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Everything's not awesome - let's build it together. Construction and Rectification of Wills

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1. Table of Contents

1. PRINCIPLES OF CONSTRUCTION

1.1. The object of construction of a Will is to give effect to what the testator intended by the words used, having regard to admissible extrinsic evidence: *De Lorenzo v De Lorenzo* (2020) 104 NSWLR 155; [2020] NSWCA 351 at [50] per White JA (Gleeson JA agreeing); the Hon Justice M Meek writing extra-judicially on "Will Construction", 22 March 2023.

1.2. In *Perrin v Morgan* [1943] AC 399; [1943] 1 All ER 187 at 190 Viscount Simon LC said:

> "My Lords, the fundamental rule in construing the language of a will is to put upon 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."

1.3. In *Marley v Rawlings* [2014] UKSC 2; [2015] AC 129 Lord Neuberger (with whom Lord Clarke, Lord Sumption and Lord Carnwath agreed) said:

> [19] "When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions. In this connection, see *Prenn* at 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, per Lord Wilberforce, *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in *Rainy Sky*, per Lord Clarke at paras 21-30.
>
> [20] When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context. As Lord Hoffmann said in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, para 64, "No one has ever made an acontextual statement. There is always some context to any utterance, however meagre." To the same effect, Sir Thomas Bingham MR said in *Arbuthnott v Fagan* [1995] CLC 1396, that "[c]ourts will never construe words in a vacuum".

1.4. Ten principles of construction were set out by Isaacs J in *Fell v Fell* (1922) 31 CLR 268; [1922] HCA 55 at 273-275 (citations omitted)

(1) "Every will must by law be in writing, and it is a necessary consequence of that law that the meaning must be discovered from the writing itself, aided only by such extrinsic evidence, as is necessary in order to enable us to understand the words which the testator has used" …

(2) "The instrument ... must receive a construction according to the plain meaning of the words and sentences therein contained. But ... you must look at the whole instrument, and, inasmuch as there may be inaccuracy and inconsistency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it" …

(3) "If the will shows that the testator must necessarily have intended an interest to be given which there are no words in the will expressly to devise, the Court is to supply the defect by implication, and thus to mould the language of the testator, so as to carry into effect, as far as possible, the intention which it is of opinion that the testator has on the whole will, sufficiently declared" …

(4) An inference cannot be made "that did not necessarily result from all the will taken together" … A necessary inference is one the probability of which is so strong that a contrary intention cannot reasonably be supposed ...

(5) "We cannot give effect to any intention which is not expressed or plainly implied in the language of" the "will" … You have no right to fancy or to imply, unless there be something within the four corners of the will which is not only consistent with the implication you make, but which could hardly stand, if at all, in the will, without that implication being made. That is what is called necessary implication, and legitimate implication, in contradistinction to gratuitous, groundless, fanciful implication"...

(6) "If the contents of a will show that a word has been undesignedly omitted or undesignedly inserted, and demonstrate what addition by construction or what rejection by construction will fulfil the intention with which the document was written, the addition or rejection will by construction be made" ...

(7) "When the will is in itself incapable of bearing any meaning unless some words are supplied, so that the only choice is between an intestacy and supplying some words; but even there, as in every case, the Court can only supply words if it sees on the face of the will itself clearly and precisely what are the omitted words, which may then be supplied upon what is called a necessary implication from the terms of the will, and in order to prevent an intestacy" …

(8) "There are two modes of reading an instrument: where the one destroys and the other preserves, it is the rule of law, and of equity, following the law in this respect (for it is a rule of common sense ...), that you should rather lean towards that construction which preserves, than towards that which destroys. Ut res magis valeat quam pereat is a rule of common law and common sense; and much the same principle ought surely to be adopted where the question is, not between two rival constructions of the same words appearing in the same instrument, but where the question is

on so ready an instrument as that you may either take it verbally and literally, as it is, or with a somewhat larger and more liberal construction, and by so supplying words as to read it in the way in which you have every reason to believe that the maker of it intended it should stand; and thus again, according to the rule ut res magis valeat quam pereat, to supply, if you can safely and easily do it, that which he per incuriam omitted, and that which instead of destroying preserves the instrument; which, instead of putting an end to the instrument and defeating the intention of the maker of it, tends rather to keep alive and continue and give effect to that intention" ...

(9) If on reading the will you can see *some mistake* must have happened, "that is a legitimate ground in construing an instrument, because that is a reason derived not dehors the instrument, but one for which you have not to travel from the four corners of the instrument itself" …

(10) "The mind never inclines towards intestacy; it is a dernier ressort in the construction of wills" ... "In ascertaining the intention, I ought to a certain extent—we all know what the expression means—to lean against an intestacy, and not to presume that the testator meant to die intestate if, on a fair construction, there is reason for saying the contrary"...

1.5. “Armchair evidence” is admissible to establish the connection between the Will and the outside world. Resort may be had to other extrinsic evidence only in cases of latent ambiguity or equivocation. Section 32 of the *Succession Act* 2006 (NSW) permits the admission of evidence to assist in the interpretation of the language used in the will if the language used is meaningless or ambiguous.

1.6. The word “ambiguous” is defined in the Macquarie Dictionary as:

(a) open to various interpretations; having a double meaning; equivocal: *an ambiguous answer*.

(b) of doubtful or uncertain nature; difficult to comprehend, distinguish, or classify: *a rock of ambiguous character*.

(c) lacking clearness or definiteness; obscure; indistinct.

2. CONSTRUCTION – NEW SOUTH WALES LEGISLATION

2.1. The *Succession Act* 2006 (NSW) commenced 1 March 2008. Part 2.3 (sections 29 to 46) of the *Succession Act* 2006 (NSW) may be relevant to the construction of wills. The general purport of the legislation is to assist in giving effect to the testator’s intention, and to reduce the instances where a partial intestacy might result from the failure of a gift.

2.2. The transitional provisions in schedule 1 are important because some of the provisions apply to wills whenever made provided the testator dies after commencement, and others only apply to wills made after commencement.

2.3. Section 30 of the *Succession Act* 2006 (NSW) provides, subject to contrary intention appearing in the will, a will takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator.

2.4. Section 31 of the *Succession Act* 2006 (NSW) provides, subject to a contrary intention appearing in the will, if and to the effect a disposition of property is ineffective wholly or in part, the will takes effect as if the property or undisposed part of the property were part of the residuary estate of the testator.

2.5. Section 32 of the *Succession Act* 2006 (NSW) provides:

> (1) In proceedings to construe a will, evidence (including evidence of the testator's intention) is admissible to assist in the interpretation of the language used in the will if the language makes the will or any part of the will—
>
> (a) meaningless, or
>
> (b) ambiguous on the face of the will, or
>
> (c) ambiguous in the light of the surrounding circumstances.
>
> (2) Despite subsection (1), evidence of the testator's intention is not admissible to establish any of the circumstances mentioned in subsection (1) (c).
>
> (3) Despite subsection (2), nothing in this section prevents evidence that is otherwise admissible at law from being admissible in proceedings to construe a will.

2.6. This section applies to wills made on or after commencement.

2.7. Section 35 of the *Succession Act* 2006 (NSW) provides, subject to contrary intention appearing in the will, if a disposition of property is made to a person who dies within 30 days of a testator's death, the will is to take effect as if the person had died immediately before the testator. This section applies to wills made on or after commencement.

2.8. Section 41 of the *Succession Act* 2006 (NSW) provides, subject to contrary intention appearing in the will, if a testator makes a disposition of property who is issue of the testator, the interest of the original beneficiary does not come to an end on or before the original beneficiary's death, and the original beneficiary does not survive the testator by 30 days, the issue (per stirpes) of the original beneficiary who survive the testator by 30 days take the original beneficiary's share of the property in place of the original beneficiary as if the original

beneficiary had died intestate leaving only issue surviving. S 41(5) provides that a gift to persons as joint tenants on its own indicates a contrary intention for the purposes of the section.

2.9. Section 42(2) of the *Succession Act* 2006 (NSW) provides, subject to contrary intention appearing in the will, if a part of a disposition in fractional parts of all, or the residue, of the testator's estate fails, the part that fails passes to the part that does not fail, and if there is more than one part that does not fail, to all those parts proportionately. This section applies to wills made on or after commencement, except where the testator and his or her issue have died after commencement.

2.10. Section 44 of the *Succession Act* 2006 (NSW) provides a power or trust to dispose of property, created by will, is not void on the ground that it is a delegation of the testator's power to make a will, if the same power or trust would be valid if made by the testator by instrument during his or her lifetime.

3. CONSTRUCTION – BENEFICIARIES

3.1. Older authorities provide, subject to contrary intention appearing in the will, generally the law presumes that a gift to an individual beneficiary by description is a gift to the person(s) fulfilling the description at the date of the will or republication: G E Dal Pont, *Interpretation of Testamentary Documents*, 2019,Lexisnexis Butterworths, at [7.5]; A Learmonth QC, C Ford, T Fletcher, Master Clark, Master Shuman, *Theobald on Wills* 19th Edition, Thomson Reuters 2021 at 28-002.

3.2. This rule does not apply to class gifts: Dal Pont at [7.12].

3.3. Survivorship is determined at the date of death, subject to contrary intention and to legislation.

3.4. The older rule must be subject to the general principles in part 1 and the legislation in part 2.

4. CONSTRUCTION – PROPERTY

4.1. As set out in part 2 of this paper, section 30 of the *Succession Act* 2006 (NSW) provides, subject to contrary intention appearing in the will, a will takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator. This makes consideration of whether a gift is a generic (*Pohlner v Pfeiffer* [1964] HCA 8; (1964) 112 CLR 52

at [27]) or specific (*McBride v Hudson* (1962) 107 CLR 604 at 617) usually irrelevant.

Property owned by testator disposed of prior to death

4.2. A specific gift of an asset disposed of by the testator before the date of death will fail unless it is saved by legislation.

4.3. Section 22 of the *Powers of Attorney Act* 2003 (NSW) provides that any person who is named as a beneficiary under the Will of the deceased principal who executed an enduring power of attorney has the same interest in any surplus money or other property arising from any sale, mortgage, charge or disposition of any property or other dealing with property by the attorney under the power of attorney as the named beneficiary would have had in the property the subject of the sale, mortgage, charge disposition or dealing, if no sale, mortgage, charge, disposition or dealing had been made.

4.4. A similar provision exists with respect to property of a person under financial management: s 83 of the *NSW Trustee & Guardian Act* 2009 (NSW).

4.5. In *Christensen v McKnight* (Supreme Court of NSW, 2 March 1995, unreported), Hodgson J said (in respect of the equivalent section 48 of the *Protected Estates Act* 1983 (NSW)):

> "I accept that section 48(1) only operates so long as the 'surplus money' arising from a sale to which it applies, is identifiable as such. In my view, the word 'surplus' indicates that the section only applies to the net proceeds of any such sale, and only to so much of these as remain identifiable at the date of death."

Property not owned by testator

4.6. It is not uncommon for testators to attempt to give away property by their will which is not owned by them, but which is held either through a company, a trust, or through superannuation. Gifts which purport to do this raise complications for the executor, both as to whether he or she can, or with the consent of the affected beneficiaries should, give effect to the gift, but also because such gifts may not obtain the concessional duty and capital gains tax rollover relief which might otherwise be available by gifts made directly from a testator's assets.

Trusts and superannuation

4.7. Section 4 of the *Succession Act* 2006 (NSW) provides:

> (1) A person may dispose by will of property to which the person is entitled at the time of the person's death.
>
> (2) Subsection (1) applies whether or not the entitlement existed at the date of the making of the will.
>
> (3) A person may dispose by will of property to which the person's personal representative becomes entitled, in the capacity of personal representative, after the person's death.
>
> (4) Subsection (3) applies whether or not the entitlement existed at the time of the person's death.
>
> (5) A person may not dispose by will of property of which the person is trustee at the time of the person's death.

4.8. The effect of s4(5) of the Act is that trust interests cannot be disposed of by will except where either permitted by s 37 of the Act (exercise of a power of appointment over trust property) or s 4(3) of the Act (where the trust property is paid or transferred to the personal representative after the person's death).

4.9. Similarly, the effect of s 4(3) of the Act is that superannuation interests cannot be disposed of by will except where the superannuation is paid to the personal representative after the testator's death.

4.10. Many superannuation trust deeds permit the payment of a member's death benefit to a death benefits dependant, or to a member's legal personal representative.

4.11. There is authority in other states that an administrator to whom Letters of Administration has been granted has a fiduciary duty to take all necessary steps to seek to cause a deceased person's superannuation to be paid to his or her estate: *McIntosh v McIntosh* [2014] QSC 99; *Burgess v Burgess* [2018] WASC 279 and *Gonciarz v Bienias* [2019] WASC 104.

4.12. The same considerations have been held to apply to an executor: *Brine v Carter* [2015] SASC 205. The rationale for applying such principles to executors (in contrast to administrators) is, with respect, not as clear particularly where a testator names his or her executor with knowledge (express or imputed) that he or she may be entitled to be paid the superannuation death benefit as a death benefits dependent.

Companies and other interests

4.13. *Re Bowcock (deceased); Box v Bowcock* [1968] 2 NSWR 697 concerned a gift of by a testator of a property known as “Alabama, Kelvinside and The Vale situate near Scone in the State of New South Wales”. The testator did not own a property by that description, instead it was owned by a company Alabama Stud Pty Ltd in which the testator was the sole shareholder. Else-Mitchell J determined that:

a. to adopt the view that a gift would be void where the testator did not own any interest in the subject matter would defeat the testator’s *manifest intention*; and

b. the question was whether, the testator’s intention being *clear*, the executors can be required to give effect to it.

4.14. *In Leigh’s Will Trusts; Handyside & Anor -v- Durbridge & Ors* [1970] 1 Ch 277 the relevant gift was a gift of all of the testatrix’s shares, and any other interest or assets which she had in Sheet Metal Prefabricators (Battersea) Ltd. At the date of the testatrix’s death the estate of her late husband, Donald, owned 51/100 shares in that company, and was owed a sum by loan account. Letters of Administration of Donald’s estate had been granted to the testatrix before her death, but she had made no formal assent, although by the time of the application Donald’s estate had been fully administered without recourse to the company assets. The context of this judgment was that the parties to the proceedings agreed that it was the testatrix’s intention to dispose of the shares in the company, and the loan account, by the specific gift: the submission by the residuary beneficiaries was that the testatrix was incompetent to dispose of those assets at her death because she did not hold them to her own use. Buckley J said (at 284) that the testatrix had complete dominion over the conduct of administration of the estate; she could have in her lifetime have become absolutely and indefeasibly entitled to those assets; and made orders giving effect to the gift.

4.15. In *Re O’Callaghan, deceased* [1972] VR 248 the testator by clause 3 of his Will made a number of specific gifts of “flat premises at Sheridan Close” and shares in public companies. At the date of the deceased’s death he did not own assets meeting the descriptions in the Will, but there were assets meeting those descriptions by a company, W E O’Collaghan Pty Ltd (referred to in the judgment as “the Name Company”). At the time of his death the testator owned 24,219

shares in the company, with one held by his widow. The widow's share was determined to be held on trust for the testator. The company's name was not mentioned anywhere in the Will.

4.16. Clause 3 commenced: "*I give devise and bequeath to my trustee all the real and personal estate of or to which I shall be seized possessed or entitled at my death or over which I shall then have any power of disposition or appointment, upon trust*…". The specific gifts then followed by sub-lettered paragraphs, with a concluding sub-paragraph (d): "*for sale conversion and getting in*…" By clause 4 the testator directed the trustee to stand possessed of the proceeds of conversion upon trust to pay debts or other specified costs and expenses, and certain pecuniary legacies, and to divide the reside into six equal parts for distribution among his wife, three nieces and a nephew.

4.17. The structure of the Will was held to be significant. Gowans J said (at 256):

> "Where a testator conveys to his executor a direction to reduce into possession an asset not owned by the testator and the executor is armed by him with the power to get it in, the executor is bound to do so and deal with it by way of disposition in the way the testator directs."

4.18. A similar issue was considered in *Estate Reid; Roberts v Moses & Palmer* [2018] NSWSC 1145. In that case, the plaintiff was given by one of the deceased's many Codicils a gift of income on National Australia Bank and Commonwealth Bank of Australia shares in the sum of $500,000 per annum. At the date of the making of the Codicil and at the date of death, the deceased owned National Australia Bank shares but did not own any Commonwealth Bank of Australia shares in his own name. Instead, a company Vanreid Enterprises Pty Ltd (the shares of which were owned by Vanreid Industries Pty Ltd of which the deceased was the sole shareholder) owned a sufficient number of National Australia Bank and Commonwealth Bank of Australia shares to generate the required amount of income. The Court determined that the plaintiff was entitled, pursuant to the deceased's Will and Codicils, to payment from the deceased's company up to a maximum of $500,000 in any 12 month period, and that the executor/residuary beneficiary was under an equitable obligation to ensure that the plaintiff received the monies referred to in that declaration.

4.19. See also *Mark Gerard Ireland as Executor of the Estate of the late Charles Stuart Gordon v Sandra Jane Retallack & Ors* [2011] NSWSC 846 but compare *Wheatley v Lakshmanan* [2022] NSWSC 583.

5. CONSTRUCTION – SUBSTITUTION

5.1. Issues of construction often arise in substitute gifts either in identification of the substitute beneficiar(ies) and/or in applying the conditions in which the substitute beneficiaries will take.

5.2. Recent decisions have considered the construction of the phrase "dies before attaining a vested interest": *Application by Elizabeth Marie Robinson* [2015] NSWSC 1387; *Serwin v Dolso* [2020] NSWSC 370 and *Kinloch v Manzione* [2022] ACTSC 76.

5.3. In all three decisions the Court determined that a residuary beneficiary survived the deceased by 30 days but having died before the administration of the estate was complete, had not attained "a vested interest". In those circumstances, the substitute beneficiary named in the respective Wills received the entitlement of the original beneficiary. The arguments in favour of the alternative construction, that survival by 30 days results in a vested interest, are as follows.

5.4. Both *Application of Elizabeth Marie Robinson* and *Serwin v Dolso* appear to have been argued on the basis that the distinction between a gift being "vested in interest" and being "vested in possession" is significant.

5.5. "Vested in possession" means a present right of present enjoyment, whereas "vested in interest" means a present right of future enjoyment: A Learmonth, C Ford, T Fletcher, J Clark, K Shuman, *Theobald on Wills 19th Edition*, Sweet & Maxwell, 2021 at 34-001.

5.6. The word "vest" prima facie encompasses "vested in interest" rather than "vested in possession" subject to the context of the will (*Marks v Trustees Executors and Agency Co Ltd* [1948] HCA 38; (1948) 77 CLR 497 at 507; G E Del Pont Interpretation of Testamentary Documents, LexisNexis Butterworths Australia 2019 at paragraphs 14.4 and 14.5). This principle was also considered in *Austin v Wells* [2008] NSWSC 1266 but in that case the Court decided against the presumption because to do so would result in a partial intestacy.

5.7. In the context of gifts of residue both interests vested in interest and vested in possession are present rights – a right to have the administration of an unadministered estate completed is no less vested than a right to particular property at the conclusion of that administration: *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694 (1964) 112 CLR 12. The right to have an estate administered is a chose in action capable of assignment: *Re Leigh's Will Trusts*

[1970] Ch 277. The right is also property which would vest in the Official Receiver on bankruptcy pursuant to the *Bankruptcy Act* 1966 (Cth): *Official Receiver in Bankruptcy v Schultz* [1990] HSC 45; (1990) 170 CLR 306.

5.8. In A Learmonth, C Ford, J Clark and J Martyn, *Williams Mortimer & Sunnucks on Executors Administrators and Probate, 21st edition*, Thomson Reuters 2018 at [35-05] the learned authors wrote: "It should be noted, however, that although a beneficiary does not own or have any interest in any specific asset in the hands of the executor or administrator, the residuary legatee has a composite right to have the estate properly administered and to have the residue (if any) paid to him as and when the administration is complete".

5.9. In T Jarman, A Treatise on Wills (CP Sanger) 7th Edition, Sweet and Maxwell,1930 at Ch XXXVII (I)(iii) p 1327- 1328 the learned authors said the meaning of "vested" is "vested in interest" subject to exceptions including - "If the testator has in other parts of the will treated the property devised or bequeathed as belonging to the devisee or legatee, and spoken of his share therein before the specified period, or if he has given over the property in case the devisee or legatee dies before the time named without issue, from which it is to be inferred that he is to retain it in every other case, the natural conclusion is that the word is to be read as meaning "vested in possession", or "indefeasibly vested", and that the gift is vested, liable only to be divested on a particular contingency. An accruer before the time named, or before attaining a "vested interest", *simpliciter*, although perhaps indecisive by itself, tends strongly to lead to the same conclusion". (The cited passage forms part of the Chapter: Devises and Bequests, whether vested or contingent.)

5.10. Fundamental to *Application of Elizabeth Marie Robinson* and *Serwin v Dolso* was a concern that meaning had to be attributed to the words "dies before attaining a vested interest" (*Application by Elizabeth Marie Robinson* at [28] and *Serwin v Dolso* at [75]). In *Serwin v Dolso* the Court at [74](4) said that the words "before attaining a vested interest" would have been unnecessary if the testator's intention was to vest the gift on the date of death. At paragraphs [75] – [79] the Court set out three alternative meanings for the words "before attaining a vested interest" and concluded that those words meant "before the estate is fully administered and available to be distributed".

5.11. But there are a variety of ways in which a person might survive a testator but fail to attain a vested interest:

(a) Where a testator survives a will-maker but dies before the expiry of a statutory survivorship period such as the 30 day period specified in s 35 *Succession Act* 2006 (NSW).

(b) In the event of forfeiture or disclaimer – although s 139 of the *Succession Act* 2006 (NSW) provides, in the event of intestacy, in the event of disclaimer or disqualification of interest for any reason, a person will be treated as having predeceased an intestate, there is no equivalent provision with respect to gifts made by Wills. There is some authority that a disclaimer operates so that the disclaiming person is non-existent (eg *In the Estate of Simmons (deceased)* (1990) 56 SASR 1 at [14]).

5.12. Accepting that a residuary beneficiary attains after the death of the testator a right vested in interest to have the estate administered, as a matter of general principle, such rights should not be found to be divested absent clear language to that effect: *Kenna v Conolly* (1938) 60 CLR 583 at 596 per Dixon J.

6. CONSTRUCTION – LIFE INTERESTS AND RIGHTS OF RESIDENCE

6.1. There are many decisions concerning the rights and obligations attaching to a right of occupation of property given under a will. Many turn on the distinction between a "life estate" and a "right of residence". The law on that issue was summarised by Powell J in *Binetter v Dunkel* (NSWSC unreported 28 May 1993 at 32) cited with approval by Bryson J in *Hatzantonis & Anor v Lawrence; Cox v Lawrence* [2003] NSWSC 914 at [17] and referred to by Lindsay J in *Estate of Gilmore JA, deceased* [2014] NSWSC 1263 at [30] as follows:

> "There appears, over the years, to have developed a rule of construction that, in the absence of a contrary intention, a devise of the "free use" or the "use and occupation" of land passes an estate in the land … whereas a direction to trustees to permit a named person to reside rent free, or an option to reside, is to be construed as a mere personal licence…
>
> The general rule would seem to be that, as a life tenant is entitled to the rents and profits of the subject land, he is also liable to pay the annual charges, as, for example, rates and taxes …but, quaere insurances …but that, in the absence of an express duty to repair …or liability for permissive waste, is not liable to repair …
>
> Although - since, prima facie, a "right to reside" is not to be equated to a life tenancy - one might be disposed to think that, in a case in which there is but a "right to reside", recurrent outgoings would

> therefore be a charge upon the income of residue, there appears to have developed a practice that, during such time as the right of residence is exercised such outgoings are payable by the person exercising that right …"

6.2. The proposition that a life tenant has an obligation to pay council, water and sewerage rates and taxes in respect of real estate during the tenure of the interest unless there is a contrary intention in the will was referred to in R Jennings & J C Harper, *Jarman on Wills*, Sweet & Maxwell London 1951 at p1188 and D M Haines, *Construction of Wills in Australia*, Lexisnexis Butterworths 2007 at [23.9]. In the Haines text at [23.11-23.14] it is said that a life tenant has no obligation to repair (but may be liable in the event of waste) or to insure.

7. CONSTRUCTION – CHARITY

7.1 The following principles relevant to the construction of Wills and Charitable gifts in Wills were set out in *Estate Polykarpou*; *re a Charity* [2016] NSWSC 409 at [64]:

> (principles earlier referred to omitted)
>
> g. The Court leans in favour of charity; if the text of a will is capable of a meaning which supports a finding of charity, that construction ordinarily should be adopted: *Taylor v Taylor* (1911) 10 CLR 218 at 225; *Hadaway v Hadaway* [1955] 1 WLR 16 at 19.
>
> h. If a donee exists exclusively for charitable purposes, a gift to it, absent a contrary intention, is a gift for its charitable purposes; a gift for a charitable institution is, *prima facie,* a gift for charitable purposes: *Smith v West Australian Trustee and Executor & Agency Co Limited* (1950) 81 CLR 320 at 322 and 325; *The Sydney Homoeopathic Hospital v Turner* (1959) 102 CLR 188 at 203; *Stratton v Simpson* (1970) 125 CLR 138 at 163.
>
> i. Under the general law, a general charitable intention may be found if the will manifests a charitable intention wider than the execution of a specific plan involving the particular failed gift; that is, an intention which, while not going beyond the bounds of the legal conception of charity, is more general than a bare intention that the impracticable direction represented by the gift (in clause 4.2 of the deceased's will) to the now defunct 0AN be carried into execution as an indispensable part of the will: *Attorney General (NSW) v Perpetual Trustee Co Limited* (1940) 63 CLR 209 at 225."

7.2 If a testator gives a legacy to a charitable institution which has ceased to exist before his death, the legacy lapses, unless the testator expresses an intention to give it to charitable purposes independently of the existence of the particular institution: *A Treatise on Wills by Thomas Jarman* 8th Ed, Sweet and Maxwell Ltd, 1951, p 448.

7.3 At page 1233 of Jarman it was said; "*if a testator makes a disposition in such terms that the subject object of gift cannot be identified, the gift necessarily fails.*"

7.4 In GE Dal Pont, *Law of Charity*, 2nd Edition, LexisNexis Butterworths 2017 at 15.26, the author states "*a bequest to an institution that has never existed lapses unless it can be inferred from how the institution is described that the donor intended to benefit a charitable purpose – that is, the donor exhibited a general charitable intention – which enables the gift to be applied cy pres. Such a gift will not lapse, in the alternative, if the evidence satisfies the Court that it was a misdescription and the Court can ascertain the object with the requisite degree of certainty.*"

8. CY PRES SCHEMES

8.1 There is jurisdiction to apply property given for charitable purposes cy-pres where the original purposes of the trust have become impossible to carry out.

8.2 The circumstances in which cy-pres schemes may be implemented were extended by the *Charitable Trusts Act* 1993 (NSW) ("the *Act*") which commenced on 15 April 1994. The *Act* applies to a trust created before or after the commencement of the *Act*, except as provided by the *Act*.

8.3 Section 9(1) of the *Act* provides:

> "The circumstances in which the original purposes of a charitable trust can be altered to allow the trust property or any part of it to be applied cy pres include circumstances in which the original purposes, wholly or in part, have since they were laid down ceased to provide a suitable and effective method of using the trust property, having regard to the spirit of the trust."

8.4 Section 10(2) of the *Act* provides that a general charitable intention is to be presumed unless there is evidence to the contrary in the instrument creating the charitable trust.

8.5 But s10(2) of the *Act* is a statutory presumption that a charitable intention is general, not that there is a charitable intention: *Public Trustee v Attorney-General of New South Wales & Ors* (1997) 42 NSWLR 600 per Santow J.

8.6 The four recognised categories of charitable objects include: relief of the poor aged and impotent, advancement of education, advancement of religion, and other purposes beneficial to the community: *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531. The requirement of "exclusive" charitable purposes has been altered by s 23 of the *Act*.

8.7 Academic texts debate whether “cy pres” is derived from the Norman French “ici pres” meaning “near here” or “si-pres” meaning “so near” or “as near”. Considerations of proximity (to the original purpose), usefulness and practicability have been said to be relevant to the choice of scheme. L A Sheridan & V H T Delaney, *The Cy-Pres Doctrine*, Sweet & Maxwell London, 1959 at p 5; H Picarda, The Law and Practice Relating to Charities 4th Edition, Bloomsbury Professional, 2010, p437, 653; *Re Fitzpatrick* (1984) 6 DLR (4th) 644 at 653.

8.8 Section 12 of the *Charitable Trusts Act* 1993 (NSW) provides that the Attorney-General may by order, establish a scheme for the administration of any charitable trust. In particular the Attorney-General may by such an order:

a. Establish a scheme for the alteration of the original purposes of a charitable trust so as to enable the trust property or any part of it to be applied cy pres if it appears to the Attorney-General that the trust property or any part of it may be so applied; or

b. Establish a scheme to extend or vary the powers of the trustee of a charitable trust or prescribe or vary the manner or mode of administration of any charitable trust, either generally or in a particular case, if it appears to the Attorney-General that it is expedient to do so in the interest of the administration of the charitable trusts.

8.9 Section 14 provides that the Attorney-General is not to establish a scheme under this part if the value of the trust property affected by the scheme exceeds $500,000 or such other amount as it prescribed by the Regulations, or, that the Attorney- General is satisfied that the subject matter is, because of its contentious character only a special question of law or fact or for other reasons, more fit to be dealt with by the Court.

8.10 If the trust property affected exceeds $500,000 an application for orders for the establishment of a cy pres scheme is made to the Court with the authorisation of the Attorney General: s 6 *Charitable Trusts Act* 1993 (NSW).

9. RECTIFICATION

9.1 The Court’s power to rectify the Will is found in section 27 of the *Succession Act* 2006 (NSW).

9.2 Pursuant to section 27 of the *Succession Act* 2006 (NSW), 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 either a

clerical error was made or the Will does not give effect to the testator's instructions.

9.3 A statement of principles concerning rectification was also set out in *Estate of Aspasia Kandros* [2019] NSWSC 757 at [59] -[66].

9.4 On an application for rectification it must be established:

a. What were the testator's actual intentions;

b. Is the Will expressed so that it fails to carry out those intentions;

c. 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?

9.5 What must be shown is the testator's actual intention concerning the part of the Will to be rectified, not what the intention probably would have been had the testator thought about the matter: *Lockrey v Ferris* [2011] NSWSC 179 at [67].

Clerical error

9.6 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.

Instructions

9.7 In *Vescio v Bannister (Estate of the late Betty Tait)* [2010] NSWSC 1274 Barrett J described the analysis required by s 27 in the following terms:

> "[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".

[14] Having ascertained "the testator's instructions", the court must construe the will as executed and compare its effect, according to its proper construction, with those "instructions": *ANZ Trustees Ltd v Hamlet* [2010] VSC 207 at [3]; and see the course of analysis and comparison in *The Public Trustee of Queensland v Smith* [2008] QSC 339; [2009] 1 QdR 26. Only if some discrepancy appears can an order be made under s 27; and the only permissible order is one that causes the will to be in a form that carries out the testator's "intentions".

[15] It follows that the court must also make findings about the "intentions" of the testator – necessarily, of course, the "intentions" existing when the will was made. It is those "intentions" that any rectifying order must reflect. Although the legislation does not expressly say so, it must, I think, be inferred that the "intentions" of the testator correspond, as to content, with "the testator's instructions". I say this because, in the ordinary course, a testator's intention is that his will should implement the instructions he gives for its preparation. It is with that intention that s 27(1)(b) is concerned. This seems to have been assumed in both *Re Hawkes* [2005] VSC 93 (at [17]) and *Lawler v Herd* [2010] *QSC 281."*

9.8 An application for rectification must be made within 12 months of the date of death. However, the Court may extend the period of time for making the application if it considers it necessary and final distribution of the estate has not been made.

9.9 In *Bear v Bear*; *Jordan v Bear* [2022] NSWSC 1687, Meek J said the following concerning an application for extension of time to file an application for rectification:

236. "The ordinary English meaning of "necessary" connotes something that is "requisite" or "indispensable": *Macquarie Dictionary*, online ed.

237. In *Reilly v Reilly* [2017] NSWSC 1419, Lindsay J found that a Will had not carried out the testator's intentions.

238. His Honour had cause to address the question of whether an extension of time for an application for rectification ought be made. In that case, the deceased had died in December 2012 and the claim for rectification (following an order for pleadings) had been made in October 2014.

239. His Honour noted that the plaintiff's delay in making the application had not been fully explained in the course of events following the deceased's death: at [62]. However, no application for a grant of representation had been made in respect of the estate until the applicant had applied.

240. In the context in which there had been no final distribution of the deceased's estate and in circumstances in which His Honour determined that the Will had not carried out the deceased's intentions, His Honour determined that an order for rectification (and an associated grant of extension of time) was "necessary" for the

> purpose of giving effect to the deceased's testamentary intentions: at [62]."

9.10 At paragraph [255], Meek J said that where the evidence regarding the mistake is clear and in the context in which the purpose of rectification is to ensure the testator's intentions are given effect to, it does seem to be necessary to extend the time for the making of the application, as without doing that an order for rectification cannot be made.

10. CONCLUDING REMARKS

10.1 Most wills can be interpreted and administered by reference to the words on the page in light of the surrounding circumstances.

10.2 Where the terms of a will are meaningless or ambiguous, section 32 of the *Succession Act* 2006 (NSW), permits evidence of actual intention. This should mean that in many instances the search for meaning ends upon examination of the instructions provided in the course of preparation of the will.

10.3 Where there is conflict between the terms of the will and the evidence of actual intention in New South Wales there is scope to apply to the Court for rectification of the will.

10.4 I have attempted in this paper to address the principles relevant to some of the issues of construction which can arise, but there are many others. Relevant resources include Dal Pont's *Interpretation of Testamentary Documents*, Lexisnexis Butterworths 2019; *Theobald on Wills 19th Edition*, Sweet & Maxwell 2021 and paper by the Hon Justice M Meek "*Will Construction*", 22 March 2023.

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