Construction of Wills

This month’s CPD will discuss the construction of wills and the general principles that apply to the interpretation of wills. Knowledge of these rules will help the drafter understand the importance of clear drafting and the problems that can arise where the meaning of a will is not clear and needs to be discovered. This paper will also briefly cover the remedies available where a meaning is not clear.

INTRODUCTION

Construction, derived from the verb ‘to construe’, is the interpretation of a will to discover the meaning of it where there is a dispute, or the meaning is unclear. To interpret the meaning of a will it must be considered as a whole, not just the clause(s) that there is doubt.

The key principle of the construction of wills is to give effect to the testator’s intention as written, not the intention in the testator’s mind at the time of writing. The court does not set out to makes sense of the words written by adding to or otherwise altering them. To avoid construction issues arising it’s important to know what presumptions are made when interpreting a will and what ordinary meanings the courts will ascribe to certain words and phrases.

COMMON LAW AND STATUTORY APPROACHES

The starting point is the case of Marley v Rawlings [2014] UKSC 2 where the correct approach to interpretation of wills was set out as mirroring that of the interpretation of contracts. The court will set out to find the intention of the testator by identifying the meaning of the words used in light of the following, but ignoring subjective evidence of intention:

- the ordinary meaning
- the purpose of the document, considering it as a whole
- any other provisions of the document
- the facts known or assumed by the relevant parties at the time of execution
- common sense

This all boils down to finding the testator’s intention.

Further to this in some situations it is possible for extrinsic evidence of the testator’s intention to be submitted due to the provisions of section 21 of the Administration of Justice Act 1981. This applies to deaths that occurred after 31st December 1982.

“21 (1) This section applies to a will—

(a) in so far as any part of it is meaningless;

(b) in so far as the language used in any part of it is ambiguous on the face of it;
(c) in so far as evidence, other than evidence of the testator’s intention, shows that the
language used in any part of it is ambiguous in the light of surrounding circumstances.

(2) In so far as this section applies to a will extrinsic evidence, including evidence of the
testator’s intention, may be admitted to assist in its interpretation.”

s21(1)(a) covers cases where the testator has used words or phrases that have no apparent meaning,
s21(1)(b) covers cases where a word is used that have multiple potential meanings, and s21(1)(c) covers
cases where from context the testator’s use of a word appears to differ from its ordinary meaning.

Evidence of the testator’s language is always admissible to show that they intended a particular meaning
or used a word in a particular way that differed from its ordinary meaning. An example of this would be
where a testator was in the habit of referring to their friend’s son as their nephew, or where it could be
shown that they intended a word to have a wider or narrower meaning for example references to
“issue” or “money”. Evidence considered may be notes the testator or the drafter has made or things
they have said to the drafter or others.

Evidence of the testator’s dispositive intention i.e. what they have told someone about the contents of
their will, is only admissible if s21(1)(a) or (b) apply. Evidence of the testator’s intention is not admissible
where the testator has used a word that has an ordinary meaning and there is nothing to suggest that it
has been used in an unusual sense, apart from what the testator apparently said about the contents.

PRESUMPTIONS

Ordinary meaning

This is a literal approach to interpretation. It is presumed that the words used in a will bear their
ordinary and natural meaning, unless there is an evident contrary intention. Where a word has multiple
ordinary meanings, as is common in English, the courts will consider the will as a whole as well as any
available extrinsic evidence such as the drafters attendance notes to determine the meaning that the
testator intended.

If a word has an ordinary meaning and a secondary meaning, then the secondary meaning will only be
applied if applying the ordinary meaning would create an absurdity and it is clear that the testator
cannot have meant the ordinary meaning to apply.

There are cases where the testator’s use of a word or phrase does not match with the ordinary use of
that word. This is where most construction issues arise. Take for example a case where a testator wishes
to leave his estate to “all my nephews and nieces”. Under the ordinary meaning of that phrase this
would refer only to the children of his siblings. If there is dispute as to whether the testator actually
intended to include the nephews and nieces of his spouse, and evidence to suggest that he referred to
them as such, then the will could be constructed to include them.

Related to this is the presumption that where the words used are unambiguous they must be
interpreted as having their clear meaning, even if this results in the testator’s wishes being difficult to
carry out.
The best way to avoid any disputes like this arising is for the drafter to make the testator’s intentions very clear on the face of the will. Confirm the testator’s intended meaning of a phrase, and where this differs from the ordinary meaning make sure to include a definition clause in the will to make the meaning clear.

**Technical meanings**

Where a will includes technical or legal language there is a rebuttable presumption that the word or phrase has been used properly and the testator intended it to take its technical meaning. If a professional drafter misuses technical language and the result is that the will does not fulfil the testator’s intention, then the wording can be interpreted to give effect to the intended meaning and not the literal meaning. s21 AJA 1981 would allow extrinsic evidence of the testator’s intention to be submitted to assist with the interpretation.

**Presumption against intestacy**

There is a presumption that the testator did not intend to die wholly or partly intestate, so when the meaning of a will is in doubt it should be constructed in a way that does not lead to an intestacy, insofar as it is possible to do so.

**Avoiding accidental life interests**

The accidental creation of a life interest is more a problem with homemade wills than professionally drafted ones (you would hope). It is possible and not too uncommon for a testator drafting their own will to intend their estate to pass to their spouse and then their children on second death, but to word this in a way that looks to be creating a life interest. For example, ‘I give my estate to my wife Jane Smith and then to my son John Smith’ would be giving a life interest to the wife with the son as remainderman.

Thankfully s22 AJA 1982 provides that if the testator makes a gift to their spouse or civil partner there is a presumption that the gift is intended to be absolute if the following two requirements are met:

1) The gift is made in terms in which themselves would give an absolute interest to the spouse; and
2) By the same instrument the testator purports to give their issue an interest in the same property.

This avoids the accidental creation of a life interest for a spouse.

**Dealing with the same words in different parts of the will**

In English the meaning of a word obviously changes depending on the context it is used in, so it is possible for the same word used throughout the will to have different meanings. This is fine and won’t cause a construction issue if each time the word is used its meaning is clear. Problems arise where a word used is clear at one point, but ambiguous elsewhere in the will. In these cases the meaning of the word at the ambiguous part will be treated as holding the same meaning as at the place where it was used unambiguously, as long as it makes sense in the context (*Re Birks* [1900] 1 Ch 417).
**SPECIFIC RULES OF CONSTRUCTION**

Where do words and phrases gain their ordinary meaning? In a lot of cases the “ordinary” meaning of a word is gained through use and is subject to change over time. This has always been one of the main criticisms of the literal approach to interpretation. In other cases the meaning given to a word is helpfully set out in statute. Sections 24-33 of the Wills Act 1837 are interpretation sections that provide the meaning of certain phrases, or fill gaps where the testator failed to mention something by will. The most well-known “gap filling” section is likely s33, which prevents lapse where a testator makes a gift by will to their issue and they die before the testator leaving issue of their own. Other definitions may come from case law. Let’s consider some common references and the meanings given.

**REFERENCES TO BENEFICIARIES**

There are specific rules of construction that apply to references to certain types of beneficiary in a will. Among them is a presumption of when a will speaks from. When it comes to defining beneficiaries, the will speaks from the date of its execution unless there is any contrary intention, so be aware of this when referring to individual beneficiaries by relationship alone. This rule does not apply to class gifts.

In *Peasley v Haileybury and ISC* [2001] WTLR 1356 a will gave the testator’s great-niece “and her husband” a right to occupy a property. It was held that the husband in question was the husband at the time the will was executed. Similarly, a gift to “my sister Dot’s eldest son” would make a gift to the son who met that description at the time the will was signed. Say Dot had three sons, and the eldest died between the signing and the testator’s death, the gift would lapse and would not instead pass to the next son.

If a reference is made to a beneficiary by description and the will is later republished by the execution of a later codicil, then the beneficiary will be the person who fulfilled the description at the time the codicil was executed and not when the original will was executed, subject to any contrary intention.

**References to Children**

The term children could potentially include the legitimate children of the testator, illegitimate children, children born as a result of fertility treatment or surrogacy arrangements, adopted children, and children conceived before the testator’s death but born afterwards. When drafting it is possible to define exactly what any references to children will mean so that the testator’s intention is clear, but if the will is silent then the word “children” will be given its meaning under the general law.

Legitimate and legitimated children of the testator obviously fall within the definition.

Under the Adoption and Children Act 2002 (ACA) adopted children are treated in law as though they are the natural children of their adopters, but not of their birth parents. In follows then that references to children in a will include a child who the testator has adopted, but not a child of theirs who has been adopted away. It will also apply to children adopted to the testator’s own children and so on, so that a gift to the testator’s children with a gift over to issue would benefit a child that had been adopted by the testator’s child should the original beneficiary die.
Where it is necessary to determine the date of birth of an adopted child for the purposes of a gift the ACA 2002 provides that an adopted person is treated as though they had been born on the date of their adoption. This resolves disputes where the testator dies leaving a gift to the children of a person such as “the children of A living at my death or born afterwards before any one of such children attain the age of 21”, and a child is living at the time of the testator’s death but is not adopted by A until years afterwards. Technically they were living at the testator’s death but did not meet the description of a child of A. Thanks to the rule of construction given in ACA 2002 such a child would be treated as though they were born on the date of the adoption so would fall into the category of a child born afterwards.

In wills or codicils executed before 1 January 1970 a class of children will only include legitimate children. There is no longer any distinction made between a legitimate or illegitimate child, so references to children are construed to include illegitimate children unless there is any contrary intention. under s19 of the Family Law Reform Act 1987, this rule of construction applies to gifts made by will or codicil after 3 April 1988.

Children en ventre sa mère are included within the definition of children within a will.

References to Issue

Unless otherwise stated references to issue will include only direct descendants of the testator. This does not naturally include stepchildren unless they have been adopted.

In the case of Reading v Reading [2015] WTLR 1245 it was found that a testator’s reference to “issue” did in fact include his stepchildren. The facts of this case were that the solicitor drafting the will used the word “issue” incorrectly as they knew that the testator intended to include not just his descendants, but his stepchildren and step grandchildren. The solicitor’s error was corrected by construction, and it was held that based upon the reading of the will as a whole it was clear that the testator’s intention was to include his stepchildren and step grandchildren within the meaning of the word “issue”. Extrinsic evidence was not admitted under s21 AJA 1982 in this case as it wasn’t necessary, but had it been the solicitor’s attendance note could easily have been admitted and would have clarified the testator’s intentions.

This construction issue could easily have been avoided if the drafter had not been careless with the terminology they used or had included in the will a clause defining what was meant by the word “issue”.

CHANGE OF GENDER

If a beneficiary changes their gender between the date of the will and the testator’s death this may affect the distribution of the estate.

s9(1) of the Gender Recognition Act 2004 states that once a full gender recognition certificate is obtained by a person their gender becomes the acquired gender for all purposes. This means that a gift in a will construed as ‘to my daughters’ could benefit a person who was previously a son or could remove benefit from a person who was previously a daughter. Similarly, a gift to ‘my eldest son’ could pass to someone other than the intended beneficiary or fail entirely if by the date of the death the son in question has acquired a gender recognition certificate.
For this reason, it is best to avoid solely gender specific drafting and refer to beneficiaries by name so the intended beneficiary is clear. If a beneficiary is specifically named but changes their name and gender before the testator’s death the gift to them can still take effect as the will expressed a clear intention to benefit that particular person. If the beneficiary is able to verify that they are the same person referred to in the will then the gift will take effect.

s15 GRA 2004 further provides:

‘The fact that a person’s gender has become the acquired gender...does not affect the disposal or devolution of property under a will or other instrument made before 5 April 2004.’

REFERENCES TO ASSETS

When referring to property the will speaks from death. Section 24 of the Wills Act 1837 provides that:

“24. Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.”

A gift in a will of ‘all my motor vehicles’ would therefore include any vehicles the testator owned at the time the will was executed, and all after-acquired vehicles that they own at their death. This means that the subject of a specific legacy is susceptible to increasing or decreasing between the date of the will and the date of death.

References to land

A gift in a will of “land” naturally includes any property or buildings built upon it. It also includes any incorporeal hereditaments, for example rental profits, titles associated with the land, and profits à prendre. A gift of a “house” would include the garden and outbuildings designed for the houses use and enjoyment.

If a property gifted is subject to a mortgage debt or other charge then the beneficiary will be liable for the payment of this debt unless there is a contrary intention (s35 Administration of Estates Act 1925)

References to personal chattels

Personal chattels has the meaning given to it by s55(1)(x) AoEA 1925 as amended by the Inheritance and Trustees’ Powers Act 2014:

“55(1)(x): Personal chattels” means tangible movable property, other than any such property which—

consists of money or securities for money, or

was used at the death of the intestate solely or mainly for business purposes, or

was held at the death of the intestate solely as an investment:

As with everything else discussed so far this is subject to contrary intention, so if the testator wishes a particular type of asset to be included within the definition of “personal chattel” that would not naturally be included he can do so by making his intention clear on the face of the will.
It is possible to make a gift of the contents of a room or an item, for example a particular drawer. It should be noted that this type of gift will include only the actual contents of the room or item at the testator’s death, so would not include any items located elsewhere that are linked to the contents gifted. For example, a gift of “the contents of the top drawer of my desk” would not also include the contents of the bottom drawer if the key to it happened to be kept in that drawer.

**Rectification**

Rectification ought really to be considered first, as the courts should consider rectification before they consider construction (though in quite a few recent cases they have not done so, Marley v Rawlings and Reading v Reading among them). This paper is mainly concerned with construction though so what follows is a brief introduction to rectification.

Under s20(1) AJA 1982 where the court is satisfied that a will fails to carry out the testator’s intentions they may order the rectification of the will if the reason it fails to carry out the intention is due to:

- A clerical error, or
- A failure to understand the testator’s intention.

Applications for rectification must be brought within 6 months of the grant of representation being taken out, unless the court grants leave for an application out of time.

Clerical errors are errors made by the drafter in the preparation of the will, not necessarily errors made by clerks – a professional drafter or the testator writing their own will could make a clerical error. An example of such an error was seen in the recent case of Joshi v Mahida [2013] WTLR 859. In this case the solicitor used the words “one half of my share” when he should have written “my one-half share”. The testator’s actual intention was clear and this was clearly an error on the part of the drafter, so rectification was allowed.

**Conclusion**

No professionally drafted will should give rise to construction problems as it is the drafters duty to understand their client’s intention and make sure that this is clear on the face of the will. Hopefully readers take away a greater understanding of the rules of construction that apply to wills to aid them in how they advise their clients.

**Important Reminder:**

These notes are produced solely for the benefit of SWW members when completing the November 2018 CPD test to gain 1 hour of structured CPD towards their annual quota. The notes do not represent legal advice and no reliance can be made on the content of the notes in any or individual specific client circumstances. Having read the notes members should cement their understanding by considering further reading around the subject – cases details can be found by searching the case references using BAILII or GOOGLE.