Where the Will does not carry out the Testator's Intentions: Rectification of Wills and Testamentary Documents

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Presented at the Two Wentworth Succession Conference

22 March 2025
Forresters Beach, NSW

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A. Introduction

1. Absent express statutory power, the Courts in New South Wales have limited inherent jurisdiction to correct testators' mistakes. Those limitations were the subject of the NSW Law Reform Commission Report 47 (1986) *Wills – Execution and Revocation.*

2. The Report identified four significant limitations at [7.5] – [7.8]:

> *First*, it is generally accepted that the court has no power to add or alter words when admitting a will to probate, even if there is clear evidence that the omission of the correct word or words was unintentional. One example of the irrationality of this limitation is that a legacy of "$50" which should have read "$500" cannot be corrected, whereas a legacy of "$500" which should have read "$50" can be altered by omission of the last "0"….
>
> A *second* limitation lies in the truncated manner in which the court will rectify mistakes by omitting words. The Probate Division of the Supreme Court of New South Wales handles all proceedings relating to the validity of wills, whether or not such proceedings are contested…. But in exercising its "probate" jurisdiction, the court does not provide any binding interpretation of the will which is admitted to probate.
>
> The *third* limitation is that where the error is a mistake of law or error in drafting being matters in which the draftsman was empowered by the testator to use his or her own judgment, the testator is bound by the mistake. One example is where the testator instructs his or her solicitor to draw a will containing a gift in favour of children and the solicitor uses the word "issue" in a context where it has its legal meaning of descendants. This limitation has worked harsh injustices.
>
> The *fourth* limitation on the court's power to rectify by omitting words or phrases when admitting a will to probate, lies in the court's refusal to do this where the result would be to alter the sense of the remaining words.

3. Following the Report, section 29A was inserted into the *Wills Probate and Administration Act 1898* (NSW) *("**WPAA**")*. The effect of the amendment was to grant the Court a discretion to rectify a will "*if it fails to carry out the testator's intentions"* so that it carries out the testator's intention: s 29A(1) *WPAA*

4. Sections 27 and 28 of the *Succession Act 2006* (NSW) apply in New South Wales where the testator died after 1 March 2008, regardless of when the will was drafted. Section 29A of the *WPAA* applies to wills where the testator died before 1 March 2008.

B. The Statutory Regime

5. Section 27(1) of the *Succession 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 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.

6. The corresponding provisions in all Australian states and territories, and the United Kingdom, are contained in **Schedule 1**. South Australia is the outlier, where the legislation continues to reflect the earlier *Wills Act 1936* (SA).

7. Section 27(2) – (3) deal with time limits to commence an application, providing:

> (2) A person who wishes to make an application for an order under this section must apply to the Court within 12 months after the date of the death of the testator.
>
> (3) However, the Court may, at any time, extend the period of time for making an application specified in subsection (2) if--
>
> (a) the Court considers it necessary, and
>
> (b) the final distribution of the estate has not been made.

8. *Supreme Court Rules* Pt 78 r 39 sets out the notice and consent requirements for an application under section 27.

C. Principles applicable to rectification

9. A condition precedent of the Court exercising its discretion to rectify a will is that there is a discrepancy between the effect of the will as executed, on its proper construction, and the testator's intentions. The statutory language requires that there be a causal connection between the failure ("*because*") with either the existence of (a) a clerical error or (b) a failure to give effect to the testator's instructions.

10. In *Lockrey v Ferris* [2011] NSWSC 179, Hallen AsJ (as his honour then was) at [73] posed the questions in approaching s 27(1) as follows:

> *Thus, the three questions posed by the section are, **first**, what were the testator's actual intentions with regard to dispositions in respect of which rectification is sought; **second**, is the will expressed so that it fails to carry out those intentions; and, **third**, is the will expressed as it is in consequence of either a clerical error, or a failure on the part of someone to whom the testator gave instructions in connection with the will, to comply with those instructions?*

Determining the testator's intentions

11. The testator's intentions must be determined at the time of the making of the will. In New South Wales, the level of satisfaction is on the balance of probabilities (in contrast, Tasmania requires satisfaction "*beyond reasonable doubt"*).

12. In *Trimmer v Lax; Estate M A Fresen* (unreported, NSWSC, Hodgson J, 9 May 1997) Hodgson J at 12 – 13 stated:

> In coming to this view, I do take into account the need for clear and convincing proof in cases of rectification. As I understand that requirement, it means that the Court should not act unless it is satisfied that the party seeking rectification has used reasonable diligence in presenting to the Court all evidence going to the question of intention, and that the Court must take into account that what is sought is to alter a document which the deceased has taken the trouble to write out and sign and have witnessed. It is also necessary to show an actual intention, not merely what the deceased would have

> intended had she thought about the matter. But, as I understand it, the requirement for clear and convincing proof does not mean that the standard of proof is other than the balance of probabilities, having regard to the considerations I have mentioned.

13. In *Long v Long; Estate of Ethel Edith Long* [2004] NSWSC 1002 Barrett J said at [9]:

> The important point is that the court must be satisfied, according to the balance of probabilities, as to not only a negative proposition (that the testatrix did not intend the will to be in the form it eventually took) but also a positive proposition (that the testatrix intended the will to be in the form for which the plaintiff contends).

14. A failure to establish, on admissible evidence, the testator's *intentions* is a common problem in applications before the Court.

What was the cause of the failure to carry out the testator's intentions?

15. What constitutes a clerical error attracts a broad interpretation. In *Re Will of McCowen* [2013] NSWSC 1000 Young AJ said at [15]:

> In England, the term "clerical error" in this branch of the law has been widely interpreted. The term not only covers errors in the process of recording the intended words of the testator but also extends to situations where the person drafting the will has not appreciated the significance or effect of the introduction (or deletion) of a particular provision: *Wordingham v Royal Exchange Trust Co Ltd* [1992] Ch 412, *In re Segelman* [1996] Ch 171 and *Marley v Rawlings* [2011] 1 WLR 2146. However, executing the wrong will is not within the term (*Marley's case*) nor is the failure of the drafter to understand the testator's instructions: *In re Segelman*, *Pengelly v Pengelly* [2008] Ch 375 and see *Vescio v Bannister* [2010] NSWSC 1274.

16. Blackburne J in *Bell v Georgiou* [2002] WTLR 1105 at [8] in considering section 20(1) of the *Administration of Justice Act 1982* (UK), stated *"The essence of the matter is that a clerical error occurs where someone, who may be the testator himself, or his solicitor, or a clerk or typist, writes something which he did not intend to insert or omits something which he intended to insert."*

17. In *Vescio v Bannister* [2010] NSWSC 1274 at [12] – [13] Barrett J made the following comments regarding instructions:

> 12 Implicit in s 27(1)(b) is an assumption that the testator gave "instructions" as to the content of the will. "Instructions" are, of their nature, communicated by one person to another with a view to compliance or obedience by that other person. It seems to follow that s 27(1)(b) cannot apply to a will composed and written by the testator personally.
>
> 13 In the present case, the will was drawn by a solicitor. There is evidence about the communication by the deceased to the solicitor of "instructions", in the sense of expression by her of her wishes as to how her estate should be disposed of by the will the solicitor was asked to prepare. The court thus has a basis for making findings as to the content of "the testator's instructions".

18. The evidence of the will drafter is paramount in determining the contents of the instructions given. In *Lockrey v Ferris* the Court was satisfied that the testator's intentions were not for his estate to be dealt with as an intestacy, however, in the absence of evidence from the will drafter, his honour concluded at [86] – [87]:

> What his instructions were is impossible to glean. There is no evidence of any conversation with Mr Aubin and there are no notes, or written records, of what the testator may have said. There is nothing that occurred at the time that he made the Will that would justify me inferring that he had any expressed particular intention about what would happen in the event that one of the beneficiaries named in Clause 3(d) did not survive him. There is simply no basis for determining what the testator said on this topic, or if he said anything at all.
>
> 87 Without knowing what, if anything, the testator communicated to the draftsman of the Will, I am unable to conclude that s 27 applies, and cannot, therefore, order rectification of Clause 3(d). It is, therefore, unnecessary, for me to decide whether there was a clerical error, and if so, whether it is necessary to extend the time period for making the application for rectification.

19. In *Re the Will of the Late Stanko Zulj* [2014] TASSC 14 a will was prepared by a firm of solicitors. The will appointed one of the testator's six siblings as sole executor but failed to dispose of *any* of the testator's property. The consequence was an intestacy.

20. The executor commenced proceedings in the Supreme Court of Tasmania seeking to rectify the will so that it gifted the net residue of the estate solely to him: [5]

21. Evidence prepared over a 4 year period was relied upon in proceedings: [8] The evidence appeared to have been limited to affidavits obtained from the will drafting solicitor, and the two witnesses.

22. The will-drafter accepted that *"the will as drawn did not finally dispose of the testator's estate, and that it is probable the clerk who prepared it did not prepare the will properly and that he did not check it properly."* ([9]) The reasons do not record any evidence from the will drafting solicitor of the nature of file notes, drafts or recollection of the testator's intentions or instructions.

23. One of the witnesses, Mr Fitzallen, gave evidence that the Deceased *"told me that he was going to leave everything to his brother Drago [the Applicant] because he liked to help his family…"* ([11])

24. Her honour Tennent J relevantly reasoned:

    a. The Court accepted an inference that the testator, in engaging a lawyer to draft his will, did not intend his estate to be dealt with as an intestacy: [15]

    b. The error was one that would constitute a "clerical error": [19]

    c. The relevant time that the intentions of the testator are to be determined is *at the time of the making of the will*. There was no direct evidence before the Court as to the testator's intentions at the relevant time: [14]

    d. The evidence of Mr Fitzallen as to an expressed intention fell short as it had no temporal connection to the time the will was made: [14]

    e. Accordingly, the Court could not be satisfied –"beyond a reasonable doubt" – as to the testator's intentions at the time of the making of the will.

> Accordingly, and notwithstanding satisfaction of the failures of the will to carry out the testator's intentions, the application was dismissed.

25. Whilst the onus of proof in Tasmania is more onerous than that in New South Wales for rectification, the paucity of evidence would likely result in the same outcome had the application been brought in New South Wales.

26. On the other hand, in *Re Perry* [2021] QSC 97 a will was prepared in Australia which had the effect of revoking all prior wills, including two separate wills relating to the testator's assets held in the United Kingdom and Thailand.

27. The Court considered the evidence surrounding the making of the United Kingdom and Thai Will and concluded that it *"provided powerful evidence that Mr Perry intended the UK will to operate in respect of UK property only, and the Thai will to operate in respect of Thai property only."* ([6])

28. Similarly, the Court considered the contents of the testator's instructions with respect to the making of the Australian will. There was no evidence that the testator instructed that the UK and Thai will be revoked: [11] The testator's instructions to the Australian solicitor dealt only with Australian assets and therefore the testator "*implicitly, only sought a will which would affect the disposition of those assets":* [6] Those instructions neither mentioned the UK or Thai will or that he held substantial assets overseas: [11]

29. At [12], Henry J concluded:

> The testator's actual intention was that his Australian will would not affect the continued operation of his UK and Thai wills. His instructions, construed in light of his lay misunderstanding, were to make a will which would only operate in respect of his Australian property. The revocation clause of the will, unbeknown to the lawyer drafting it, did not give effect to those instructions. It follows I am satisfied the will did not carry out the testator's intentions because it did not give effect to his instructions.

D. Principles applicable to extending the time to bring an application

30. An application for rectification under s 27 of the New South Wales act must be brought within 12 months after the date of death of the testator: s 27(2) *Succession Act*.

31. Section 27(3) grants the Court power and discretion to extend the time to bring an application *"if the Court considers it necessary"* and final distribution of the estate has not been made.

32. Section s 27(3), unlike the *WPAA*, no longer requires demonstration of "sufficient cause" to extend the time to bring an application. On one view, this evidences a relaxation of the "more stringent test" that Young J identified under the WPAA: *Re Swain (Dawn)* [2008] NSWSC 1343 at [51]

E. Procedure in NSW

33. An application for rectification should, ordinarily, be made concurrently with a grant. However, a Court may make orders for rectification after a grant has been made, or, before a grant is sought: *The Estate of Cecil Douglas Brisbane* (NSWSC, Powell J, 19 June 1992, unreported); *Huszar (Re Estate of)* [1999] NSWSC 388; *Rawack v Spicer* [2002] NSWSC 849.

34. Whilst rectification is a matter for probate court, it has been held that following the *Civil Procedure Act 2005,* proceedings for rectification can be brought together with a construction suit: *Estate of Aspasia Kandros* [2019] NSWSC 757

35. The proceedings ought to ordinarily be commenced by summons, unless there is some other relief or controversy that requires commencement by Statement of Claim.

36. The originating process should seek an order pursuant to section 27 that the will be rectified, setting out the form of the rectification sought. The authors of *Succession Law and Practice NSW* suggest the originating process seek a declaration the will

does not carry out the testator's intentions. Whilst that accords to usual practice, a failure to do so is unlikely to be fatal.

37. Where an extension of time is required, it must be sought in the originating process.

38. Any application must be supported by affidavit evidence. The ordinary rules of evidence apply, notwithstanding that an uncontested application may be dealt with by a registrar in chambers.

39. Rule 78.39 of the Supreme Court Rules requires an applicant to file an affidavit showing the persons whose interests would be adversely affected if the order sought was made. It also requires notice of proceedings to be served on each affected person within 28 days after the application is made, except for those persons who have consented to the making of an order.

40. The appropriate form for the notice is UCPR form 140.

41. The Rules require evidence of consent be filed. There is no approved form. UCPR Form 133 or 134 will modifications of the nature required by former Supreme Court form 106CA will suffice. Form 106CA is Schedule 2.

Ari Katsoulas
March 2025

Schedule 1

Comparison of Rectification Powers in all states and territories and the United Kingdom.

Jurisdiction	Legislation	Section	Wording
New South Wales	*Succession Act 2006*	27	"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."
Victoria	*Wills Act 1997*	31	"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."
Queensland	*Succession Act 1981*	33	"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."
Western Australia	*Wills Act 1970*	50	"The Court may make an order to rectify a will to carry out the intentions of **a** 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."
South Australia	*Succession Act 2023*	22	"**If the Court is satisfied that a will does not accurately reflect the intentions of a deceased testator,** the Court may order that the will be rectified **to properly reflect the testator's intentions.**" *(Different wording and phrasing from NSW, omitting references to clerical errors and instructions.)*
Tasmania	*Wills Act 2008*	46	The Court may make an order to rectify a will to carry out the intentions of the testator if the Court is satisfied **beyond reasonable doubt** that the will does not carry out the testator's intentions because –

Jurisdiction	Legislation	Section	Wording
			(a) a clerical error was made or (b) the will does not give effect to the testator's instructions."
Australian Capital Territory	*Wills Act 1968*	12B	"The court may make an order **inserting material in, or omitting material from, the probate copy of 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."
United Kingdom	*Administration of Justice Act 1982*	20	"If the court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence— (a) **of a clerical error; or** **(b) of a failure to understand his instructions,** it may order that the will shall be rectified so as to carry out his intentions." *(Refers to 'failure to understand his instructions' instead of NSW's 'does not give effect to the testator's instructions'. 'His' instead of 'the'. 'Shall' instead of 'may'.)*

Schedule 2

Form 106CA

P. 78, r. 34A (IA)

CONSENT TO ORDER

I ***(name)*** of ***(place)*** ***(occupation)*** would receive the following benefit under the will dated ***(date)*** of ***(name of deceased)*** if the order set out below is not made ***(specify benefit).***

If the order is made my benefit would be ***(specify benefit).***

I am over 18 years of age. I am not an undischarged bankrupt. I have not assigned or encumbered any interest that I may have in the estate of the deceased.

I consent to an order being made that ***(specify order).***

Dated: ***(date).***

Signed in the presence of }

AFFIDAVIT OF WITNESS TO CONSENT

On ***(date)*** I ***(name, address and occupation)*** say on oath:

1. The above document was signed in my presence on ***(date)*** by ***(name).***

2. The signatures (set these out) are respectively my signature and that of ***(name of person consenting).***

Sworn at
before me }