will be rectified **so as to carry out the testator's intentions**.

(2) The Supreme Court may order that the probate copy of the last will of a testator be rectified **to give effect to the testator's probable intention** if satisfied that—

(a) any of the following apply in relation to circumstances or events (whether they existed or happened before, at or after the execution of the will):

(i) the circumstances or events were not known to, or anticipated by, the testator;

(ii) **the effects of the circumstances or events were not fully appreciated by the testator;**

(iii) the circumstances or events arose or happened at or after the death of the testator; and

(b) because of the circumstances or events, the application of the provisions of the will according to their tenor would fail to give effect to the **probable** intention of the testator if the testator had known of, anticipated or fully appreciated their effects.

...

(7) In this section:

***Order for rectification*** means an order inserting material in, or omitting material from, the probate copy of a will.

*...* [Emphasis added.]

26. The broad terms of the section may be contrasted from significantly narrower provisions in other states, such as s 31 of the *Wills Act 1997* (Vic), on which s 27 of the *Succession Act 2006* (NSW) and s 33 of the *Succession Act 1981* (Qld) were modelled: *Rose v Tomkins & Ors* [2017] QCA 157 at [31]. The said provisions of those statutes permit rectification only where there has been a clerical error or a failure to understand instructions, such provisions being more closely aligned with s 20 of the *Administration of Justice Act 1982* in the United Kingdom.

27. That is a matter to which I will return below.

28. Section 12B of the Act also has application given the nature of the issues and the evidence. It is relevantly in the following terms:

**12B Extrinsic evidence**

In proceedings to construe a will, evidence, including evidence of the testator's dispositive intention, is admissible to the extent that the language used in the will renders the will, or any part of the will –

(a) meaningless; or

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

(c) ambiguous or uncertain in the light of the surrounding circumstances;

**but evidence of a testator's dispositive intention is not admissible to establish any of the circumstances referred to in paragraph (c).**

[Emphasis added.]

29. In light of the Codicil, the evidence concerning the executor's discretion, and the submissions of the parties (referred to below), some small attention should also be given to two further sections of the Act. Section 11 of the Act provides:

> **11 Appointments by will**
>
> (1) If a testator purports to make an appointment by his or her will in exercise of a power of appointment, the appointment is not valid unless the will is –
>
> (a) executed in accordance with this part; or
>
> (b) under part 2A, to be taken to have been properly made.
>
> (2) If power is given to a person to make an appointment by a will that is executed in some particular manner or with some particular solemnity, the person may exercise the power by a will that is executed in accordance with this part but is not executed in that manner or with that solemnity.

30. Section 14A of the Act provides:

> **14A Certain appointments and trusts not void**
>
> If a testator, by his or her will –
>
> (a) gives a person a power to appoint property; or
>
> (b) appoints a person to be trustee of any property with power to distribute the property as the trustee thinks fit;
>
> the giving of that power, or the creation of that trust, by the will shall not be void if the same power could have been given, or the same trust created, by an instrument inter vivos.

## Principles for rectification

31. The principles set out here are in the context of rectification pursuant to s 12A(1) of the Act. Section 12A(2) of the Act is considered separately below.

*Rectification generally*

32. On an application to rectify a will under s 12A(1) of the Act, it will be necessary for the Court to:

    (a) determine the meaning of the will;

    (b) determine the testamentary intention of the testator;

    (c) determine whether the will accurately reflects that intention; and, if not,

    (d) determine whether the will can be rectified and in what terms.

33. This was the approach taken by Debelle J in *Wesley v Wesley* (1998) 71 SASR 1 (***Wesley***) at 4, in considering s 25AA of the *Wills Act 1936* (SA), the terms of which are the same as the words used in s 12A(1) of the Act, in substance, if not in form. See also *Estate of Varley (decd); Estate of Veldhuis, Re* [2007] SASC 420 (***Varley***) at [2]; *Re Estate of Epheser (decd)* [2008] SASC 311; 1 ASTLR 112 per Gray J at [5]; and *Trenberth v Trenberth* [2014] SASC 50 per Nicholson J at [28].

34. Before the Court is able to exercise the power, it must be satisfied (on the balance of probabilities) as to the testamentary intentions of the testator. The relevant date at which the court must determine the intention of the testator will be the date when the will was made: *Wesley* at 5; *Varley* at [3].

35. In *Varley,* Debelle J went on to state at [6]:

> While the court can rectify a will so that it accords with the **expressed testamentary intentions** of a testator person, **the court cannot supply any gap in the expression of that intention or assume what that intention would have been in the case of a failure of a gift.** In *Mortensen v State of New South Wales* (unreported, NSW Court of Appeal, 12 December 1991), the Court of Appeal in New South Wales upheld the decision of Needham J who refused to rectify a gift in a will to three children of whom the testatrix was particularly fond when one of those children had predeceased the testatrix. The testatrix had not provided for any gift over should any of those children predecease her. Needham J refused an application to rectify the will by adding "or to the survivor of them" after the name of the last of the three children. That decision should be compared with *Trimmer v Lax* (unreported, Supreme Court of NSW, 9 May 1997) and *re Estate of Rose* [1999] NSWSC 365. In *Estate of Miller* (2002) 223 LSJS 133, the testator owned a number of rural and commercial properties. At the time of making his will, he mistakenly believed that he had transferred all his interests in his rural properties to Rgana Pty Ltd, the trustee of one of his family trusts. He instructed his solicitor to alter his will so that his interests in his commercial properties would be bequeathed to two of his children. The effect of the will as altered was to devise all his interests in real estate, including his rural property, to those two children. The question to be determined was whether the will could be rectified to include a devise of the rural property to Rgana. Mullighan J refused to rectify the will in that way, holding that there was no evidence of what the intention of the testator would have been had he been aware that the rural property had not been transferred to Rgana Pty Ltd. That decision should be compared with *Australian Executor Trustees Ltd v Casanova* [2005] SASC 93, which might represent a liberal application of s 25AA. **In short, the court may rectify where there is clear evidence of the actual intention of a testator. It cannot guess at the probable intention where the testator has failed to address a particular contingency.**
>
> [Emphasis added.]

36. These comments were made in relation to a statutory provision which did not permit rectification by reference to *probable* intention in light of events that have come to pass.

37. The standard of proof is on the balance of probabilities, however the court will carefully examine the evidence because the will has been signed by the testator and is the expression of the intention of a person who is not available to give evidence: *Varley* at [5]; *Wesley* at [5].

*Determining the meaning of the Will*

38. In construing a will the task is, first, if it be possible, to ascertain the basic scheme which the testator had conceived for dealing with his estate, and second, to construe the will as, if it be possible, to give effect to the scheme so revealed: *Perpetual Trustee Co Ltd v Wright* (1987) 9 NSWLR 18 per Bryson J at 33, *Coorey v George* (Unreported, Supreme Court of New South Wales, Powell J, 27 February 1986) at 14; *Fairbairn v Varvaressos* [2010] NSWCA 234; 78 NSWLR 577 at [19]; see also *In the estate of Love* [2017] ACTSC 5 (***Love***) per Mossop AsJ (as his Honour then was) at [25].

39. Earlier in *Love* at [22], Mossop AsJ had referred to a passage from the judgment of Viscount Simon LC in *Perrin v Morgan* [1943] AC 399 (***Perrin***) at 406:

> The fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case – what are the "expressed intentions" of the testator.

40. The principle has equal application in a case for rectification.

*Determining the testator's intention*

41. As to the 'expressed intentions' of the testator, in the first place, the intention of the testator will be discovered, if possible, by having regard to the plain and ordinary meaning of the words used in the will, in the context of the entire document, without reference to rules or canons of construction or the surrounding circumstances: See *Fell v Fell* (1922) 31 CLR 268 at 273-274, *Love* at [23]; *Allgood v Blake* (1873) LR 8 Exch 160 per Blackburn J at 163; and *Public Trustee of Queensland v Smith* [2008] QSC 339; [2009] 1 Qd R 26 at [21].

42. Where no technical words are in question and the intention of the testator can be collected with reasonable certainty from the whole will, that intention must have effect given to it, beyond and even against, the literal sense of particular expressions: *Parkes v Parkes* (1936) 3 All ER 653, per Lord Maugham at 669, cited in *Congregational Union of NSW v Thistlethwayte* (1952) 87 CLR 375 at 437.

43. Where the usual meaning rule is insufficient to resolve the construction of the clause in the will, a court can consider extrinsic evidence: s 12B of the Act, see also *Re Thomson (as trustees of the trusts established pursuant to the will of Shine (deceased))* [2010] QSC 167 per Atkinson J at [13].

44. Accordingly, the Court should start with the words of the Will and if their usual meaning in the context of the Will is clear then that meaning is given. If not, then resort can be had to such extrinsic evidence as traditionally applied by the courts in construing a will, together with the aids of construction.

45. One aid of construction is the presumption against intestacy. The Court will prefer a construction which is reasonably open and will avoid an intestacy: see *Love* at [26] and the cases there-cited, to which I add *Re Harrison* (1885) 30 Ch D 390, per Lord Esher MR at 393.

*Principles relevant to uncertainty of gifts*

46. Vague dispositions that do not identify the property will fail: *Re Appleby's Estate* (1930) 25 Tas LR 126. However, as long as it is possible to piece together the clues to determine the identity and quantum of the property, a gift will be sufficiently certain. Thus, *In Re Golay's Will Trusts* [1965] 2 All ER 660, a gift of 'reasonable income' was upheld because the words 'reasonable income' were, in the circumstances, capable of objective determination.

## Evidence

*Plaintiff's evidence*

47. In support of the application, the Plaintiff relied on two affidavits sworn by her on 31 May 2016 (**2016 Affidavit**) and 23 January 2017 (**2017 Affidavit**), and the Grant of Probate (Exhibit B in these proceedings).

48. The 2016 Affidavit annexed a typed document described as 'notes', created by the plaintiff on 8 December 2015 (three days after the death of the testator), in apparent compliance with the suggestion to that effect of the previous solicitor engaged by the plaintiff, Mr Ric Lucas, whom she had visited the day before she made the record.

49. In this document, the plaintiff sets out her recollection of the testator's communications to her as to his instructions about amending the Will, which include the following salient parts:

> At 2.20am on Saturday 5/12/15 George Rummer rang me on my house phone. He said his full name, as always on the phone, and then asked me to come in to Jindalee to see him as soon as possible. He said he thought he was dying and he had some important things to discuss with me in my capacity as his PoA and Executor.
>
> I quickly got dressed and drove in, arriving there at about 3am.
>
> George was sitting up in bed with papers across his knees and was writing. I sat near him and he immediately started telling me about changes he wanted to make to his Will.
>
> ...
>
> George was a strong willed and quite pedantic person and niceties always came second to business so this style of conversation was typical.
>
> The papers on his knee included a photocopy of his signed Will. He had crossed out a reference to a benefit to Roy Shepherd and had written "NO" in the margin. He had also placed a circled '?' in the margin alongside the clause leaving *all the rest and residue of my estate to my friend Judith Allison*. He had drawn lines across the page covering these final clauses in his Will.
>
> George said he hadn't got around to revising his Will as he had previously said he intended. He said he had advised his lawyer via email some time ago that he would be making changes to his Will. **He had told me a couple of weeks previously that he wanted to leave sums of money to a couple of old friends (Pat Italiano and Peter Clack) who had stuck by him and helped him throughout his time in hospital and his move into Jindalee.**
>
> I told him I wasn't sure how we could do anything at 3 o'clock on a Saturday morning but he insisted I write out his wishes so he could sign them and have them witnessed. He dictated to me because his right hand had become very weak and it was difficult for him to hold a pen for very long. He said it would take him too long and it wouldn't be clear.
>
> I got a piece of paper from the printer George had set up beside his bed.
>
> He said to write '11. DELETE'. That was the clause about leaving money to Roy Shepherd. I said Roy had been a friend for a long time and asked was he sure. He said yes and that he and Roy had parted ways quite some time ago and it was a definite end.
>
> ...
>
> I asked him what amount he wanted to leave for Judith, **adding that the house sale had not been finalised and costs, including my costs for renovating his house prior to sale, had not been deducted from his assets so it may be difficult to stipulate an amount**. He said, 'I know that. Half of what's left. So write MOST OF THE REST instead of ALL OF THE REST.'
>
> I asked what would happen with the rest of his assets. **He said that he wanted me to use my discretion with dividing it between Pat (Italiano) and Peter (Clack)** because they had not only been his friends in his youth but they had also stuck with him through to his final days despite him 'being demanding', and helping him with basic needs and cheering him by sharing memories of the old days. I asked him to be clearer about how to share the money. He said 'half and half of what's left after Rita and Judith'. ...
>
> [Emphasis added.]

50. Also annexed to the 2016 Affidavit is an email from the testator to Mr Lucas dated 17 September 2015. Relevant to the issue under consideration, the email states:

> Also, giving you a heads-up that I'll be making some minor changes to my will in the not-too-distant future, but not before I sell my house to fund a nursing home place. I'm just beginning the sale process and it may take a few months, though I may be moving into a nursing home in a matter of weeks.

51. In the 2017 Affidavit, the plaintiff deposes to the fact that the testator had lunch with herself, and Messrs Italiano and Clack on 4 December 2015, approximately 12 hours before he amended the Will. The plaintiff also deposes to the following:

> [20] On a number of occasions while he was in Jindalee, the deceased said to me words to the effect, "I am going to change my Will to leave significant gifts to Peter and Pat who have proven to be very caring friends. They have travelled the journey with me. I have told Ric Lucas that I want to change my will but I haven't said anything to Peter or Pat. ..."

52. To the extent that the paragraph elevates the gifts under consideration to 'significant gifts', the statement is inconsistent with what the testator indicated to his solicitor as a desire to make minor changes to his will. It is also inconsistent with the plaintiff's recollection, recorded in the notes she made at a time much closer to when the words were actually spoken, where he merely spoke of leaving 'sums of money'.

53. The 2017 Affidavit was made more than a year after the events the Plaintiff purports to recollect, in circumstances where the probate proceedings had been commenced and in particular where the defendant's solicitors had previously communicated to the plaintiff's then solicitor, in correspondence dated 16 September 2016 (contained in the Solicitor's File), their view that the gifts to Messrs Clack and Italiano failed for uncertainty.

54. The statement is also expressly a summary of conversations had on 'a number of occasions', rather than a specific recollection of any particular conversation. As a result of these matters, I do not accept that the testator used the word 'significant'. I find instead that the testator communicated to the plaintiff his intention as set out in the emphasised words of the notes made by the plaintiff on 8 December 2015, namely that he intended **'**to leave sums of money to a couple of old friends.'

55. That position is also more consistent with the testator's email communication to his solicitor on 17 September 2015 that he wished to make 'minor' changes to his will once he had sold his house.

56. The plaintiff was cross-examined and appeared to struggle to provide answers that were responsive to the questions asked of her. However, the difficulty in giving evidence about the plainly emotionally draining experience of taking instructions from a close friend in his dying moments is not lost on this Court.

57. That difficulty must also increase when the plaintiff has had time to form her own opinions about the meaning of what she heard, influenced by subsequent legal proceedings and advice, and she is then required to recollect the words and actions of the testator before she formed those opinions. Although I find that the plaintiff was doing her best, the plaintiff's evidence in the witness box must be seen through that prism.

58. When considering the use to be made of extrinsic evidence of testamentary intention, Justice Debelle in *Varley* commented at [4]:

> Where the will has been prepared by a solicitor, one means of ascertaining the intention the testator is to admit evidence of the testator's instructions to his solicitor: *Wesley v Wesley* at 5. ... As to evidence from others, I repeat what I said in *Wesley v Wesley* at 5.
>
> [Evidence] might also be led from persons other than the testator's solicitor to whom the testator had spoken either before or after the execution of his will. Care must be taken with such evidence. The evidence may be tainted by self-interest or by a desire to enable a particular person to benefit. Alternatively, a testator who has expressed an intention to benefit a person not named in the will might have been intending to appease a member of his family. It is not uncommon in human experience for a testator to give divergent accounts of his will to different persons either to maintain harmony or to curry favour with family or friends. Each case will have to be determined on its own facts and each will suggest the kind of caution which should be exercised.

59. I consider the same caution applies to the oral evidence of the plaintiff in this case. The plaintiff, while the only direct recipient of the testator's instructions on the morning of his death, was not in the position of a disinterested solicitor.

60. It was clear from her answers in the witness box that she had developed a strong view of what ought occur in terms of the distribution of the Will, which included that 25% of the residue ought go to her de facto partner. Even if that relationship was not productive of conscious self-interest (and such was expressly and emphatically denied by the plaintiff), it may have contributed to a subconscious bias towards benefiting a particular person in her recall of events. It may also have impacted upon the belief she formed as to the meaning of the testator's words, and his testamentary intention expressed by them.

61. It seemed to me that those personal beliefs or opinions, including a readily apparent view as to who were the more worthy beneficiaries due to spending time with the testator in the last months he was alive, has affected both the plaintiff's memory of what the testator actually communicated to her and the answers she gave to the Court.

62. One example may be seen from a question asked in re-examination (which I allowed, although strictly it did not arise from anything asked in cross-examination) concerning the direction given by the testator at the bedside as to what the testator wanted to happen. The answer given was:

> He directed me to divide the residue of his estate between Judith and Pat and Peter by basically half to Judith and a quarter each, half and half of the remainder to Pat and Peter.

63. I do not accept that evidence as being reliable or accurate evidence of what the testator directed to the plaintiff in terms. It is inconsistent with the notes of the conversation and the subsequent repetition of the substance of the notes in the plaintiff's affidavit evidence. It is also inconsistent with the word 'most' used in the Will. I consider the almost contemporaneous notes to be more reliable evidence of what was said.

64. Importantly, the plaintiff's answer above appeared to me to be the plaintiff's personal opinion of the meaning of words that were spoken, as distinct from any attempt to truly recall the event by way of first hand observations of what the testator said. The blurred distinction between what the testator said, and what the plaintiff thought he meant by those words, permeated much of the plaintiff's oral evidence. It is the testator's words which constitute the relevant evidence for the Court's consideration of the issue of testamentary intention in this case, not the plaintiff's summary of what the testator really meant.

65. Accordingly, while there is no suggestion the plaintiff was dishonest in the evidence she gave, I have given little weight to the plaintiff's oral testimony and greater weight to more contemporaneous records, particularly where they are consistent with written intentions expressed by the testator.

66. However, the state of the documentary evidence was also unsatisfactory. Apart from the single email annexed to the plaintiff's 2016 Affidavit, there was no evidence of any communications with the solicitor acting for the testator leading up to his death, in circumstances where the amendments to the Will now under consideration in this Court were foreshadowed in the email of 17 September 2015.

67. The Solicitor's File was incomplete in what might be said to be significant respects. First, the plaintiff confirmed under cross-examination that she had seen the complete file, that the papers she had seen were almost double those received by her current solicitors, and that a lien over some of the papers had been exercised by the former solicitors.

68. Second, the Solicitor's File includes correspondence between the current solicitors and the office of the previous solicitors dated the day before the hearing, confirming that none of the file notes of Mr Lucas had been provided, and further refusing to provide the file notes without Mr Lucas 'interpreting' them first. That is a matter that ought to have been addressed well prior to the hearing and by way of subpoena if necessary.

69. Third, the Solicitor's File does not even contain the particular email correspondence between Mr Lucas and the testator which was annexed to the 2016 Affidavit (set out above). It plainly formed part of the file, and suggests the Plaintiff has either inspected or been provided with other documents from Mr Lucas.

70. Finally, there is a noticeable lack of any records (even any record of a response to the testator's email of 15 September 2015) from was a critical time period between 17 September 2015 and 4 December 2015. It is highly unlikely that a solicitor knowingly acting for a very sick man who wanted to make changes to his will would do nothing in response to that email.

71. The lack of evidence of any instructions to a disinterested legal representative makes it harder for the plaintiff to discharge the onus to satisfy the Court that rectification under s 12A(1) of the Act should be made. The plaintiff is left with relying on a single conversation, the terms of which, if they are interpreted in the manner for which the plaintiff contends, are contrary to the plain and ordinary meaning of the words used in the Codicil.

*Defendant's evidence*

72. The defendant relied on the affidavit affirmed by her on 29 June 2017 and the affidavit of her sister, Susan Alexander, affirmed on 22 June 2017. Those affidavits primarily address the nature of the defendant's relationship with the testator. The evidence does not assist in determining the construction of the Will or the testator's intentions at the time he signed the Codicil.

73. The defendant also tendered the Solicitor's File, having been provided with it for the first time in response to a call during cross-examination.

**Findings as to the testamentary intentions of the testator**

74. I will deal first with the meaning of the phrase in clause 11 of the Codicil 'most of the rest and residue'. I reject the plaintiff's submission that the word 'most' should be construed to mean 'half', for a number of reasons.

75. First, the express words of the Codicil dictated by the testator are 'most' of the residue. The ordinary meaning of that word is 'in the greatest quantity, amount, measure, degree, or number' (*Macquarie Dictionary,* 7th ed). It denotes a quantity greater than 'more'. The plain meaning of the word is not 'half'.

76. Second, reading the Codicil and Will as a whole, the word 'most' must be read in the context of other express words, which refer to gifts to Messrs Italiano and Clack in the nature of an amount, determined by reference to a matter external to the Will. They do not refer to Messrs Italiano and Clack receiving a percentage share of the residue either expressly or impliedly.

77. Third, the language used in the Will enables the discernment of the apparent general scheme of the Will. It carves out an amount for the testator's only apparent relative, with a contingency depending on whether she received his superannuation death benefit, and provides for two gifts to his old 'mates' to use the language of the testator (in paragraph [21] of the 2017 Affidavit), with his close female friend, the defendant, receiving the residue.

78. The word 'most', in my view, reflects the non-legal thinking of a dying man that he needed to replace the word 'ALL' in the Will (that had been drafted by a solicitor) with a different word, as he was now allocating some of the money that would previously have formed part of the residue to two other people.

79. On that basis, the ambiguity as to the meaning of the word 'most' is resolved simply by reference to the words actually used in the Will, taken in their context and evincing a clear scheme.

80. Fourth, assuming that ambiguity about the word remained, the Court may have regard to extrinsic evidence under s 12B(b) of the Act. Contrary to the plaintiff's firmly expressed opinion and submission to this Court, in my view, the extrinsic evidence supports the above conclusion. The extrinsic evidence is the testator's words, as recalled by the plaintiff and recorded in her notes: 'Half of what's left. So write MOST OF THE REST instead of ALL OF THE REST.'

81. On the balance of probabilities, the available inference I draw is that the testator was thinking aloud as he spoke to the plaintiff. He momentarily considered whether to gift to the defendant half of the residue, and voiced that thought. He then settled on most of the residue. The evidence of both the plaintiff and the defendant was that the testator was a particular or pedantic man. The plaintiff's evidence was that he dictated, right down to the punctuation of the Codicil, what his intention was. I find that if the testator had intended that the defendant receive half the rest and residue, he would have dictated the word 'half' instead of 'most'.

82. The plaintiff's opinion, and submission to this Court, that the written word 'most' in the Codicil should be rectified to reflect an intention of half the residue is the product of a misunderstanding of the iterative thought processes of the testator at the time. It

reflects precisely the type of subconscious bias towards a particular meaning of words expressed at the time, to which reference has earlier been made.

83. Finally on this issue, the presumption against intestacy supports the same conclusion. Given that I am not satisfied that the word 'most' means 'half' on the face of the Will, or that it takes on that meaning through the words of the testator spoken at the time the Codicil was signed, a construction of the Codicil that means all of the residue is certain, and therefore one that avoids intestacy.

84. The alternative construction of 'most', as meaning something more than half, but not all, of the residue, would result in uncertainty and the gift to the defendant would fail. The residue would be left to be distributed as an intestacy. Such a result would be contrary to the principles set out above and is not to be preferred.

85. The next step is to compare the construction of the Will and Codicil with the testator's intention (as found). Notwithstanding that I have been able to ascertain its meaning on the proper construction of the Will and Codicil, the word 'most' is productive of ambiguity. It is possible for rectification of an unclear clause in a will to be granted *ex abundanti cautela*, where rectification makes clear the testator's intention, even if the clause which the testator actually executed, on its proper construction, means the same as the clause as rectified: *Rawack v Spicer* [2002] NSWSC 849 (***Rawack*),** per Campbell J at [25], citing *Application of Spooner: Estate JJ Davis* (Unreported, New South Wales Supreme Court, Hodgson J, 28 July 1995); *Estate of Cross* (Unreported, New South Wales Supreme Court, McLelland CJ in Eq, 9 May 1996).

86. The final step then is to consider whether the Will and Codicil are capable of rectification. Deleting the words 'most of' from clause 11 of the Codicil will resolve the discrepancy, so as to carry out the testator's intention.

87. Turning next to the construction of the phrase 'AMOUNTS AS DIRECTED TO MY EXECUTOR' in the Codicil. For the reasons given above, although I am satisfied that the testator intended to give an equal monetary sum to each of Mr Italiano and Mr Clack, I am not satisfied on the balance of probabilities that at the time the Codicil was drafted, his intention was to gift Messrs Italiano and Clack a quarter each of the residue of the his estate.

88. Again, the express words of the Codicil do not state that intention, nor can it be implied. The context of the Codicil and the word 'most' are also contrary to that construction, and the scheme of the Will does not produce that construction.

89. The ambiguity of those words, which in this case cannot be resolved by reference to the Will and the Codicil as a whole, requires the Court to have regard to extrinsic evidence.

90. I do not consider this case to be one concerning incorporation of an extrinsic document by reference to a direction, as was canvassed by the defendant in written submissions. The defendant referred to *Treacey v Edwards* [2000] NSWSC 846; 49 NSWLR 739 at [33], citing *In the Will of Beveridge* (1935) 6 SR (NSW) 125. It was accepted that a will that complies with formal requirements can, under certain circumstances, incorporate by reference other material which does not itself comply with the formal requirements. Essentially, the submission was that this Will did not fulfil the requirements for incorporation by reference, which are often said to be:

(a) that the document to be incorporated be in existence at the time of the will;

(b) that the will expressly describes the document to be incorporated as an existing document; and

(c) that the will sufficiently describes the document to enable it to be identified.

91. These principles were referred to by Justice White in *NSW Trustee & Guardian v Halsey; Estate of Von Skala* [2012] NSWSC 872 at [34] (and see the cases there-cited). His Honour went on (at [36]) to express doubt as to, inter alia, the extent to which such authorities remain binding in light of provisions of the *Succession Act 2006* (NSW) there under consideration, which were designed to do away with many of the limitations and restrictions that have grown up around those principles. His Honour further doubted whether they are consistent with the intentionalist approach to construction that now prevails following *Perrin.*

92. The plaintiff did not put the case as one of incorporation by reference, no doubt because there was no 'document' that might have been incorporated. Further, the argument before me was not directed to the question of incorporation, a question that is not as straightforward as the defendant submits, given the doubts expressed by Justice White. As the defendant appears to have put the argument only to rebut it, it is unnecessary to deal further with that issue.

93. The extrinsic evidence that best assists with the application of the intentionalist approach, as articulated in *Perrin*, is again the almost contemporaneous note of the plaintiff. I have emphasised what I consider to be the significant parts of it above. When discussing leaving the residue to the defendant, the plaintiff had told the testator that because the ultimate proceeds of sale were unknown, it would be difficult to stipulate an amount. One cannot ignore that statement when considering the testator's mind at that time. The remainder of clause 11 was dictated immediately after that discussion. Having been told (rightly or wrongly) by the plaintiff of the difficulty in stipulating amounts, the testator took the same course in respect of the intended gifts to Mr Clack and Mr Italiano.

94. The words of the Codicil are 'amounts as directed'. They do not permit the plaintiff to use her discretion as to stipulating an amount (recalling ss 11 and 14A of the Act).

95. I have considered the note, which records the testator's subsequent statement to the plaintiff that he wanted her to use her discretion 'with dividing it' between Messrs Italiano and Clack. Again, that statement reflects the iterative process that was occurring between the testator and the plaintiff. The plaintiff did not contend the testator's spoken words gave her discretion as executor as to amount or division and I do not find that they did either.

96. This is because the conversation moved on. The plaintiff asked the testator to be clearer about how to share the money. I do not accept the plaintiff's statement in her 2016 Affidavit that she asked him to be clearer about the amounts to be given. Such a statement is contrary to what she recorded in the note and contrary to her earlier statement to the testator as to the difficulty in stipulating amounts.

97. However, the plaintiff's question is not as important as the answer given. The testator's response of 'half and half of what's left after Rita and Judith' does not express any intention as to a particular amount.

98. The foregoing leads me to conclude first, there is certainty of intention (from the express words of the Codicil) to bestow gifts on Messrs Italiano and Clack. Second, taking into account the extrinsic evidence of the note, there is also certainty of intention that the amounts 'as directed' were to be equal.

99. However, there is no proven intention of the testator as to what the amount was. The submission that the testator's spoken words meant a quarter each of the residue was premised entirely on the plaintiff's construction of 'most', in order to give certainty to the words, 'what's left after Rita and Judith'. Having rejected that construction, the result is that the testator's words were not sufficiently exact or precise to found relief under s 12A(1) of the Act.

100. As the Will and Codicil presently stand, the gifts to Messrs Italiano and Clack thus fail for uncertainty.

**Application of s 12A(2) of the Act**

101. Section 12A(2) enables to Court to rectify a Will so as to give effect to the probable intention of the testator in certain circumstances.

102. The section is premised entirely on the hypothetical case. As may be seen from the principles set out above in relation to s 12A(1) of the Act, this part of the section significantly expands the principles of rectification.

103. The defendant's supplementary submission contended for a restrictive application of the section, premised largely on the common law, and in particular on the long-established requirement that a will be in writing. However, the section is somewhat radical, in that it expressly allows the Court to fill the gap and do what the common law precludes (see, for example, the comments of Young J (as his Honour then was) in *Re Estate of Max Frederick Dippert* [2001] NSWSC 167 at [17], cited in *Rawack* at [26]), namely to determine the testator's probable intention if (relevantly) he had fully appreciated circumstances that were not known by him, or their legal effect, and even including circumstances which occurred after the testator's death, and then to supply words to meet those circumstances.

104. Presumably the section's departure from the common law is what has led others to describe it as 'revolutionary': Queensland Law Reform Commission, *Consolidated Report to the Standing Committee of Attorneys-General on the Law of Wills*, Miscellaneous Paper No 29 (1997) at 59; New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills*, Report No 85 (1998) at 68.

105. Neither the parties nor the Court have been able to turn up any previous judicial consideration of the section. In order to explain why the defendant's submission on the construction and application of the section is not correct, the legislative history has been set out below. It enables a proper understanding of the reasoning behind the introduction of the section, and the circumstances in which the Parliament intended the section to operate, given the broad discretion it gives to the Court.

106. The Explanatory Memorandum to the Wills (Amendment) Bill 1991 (ACT) relevantly states:

> New subsection 12A(2) provides that a court may also order the will to be rectified where the provisions of the will, if applied according to their tenor, would fail to accord with the probable intention of the testator. However, before making such an order, the court will

need to be satisfied that there were – prior to, at, or after the time of execution of the will by the testator – circumstances or events which lead to that failure. The circumstances or events are matters which the testator had no knowledge of, or did not anticipate, or which the testator, while knowing of, or anticipating, them, did not appreciate their effect on the provision of his or her will. They may also be circumstances or events which occurred at the time or, or after, the testator's death. An order by the court under this subsection may only be made if the court is satisfied that it is desirable in all the circumstances to do so.

107. That last sentence reflects the fact that the section as initially introduced was in slightly different terms from the present s 12A(2):

> (2) If the court is satisfied that circumstances or events existed or occurred before, at or after the execution by a testator of his or her last will, being circumstances or events—
>
> (a) that were not known to, or anticipated by, the testator;
>
> (b) the effects of which were not fully appreciated by the testator; or
>
> (c) that occurred at or after the death of the testator;
>
> in consequence of which the provisions of the will applied according to their tenor would fail to accord with the probable intention of the testator had he or she known of, anticipated or fully appreciated the effects of those circumstances or events, the court may, **if it is satisfied that it is desirable in all the circumstances to do so,** order that the probate copy of the will be rectified so as to give effect to that probable intention.
>
> [Emphasis added.]

108. The Parliamentary debates confirm that the Parliament was fully aware of the 'revolutionary' change that it was enacting. The Hansard for the Legislative Assembly on 19 September 1991 records the Attorney-General, Mr Connolly, presenting the Bill (pp 3523, 3525):

> This Bill represents the most thorough and far-reaching reform of the law relating to wills in the ACT since the present Wills Act was made as an ordinance some 23 years ago. At the same time, it marks the arrival of the ACT at the front line of wills reform in this country.
>
> ...
>
> The second concerns the matter of unforeseen circumstances. This second matter will enable a court to insert words into, or omit words from, a will where the court is satisfied that certain circumstances or events existed, either before or after the will was made, that were generally not known to the testator. As a consequence of the lack of knowledge, the provisions of the will then fail to accord with what the testator's intentions would have been had he or she known of those circumstances. The provision represents a significant increase in the ability of the court to examine, and give effect to, the testator's underlying intentions in cases where, through no fault of the testator, circumstances combine to shipwreck those intentions.

109. The Parliamentary Hansard of the Legislative Assembly on 22 October 1991 records Mr Collaery MLA stating at pp 4104-4105:

> Subsection (2) of the same section, 12A, is, we believe, new to the common law. Continental European systems have a power like that given in this subsection. It allows the ACT Supreme Court to rectify a will to give effect to the probable intention of the testator when circumstances arise which the testator did not know of, anticipate or appreciate, or which arose after his or her death. Sometimes a court can be morally sure of what a testator wanted to do, but owing to changed circumstances the will does not give effect to those intentions. Under the existing law of construction of wills, the courts are often unable to come to a satisfactory conclusion and the plans of the testator are shipwrecked.

> One example will suffice. In *Davis v. Worthington,* reported in 1978, a testatrix left a gift to "my friend, Aldo Pace", and if he failed to survive her for 14 days, to the Muscular Dystrophy Research Association. But, in fact, Aldo murdered the testatrix and so could not inherit from her because of the rule of public policy which prevents a murderer from inheriting from his or her victim.
>
> But what about the Muscular Dystrophy Research Association? Do they miss out too because the donor got murdered? Well, they were to inherit only if Aldo had failed to survive the testatrix. He had survived her by more than 14 days. It is plain to a reasonable observer that the testatrix would have wanted the Muscular Dystrophy Research Association to inherit in the circumstances, but the Western Australian Supreme Court held that the gift to the association failed. In effect, the court defeated the intention of this good, murdered woman.
>
> Now, were that to happen, God forbid, in this Territory, her intention will not be defeated. All this is pretty exciting stuff to lawyers.

110. The section was amended in 2007 by the *Statute Law Amendment Act 2007* (ACT). The explanatory note to the relevant amendment in that Act states 'this amendment brings the structure of the subsection more closely into line with current drafting practice'.

111. The explanatory note does not assist with the reasoning behind deleting the words 'if it is satisfied that it is desirable in all the circumstances to do so'. I do not consider that the deletion of the words effects any significant change, as the Court retains a broad judicial discretion under s 12A(2) of the Act, which enables the determination of what is in the interests of justice, having regard to the circumstances of the case before it.

112. It is also worth bearing in mind, when considering the proper application of the section, Parliament's clear intention that this is beneficial or remedial legislation, and as such is to be given 'a fair, large and liberal interpretation' rather than one which is 'literal or technical', although a construction should not be given that is 'unreasonable or unnatural': *IW v City of Perth & Ors* (1997) 191 CLR 1 at 12.

113. The first question is whether the section is enlivened at all. In the present case, the final proceeds of sale of the testator's house were not known by the testator at the time the Codicil was drafted. More importantly, the testator dictating his Codicil on his death bed did not have the benefit of legal advice and did not fully appreciate the legal effects of the words he used. He did not appreciate the fact that the lack of any certainty in his 'direction' to the executor would result in two general gifts failing. I am satisfied that either sub-para (i) or (ii) of s 12A(2)(a) applies.

114. The second question is to determine whether it is possible to discern the probable intention of the testator. Based as it is on a hypothetical, this question is necessarily an uncertain exercise and reasonable minds may well differ as to a person's probable intention.

115. The plaintiff, in supplementary submissions, has helpfully drawn the Court's attention to Mr C. J. Rowland's discussion of the section's predecessor in 'The Construction or Rectification of Wills – Part II' (1993) 1 *Australian Property Law Journal* 193, at 208:

> The following sources are available to find the intentions of the testator: the will itself, and whatever extrinsic evidence is available and admissible. Where the testator either did not consider, or did not deal with, the situation which has arisen, the court, in deciding what the testator would have wanted, should consider the will itself and whatever extrinsic evidence is available and admissible. Using its own criteria of reasonableness and justice and its own experience as a guide, the court should infer what the testator would probably have

> wanted. If the court cannot decide on a balance of probabilities what the testator would have wanted, the provisions would not give a remedy. It is hoped that in applying its own standards of reasonableness and justice, the court should not strive to give effect to incomplete expressions of intention which are capricious or cruel; the court could decline to do so on the basis that it would not be [in the interests of justice]. ...
>
> [While the will] may be read in the light of the admissible evidence, the text of the will must itself provide at least some slight indication of probable intention – the trend of intention; it must provide a 'peg' from which the court's solution can hang. It would not be enough that the testator's actual or probable intentions are known exclusively from external sources.

116. I respectfully agree with the learned author.

117. I am satisfied on the balance of probabilities that, had the testator known the lack of stipulation of an amount or a mechanism for calculation of an amount would have the effect of the gifts to his two friends failing for uncertainty, he would have stated a sum for each. That much is evident from the terms of the Codicil itself.

118. As to the quantum of the gift, resort must be had to extrinsic evidence. Here, mathematical precision is illusory and reasonable minds may well differ as to the testator's probable intention. However, the entire exercise is premised on uncertainty and the beneficial nature of the legislation would be entirely defeated if the Court were to take a narrow view of what is necessary to establish the probable intention of the testator.

119. Having said that, the surrounding circumstances from which to infer the testator's probable intention may not allow the Court to grant relief. Each case will very particularly turn on what markers exist and may be drawn together to enable the Court to form a conclusion as to the testator's probable intention on the balance of probabilities.

120. In this case, I consider the following matters to be of assistance in determining the amount of the gifts. First, the plaintiff deposes to the testator saying to her at the time of making the Codicil, 'I want Peter to use his money to help the treatment of his blepharospasm and I want Pat to use his to get his teeth fixed and get hearing aids.'

121. Second, the Will executed on 20 August 2015 also gives some guidance as to a sum of money the testator considered appropriate to give to another friend at the time, Mr Roy Shepherd. That sum was $25,000. Of course, the Court is determining what the testator's probable intention would have been after that date and in respect of different people. However, the evidence is that at the time the testator executed the Will, he was very close to Mr Shepherd and indeed, such was the level of trust that Mr Shepherd held a joint power of attorney. Given the Will itself was only executed a matter of months before the Codicil, I have taken it into consideration as an indication of what the testator considered to be an appropriate amount to give a friend to whom he was very close.

122. Third, I take into account the efforts of the plaintiff in increasing the value of the testator's real property when it was sold, and in particular the testator's handwritten card to that effect the day before he died. Applying the 'armchair principle' of the testator, in that the Court places itself in the position of the testator and considers all material facts and circumstances known to the testator (*Allgood v Blake* (1873) LR 8 Ex 160 at 162), the testator placed value on that, at the time he made the Codicil. Knowing that the sale had achieved significantly more than he had anticipated, the

testator would also have known that he could afford to be a little more generous to his two friends in December 2015 than in August 2015 when he executed the Will.

123. Taking into account the purpose to which the testator wished the gifts to be put, the increased sale price of the testator's house, and the evident closeness of the relationship between Messrs Italiano and Clack with the testator, I consider that it is possible to discern the testator's probable intention of a gift of $35,000 to each as an appropriate reflection of what the testator would have wanted.

124. Because of the exercise being hypothetical, it remains arguable that the testator may well have intended to settle on a higher figure. The conclusion I have reached is an evaluative judgment based on the evidence that is before the Court. The Court's satisfaction is not based on whether a particular figure is arguable, as that would only amount to a possible intention. On the balance of probabilities, I am satisfied that by reference to the testator's thoughts expressed in other ways – what he wanted the money to be used for, what he knew about the successful sale of his house, and what he had previously intended to give other friends – the sum fairly reflects the testator's probable intention.

125. Finally, it remains for the Court to consider, in the exercise of its overarching broad discretion under the section, whether it is in the interests of justice to rectify the Will and Codicil to give effect to that probable intention. This is plainly a case where it is appropriate to do so as it avoids the plans of the testator being shipwrecked.

126. The Codicil may be rectified by deleting the words 'AMOUNTS AS DIRECTED TO MY EXECUTOR' and inserting the words '$35,000 each'.

## Costs

127. Costs are in the discretion of the Court: r 1721 of the *Court Procedures Rules 2006* (ACT) (**Rules**). However, pursuant to r 1732 of the Rules, unless the Court otherwise orders, a party who sues or is sued as a trustee is entitled to have the costs of the proceedings that are not paid by someone else paid out of the fund held by the trustee, assessed on a solicitor and client basis.

128. Under r 1700, 'trustee' includes a personal representative of a testator individual.

129. Further, in probate and trust construction matters, unless a party has been vexatious or lacking in good faith, costs are usually allowed to all parties out of the trust fund: *Elders Trustee & Executor Co Ltd v Easter* [1963] WAR 36; *Re Buckton* [1907] 2 Ch 406 at 414-415; *Kovacs v Fogarty (No 2)* [2007] ACTSC 40 at [16]; *Yunghanns v Candoora No 19 Pty Ltd* [2000] VSC 387.

130. In what I consider to be an approach broadly consistent with that principle, in *Donnolley v Clarke* [2008] NSWSC 522 White J, as his Honour was then, at [38] citing, inter alia, *Re Barden; Florence v Shekelton-Bardon* (Unreported, Supreme Court of New South Wales, Holland J, 19 December 1983), referred to two main recognised principles of exception to the general principle that costs follow the event:

    (a) If a person who makes a will or is interested in the residue has by his conduct caused the litigation to occur, the costs of a party unsuccessfully contesting the will may be ordered out of the estate.

(b) If the circumstances reasonably called for an investigation to be made before the court could properly pronounce in favour of the will, then the contesting party who fails ought not to be required to pay costs and should be left to bear his own.

131. Here, as the testator has caused the litigation by failing to make his intentions clear, costs should be paid from the estate. Further, the defendant has been substantially successful in defending the proceedings. Accordingly, in light of the above principles, I consider that the costs of the plaintiff ought be paid from the estate on a solicitor/client basis and the costs of the defendant be paid out of the estate on a party/party basis.

**Orders**

132. The orders of the Court will be:

1. Pursuant to s 12A(1) of the *Wills Act 1968* (ACT), the Will dated 20 August 2015 of George Rummer ('Will'), testator, as amended by the Codicil dated 4 December 2015 ('the Codicil'), is rectified by deleting from clause 11 the words 'most of'.

2. Pursuant to s 12A(2) of the *Wills Act 1968 (ACT)* the Will and Codicil is further rectified by deleting from clause 11 the words 'amounts as directed to my executor' and inserting in their place '$35,000 each'.

3. The costs of the parties are to be paid from the testator's estate, with the plaintiff's costs to be paid on a solicitor-client basis.

I certify that the preceding one hundred and thirty-two [132] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Associate Justice McWilliam.

Associate:

Date: