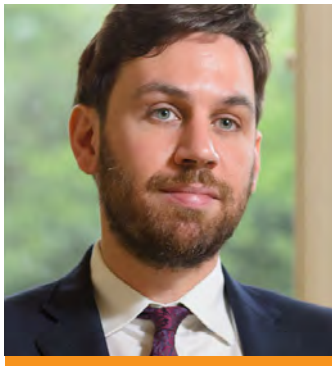
Interpreting testator intentions

Adam Carvalho and **Richard McDermott** round up recent estate planning case law and consider some possible grounds for challenging a will



Adam Carvalho, pictured, and Richard McDermott are associates at Farrer and Co
www.farrer.co.uk

In the case of *Reading and another v Reading and others* [2015] All ER (D) 64, the court construed the word 'issue' as including not only the testator's children but also his stepchildren (and their children).

The claimants in that case were trustees of a nil-rate band trust established by the will of the late John Reading for the benefit of his 'issue'. The claimants had sought (in the alternative to the construction claim) rectification of the will to replace references to 'issue' with a phrase that conveyed Mr Reading's intention to benefit his stepchildren as well as his children.

Mrs Justice Asplin's judgment in this case also provides an illustration of the way in which the courts may, in the future, interpret the phrase 'clerical error'.

The solicitor whom Mr Reading had instructed to prepare his will had been under 'no doubt that Mr Reading wanted his two children and three stepchildren, together with the children of all five of them, to be included in, and to be able to benefit from, the will trust'. The draftsman's evidence was that, when amending the will precedent he was using, he had 'simply overlooked the fact that the word "issue" [might] not include the stepchildren of [Mr Reading] or the issue of those stepchildren'.

This might look, to many, like (to quote Lord Neuberger in *Marley v Rawlings* [2014] UKSC 2) 'a classic claim for rectification'. The question for Asplin J was: if the construction claim failed, such that the term 'issue' was found not to include stepchildren, could she potentially rectify the will?

Clerical error

Section 20(1)(a) of the Administration of Justice Act (AJA) 1982 allows the court to rectify a will if it is satisfied that the will is so expressed that it fails to carry out the testator's intentions in consequence of a 'clerical error'.

In *Marley v Rawlings*, Lord Neuberger stated that 'clerical error' should be given a wide rather than a narrow meaning – to include mistakes 'arising out of office work of a relatively routine nature such as preparing, filing, sending, organising the execution of a document (*save, possibly, to the extent that the activity involves some especial expertise*)' (emphasis added).

In *Marley v Rawlings*, the solicitor's 'clerical error' had been giving wills he had prepared to the wrong people for them to sign.

In *Reading v Reading*, the claimant argued that 'the slip which [the will draftsman] made when using the precedent was not to appreciate that the term "issue" did not include stepchildren'. However, Asplin J found that the drafting of Mr Reading's will was rather more than a slip of the pen. The inclusion of the term 'was part of the activity of drafting the will rather than its preparation' and was not, therefore, a clerical error.

In any event, Asplin J felt the activity fell into Lord Neuberger's 'caveat'. This was 'not a case in which [the solicitor] inadvertently failed to delete something from the draft of the will… it related to his professional judgment and expertise in the choice of the necessary phrases to encapsulate the instructions given'. Asplin J therefore found that rectification of the will was not available in this case.

It had seemed, following *Marley v Rawlings*, that 'clerical error' would be interpreted as widely as possible to include, essentially, all errors made by the draftsman that resulted in a will which did not reflect the testator's intentions, provided the words had not been deliberately chosen by the draftsman (see, for example, *Kell v Jones* [2013] WTR 507 on this particular point).

The post-*Marley* case of *Brooke v Purton* [2014] EWHC 547 (Ch) reflects this understanding. In that case, a solicitor prepared a will that included a nil-rate band trust but overlooked the fact that the testator had left a number of chargeable legacies in the will which (as the will was drafted) would erode completely the available nil-rate band.

The deputy judge concluded that the will as drafted could not represent the testator's intention

and the solicitor's failure to appreciate the implications of the chargeable gifts represented a clerical error. He therefore allowed rectification of the will.

Asplin J had, of course, found that as a matter of construction the word 'issue' included stepchildren and their issue, so Mr Reading's wishes were put into effect. However, one might have expected that where the solicitor's evidence was that he had simply not considered whether standard wording used in his firm's precedent achieved the desired result, his failure to make the necessary amendments to the relevant clause could constitute a clerical error which could be rectified by the court.

It may be that further cases are required to provide clarification. There would seem to be sense in updating section 20 of the AJA to allow rectification of a will which simply fails to give effect to the testator's intentions (in line with other jurisdictions). In the meantime, draftsmen will wish to continue taking care when exercising 'professional judgment and expertise'.

Knowledge and approval

In *Sharp v Hutchins* [2015] EWHC 1240 (Ch), a will (the '2013 will') was challenged on the ground of lack of knowledge and approval. The parties agreed that the testator had capacity when executing the 2013 will and, indeed, when executing an earlier will (the '2011 will').

As the propounder of the 2013 will, it was for the claimant (Mr Sharp) to satisfy the court that, on the balance of probabilities, the testator understood the nature and effect of, and sanctioned the dispositions in, the 2013 will.

It is, of course, usually sufficient to establish proof of testamentary capacity and due execution – with knowledge and approval subsequently assumed. If, however, the circumstances relevant to the preparation and execution of the will (but not extraneous circumstances) excite the suspicion of the court then affirmative evidence of knowledge and approval is required.

Lord Justice Lewison (in *Simon v Byford and others* [2014] EWCA Civ 280) helpfully notes: 'Testamentary capacity includes the ability to make choices, whereas knowledge and approval requires no more than the ability to understand and approve choices that have already been made.'

Rather unusually, Mr Sharp admitted that he was just as surprised as the defendant that he had been named the sole beneficiary of the 2013 will; Mr Sharp was on friendly terms with the testator but they were not particularly close. The defendant, on the other hand, had been close to the testator for some considerable time and there was no reason to suggest that there was any rift between them. She was a beneficiary, along with two others, under the 2011 will.

That said, the court found no reason to doubt Mr Sharp's bona fides, reflecting that 'just as Mr Sharp was kind to the testator (calling on him and doing odd jobs for him without charging), the testator was kind to Mr Sharp, indulged his passion for talking and that the real shared interest was their mutual chat and banter and human interest stories'.

The court held that, on the balance of probabilities, the contents of the 2013 will truly represented the testator's intentions. The court accepted that the evidence suggested the testator read the 2013 will and that he would have understood it and its effect. The testator was 'an educated man, with full capacity who had drawn up previous wills. [The 2013 will] is short and easy to understand.'

Although the court pronounced in favour of the 2013 will, Ms Lesley Anderson QC (sitting as a High Court judge) also considered, *obiter*, the effect of the testator signing the 2011 will in the wrong place. The 2011 will had been prepared using a 'do it yourself' precedent kit of the type available on most high streets. It comprised one sheet with two sides, with handwritten entries in capital letters by the testator. The 2011 will was signed in the presence of two witnesses, albeit the signature appeared under the part setting out the testator's funeral wishes.

The judge noted that she would have been satisfied for the purposes of section 9 of the Wills Act 1837 that, by affixing his signature to the 2011 will and subsequently describing it as such to the executor, the testator intended by his signature to give effect to the 2011 will, despite signing in the wrong place.

Circular transaction

Finally, *R v Quillan and others* [2015] EWCA Crim 538 related to two schemes which involved circular transactions aimed (it was alleged) at securing the payment of income tax relief at source. Mr Justice Edis applied the *Snook* test to the relevant transactions and found that 'the high-level and un-particularised… sham allegation [was] a hopeless one' without evidence that all the parties were 'conscious participators in the sham'. **SJ**

> **Lord Neuberger stated that 'clerical error' should be given a wide rather than a narrow meaning**