



Neutral Citation Number: [2020] EWHC 1979 (Ch)

Case No: PT-2019-000906

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (Ch)

In the Matter of the Estate of Peter Henry Wales

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL
Date: 17 July 2020

Before :
MASTER TEVERSON

Between :

- | | |
|---|--------------------------|
| (1) JOHN WALES | <u>Claimants</u> |
| (2) ANDREW WALES | |
| (as Executors of the above-named Estate | |
| - and - | |
| (1) CHRISTOPHER DIXON | <u>Defendants</u> |
| (2) KIRSTY DIXON | |
| (3) WILLIAM MACKAY | |
| (4) DARCY MACKAY (a child by John Mackay her | |
| litigation friend) | |
| (5) KATIE MACKAY (a child by John Mackay her | |
| litigation friend) | |
| (6) RHIANNON ARCHER (a child by Fiona Archer | |
| her litigation friend) | |
| (7) ALEXANDER ARCHER (a child by Fiona | |
| Archer his litigation friend) | |
| (8) LUCCA BRACKPOOL (a child by Haydn | |
| Brackpool her litigation friend) | |
| (9) FELIX BRACKPOOL (a child by Haydn | |
| Brackpool his litigation friend) | |
| (10) ADAM BRACKPOOL | |
| (11) ELLICE BRACKPOOL | |
| (12) ADAM DEALHOY | |
| (13) LUKE DEALHOY | |
| (14) ROSS DEALHOY | |
| (15) BEN HADLEY | |

Jody Atkinson (instructed by **Keelys LLP**) for the **1st to 7th Defendants (inclusive)**
Stephen Boyd (instructed by **Downs Solicitors LLP**) for the **8th and 9th Defendants**

Hearing date: 8 July 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

COVID-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 17 July 2020 at 10.00am.

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MASTER TEVERSON

MASTER TEVERSON:

1. This claim is brought by the Claimants, Mr John Wales and Mr Andrew Wales, as the executors of the estate of the late Peter Henry Wales (“the Deceased”) who died on 17 February 2015 a widower without children. It asks the court to determine an issue of construction of the Deceased’s last will dated 22 December 2008 (“the Will”).
2. By Clause 7 of the Will the Deceased gave his residuary estate to “*such all of my nephew’s and niece’s children*”. At the date of his death, the Deceased had two blood nephews and two blood nieces. He also had three nephews by marriage and one niece by marriage. A further nephew by marriage had died in 1992 leaving a son.
3. It is agreed there is no evidence that the Deceased intended to benefit the children of a specific nephew or niece. The issue for determination is whether the Deceased’s residuary estate falls to be divided between the 1st to 7th Defendants inclusive who are the children of the Deceased’s nephews and nieces by blood or whether it falls to be divided between them and the 8th to 15th Defendants who are the children of the Deceased’s nephews and nieces by affinity. The net value of the Deceased’s estate was sworn for probate at £624,062. This means that before any costs are deducted, a one seventh share is worth £89,151.71 and a one fifteenth share is worth £41,604.13.
4. The Claimants have adopted a neutral position and their appearance at the disposal hearing was dispensed with by order of Deputy Master Smith dated 17 February 2020. The 1st to 7th Defendants were represented before me by Mr Jody Atkinson. The 8th and 9th Defendants, the children of Mr Haydn Brackpool, a son of the Deceased’s brother-in-law, Mr Roy Brackpool, were represented before me by Mr Stephen Boyd. They argue for the extended class of beneficiaries.
5. The Deceased was married to Wendy Wales (“Wendy”). Wendy died on 23 April 2008. By that date they had been married for 46 years. They had no children of their own.
6. The Deceased had a brother John Wales (the First Claimant) and a sister Josephine Mackay. John has a daughter Suzanne Dixon and a son Andrew Wales (the Second Claimant). Josephine has a son John Mackay and a daughter Fiona Archer. The Deceased therefore had two blood nephews and two blood nieces. Suzanne Dixon has a son and a daughter. Andrew Wales has no children. John Mackay has a son and two daughters. Fiona Archer has a daughter and a son. There are therefore seven children of the blood nephews and nieces (the 1st to 7th Defendants).
7. Wendy had a brother Roy Brackpool and a sister Celia. Roy has three sons. John, David and Haydn. Celia had a son Paul Hadley (who died in 1992) and a daughter Carole Parsons. The Deceased therefore had at the date of the Will three nephews by marriage and one niece by marriage. John Brackpool has a son and a daughter. Haydn Brackpool has a daughter and a son. Paul Hadley left a son, Ben Hadley. Carole has three sons. There are therefore eight children of Wendy’s nephews and nieces (the 8th to 15th Defendants).
8. The Deceased and Wendy both made wills in 1967, 1988 and 1997. In each case these wills were professionally prepared by solicitors. By their 1967 wills they left their entire estate to each other. In the event their spouse died before them, they both left

their residuary estate to their children. In the event they had no children, they left their estates to charities, subject to a gift of £100 to each of the children of Celia, Roy, John and Josephine.

9. By his will dated 10 June 1988 the Deceased left his estate to Wendy. If Wendy did not survive him, the Deceased, if his mother was living at his death, gave £30,000 to his brother John and sister Josephine in equal shares. He gave the contents of his home to his wife's niece Carole. He gave £3,000 to each of the children of his brother John, his sister Josephine and of his brother-in-law Roy Brackpool. He gave £3,000 to his wife's nephew Paul Hadley. He gave £2,000 to each of the three sons of his wife's niece Carole. He left the residue of his estate to two named charities. Wendy's will was in similar terms and included a legacy to the children of her brother Roy and of her brother-in-law John Wales and her sister-in-law Josephine Mackay.
10. By his will dated 19 November 1997, the Deceased gave his estate to Wendy. If she did not survive him, he left his estate to be divided in equal shares between his niece Suzanne, his nephew Andrew, his nephew John Mackay, his niece Fiona Mackay, his wife's nephew John Brackpool, his wife's nephew, David Brackpool and his wife's nephew Haydn Brackpool. Wendy left her estate, in the event she was the survivor, to the same individuals as the Deceased.
11. By the time of the 1997 wills, Paul Hadley had died. On 1 September 1992, the Deceased had written to Mr Maybury, the solicitor who prepared the 1988 wills, saying that Paul Hadley had recently died and that although Paul was survived by a wife (from whom he was divorced) and a son, they [the Deceased and Wendy] did not want to pass on the bequest to them.
12. The Claimants' understanding is that there was a falling out between Wendy and Celia (Wendy's sister) which might explain why Celia's daughter Carole was not included as a residuary beneficiary by the Deceased and Wendy in their 1997 wills. In his witness statement dated 9 December 2019, Haydn Brackpool says Wendy fell out with Celia largely due to the fact that Celia decided to return to Sussex, to be nearer to Carole and her family, without telling Wendy beforehand.
13. Wendy died on 23 April 2008. Her entire estate passed to the Deceased. The Claimants say Wendy's last will was her will dated 19 November 1997. Haydn Brackpool in his witness statement refers to Wendy telling him and his wife Sophia, he believes some time in 2007, that she and the Deceased had made wills leaving their estates to the children of their nephews and nieces in order to help with their upbringing and education. He says Wendy told him that nothing was being left to their nephews and nieces themselves as they considered that they were able to look after themselves. He says Wendy also specifically told him and his wife that they had excluded Celia's grandchildren. He says she did not explain why, but he assumed it was as a result of "the falling out". He says he understands from his brother David that Wendy had a similar conversation with his brothers.
14. Haydn's statement suggests that Wendy and the Deceased made fresh wills in 2007. They are not before the court. What is clear from the evidence before the court is that Wendy's estate passed on her death to the Deceased. The capital balance in her estate was £251,405.73.

15. The Will was made by the Deceased on 22 December 2008 some eight months after Wendy's death.
16. By clause 2 of the Will the Deceased appointed his brother John Wales and his nephew Andrew John Wales to be his Executors and Trustees. By clause 3 he directed that his ashes be buried with his wife Wendy. By clause 4 he made gifts of money of between £500 and £1,000 to six charitable organisations. By clause 6 he provided for the administration of his estate. By clause 7 the Deceased made the following gift of residue:-

"I give my Residuary Estate to such all of my nephew's and niece's children living at my death subject to each attaining 18 years of age and while any beneficiary hereunder is under such age the income thereof shall be accumulated or applied wholly or in part by my Trustees in their absolute discretion from time to time for his or her maintenance education or benefit which shall be held in equal shares and if any all of my nephew's and niece's children shall fail to obtain a vested interest leaving issue who survive me and reach the age of 18 years then such issue shall take and if more than one in equal shares their parent's failed share."

17. The Deceased died on 17 February 2015. Probate of his estate was granted to his brother John and nephew Andrew on 11 September 2015. The Deceased's net estate was valued at £624,062.
18. In *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129, Lord Neuberger PSC set out the law pertaining to the interpretation of wills as follows:-

"[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 provision 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"

*"[23] In my view, at least subject to any statutory provision to the contrary, the approach to the interpretation of contracts as set out in para 19 above is therefore just as appropriate for wills as it is for other unilateral documents. This may well not be a particularly revolutionary conclusion in the light of the currently understood approach to the interpretation of wills (See e.g. *Theobald on Wills*, 17th edition, Ch. 15 and the recent supplement supports such an approach as indicated in *RSPCA v Sharp* [2010] EWCA Civ 1474, [2011] STC 553, [2011] 1 WLR 980 at paras 22 and 31). Indeed, the well known suggestion of James LJ in *Boyes v Cook* (1880) 14 Ch D*

53, 56, 49 LJ Ch 350, 28 WR 754, that, when interpreting a will, the court should “place [itself] in [the testator’s] arm-chair”, is consistent with the approach of interpretation by reference to the factual context.

[24] However, there is now a highly relevant statutory provision relating to the interpretation of wills, namely s 21 of the Administration of Justice Act 1982 (“s 21”). Section 21 is headed “Interpretation of wills – general rules as to evidence”, and is in the following terms:-

“(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 the 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.”

[25] In my view, s 21(1) confirms that a will should be interpreted in the same way as a contract, a notice or a patent, namely as summarised in para 19 above. In particular, s 21(1)(c) shows that “evidence” is admissible when construing a will, and that that includes the “surrounding circumstances”. However, s 21(2) goes rather further. It indicates that, if one or more of the three requirements set out in s 21(1) is satisfied, then direct evidence of the testator’s intention is admissible, in order to interpret the will in question.

[26] Accordingly, as I see it, save where s 21(1) applies, a will is to be interpreted in the same way as any other document, but in addition, in relation to a will, or a provision in a will, to which s 21(1) applies, it is possible to assist its interpretation by reference to evidence of the testator’s actual intention (eg by reference to what he told the drafter of the will, or another person, or by what was in any notes he made or earlier drafts of the will which he may have approved or cause to be prepared).”

19. There is no evidence before the Court to suggest that by the use of the words “nephew’s and niece’s children” the Deceased was intending to benefit the children of only one nephew or niece. Whether one looks at blood or affinity, the Deceased had more than one nephew and more than one niece.

20. The term “nephew” and “niece” have been the subject of judicial interpretation. In *Re Daoust* [1944] 1 All E.R. 443, Vaisey J. stated at page 444:-

“I have in the first place, to consider what is in contemporary English the proper meaning of the word “nephew” and of the word “niece”. There seems no doubt at all that the strict and proper meaning of the word “nephew” is “son of a brother or sister”; and, similarly, “niece” means, in the strict sense, “daughter of a brother or sister”. But the meaning of each of these words is, in my judgment, susceptible of extension, having regard to the context and circumstance of the case, in two

directions. First of all, the word may describe the child of a brother-in-law or of a sister-in-law; and, in the second place, I think that “nephew” is often used to indicate a niece’s husband and “niece” is often used to describe the wife of a nephew... Unless compelled by context or circumstances, the court will always construe a class gift to nephews and nieces as a gift confined to children of a brother or sister, and the mere fact that the testator or testatrix has chosen elsewhere in the will erroneously to describe as a nephew or niece some person not strictly and properly so related to him or her, will not affect the general rule by admitting that person into the class.”

21. In my view, “*the context and circumstances of the case*” is not limited to the other provisions in the Will or to the case in which it is shown the gift will fail unless the terms are given an extended meaning. The court is in my view obliged to look at the background facts known to the testator alongside the terms used in the Will to establish their intended meaning. That is in line with the approach to construction of documents including wills set out by Lord Neuberger PSC in *Marley v Rawlings*.
22. I do not derive any assistance from any other provision in the Will. The fact that the Deceased appointed his brother John Wales and his nephew Andrew Wales as his Executors and that Andrew Wales is a nephew by blood does not in my view assist with the issue who is intended to be a residuary beneficiary.
23. In my view, the prior wills made by the Deceased and Wendy are part of the surrounding circumstances and background facts known to the Deceased. I do not accept Mr Atkinson’s submission that they are inadmissible as being evidence of the Deceased’s intention. They are part of the background against which the Will was made. They show that throughout their marriage, and especially after it became clear they were not to have children, both the Deceased and Wendy made mirror-like wills by which, whichever of them was the survivor, left a bequest or share of residue to members of both their family and their spouse’s family.
24. A further part of the background is that on Wendy’s death, the Deceased inherited the whole of his wife’s estate.
25. One change effected by the Will was to introduce money bequests in favour of six national and local charities. These total £4,500. Another change, in comparison to the gift of residue in the 1997 wills of the Deceased and Wendy, was to skip a generation. In my view, the decision to skip a generation is best viewed as neutral on the issue of construction before the court. There is no evidence of any agreement or understanding between the Deceased and Wendy each to benefit only their own blood great nephews and great nieces.
26. There is no extrinsic evidence which explains why the Deceased should have intended to change his will so as to exclude all of Wendy’s family. The witness statement of Haydn Brackpool says that after Wendy’s death, they as a family continued to visit the Deceased in Devon at least once a year. Haydn says he used to call the Deceased initially about once a week, and then monthly up until his death in February 2015.
27. Looking at the surrounding circumstances, it is clear to me that the Deceased by referring to “*such all of my nephew’s and niece’s children*” was intending to include nephews and nieces by affinity as well as by consanguinity. I reach this conclusion in the light of:-

- (i) a marriage lasting 46 years between Wendy and the Deceased;
 - (ii) the prior wills of both Wendy and the Deceased;
 - (iii) the passing of the whole of Wendy's estate to the Deceased;
 - (iv) the absence of any extrinsic evidence as to why the Deceased might have wanted some 8 months after Wendy's death to exclude Wendy's family;
 - (v) the continuing contact between the Deceased and the Brackpool family in the months after Wendy's death.
28. The manner in which the Deceased's instructions were taken for the Will greatly increases the likelihood that the Deceased's intention with regard to residue was not understood. His instructions were taken by telephone. The draft will was prepared and sent out on the same day.
29. The striking feature of the communications between the Deceased and Janice Smith of The Co-operative Legal Services is the lack of any focus by the Deceased on clause 7 (as opposed to the money bequests under clause 4) and the complete lack of any attempt to establish by name or parent who was intended to receive a share of residue. This illustrates graphically the dangers of taking instructions by telephone from an elderly widower without sight of his prior will or knowledge of his family tree. Clause 7 of the Will is badly drafted. It contains grammatical and punctuation errors. It fails to identify by name or parent or family the intended recipients of the gift. The manner in which the Deceased's instructions were taken and the poor quality of clause 7 enhances the scope for giving the words an extended meaning when interpreted against the surrounding circumstances known to the Deceased. The Deceased's letter to Janice Smith dated 5 December 2008 focuses mainly on the pecuniary legacies. The fact that in the letter the Deceased said the draft will "*which I agree with in accordance to my instructions*" throws no light on what the Deceased intended by the gift.
30. The evidence as to the Deceased's actual intention provided by Haydn Brackpool indicates that the Deceased was intending to widen rather than narrow the class of beneficiaries as compared to the 1997 wills. As well as wanting to skip a generation, the Deceased wanted to "bury the hatchet" with Celia.
31. On 11 July 2009, the Deceased on the advice of his financial adviser, David Roberts, set up a discretionary trust with Royal Skandia. He settled £150,000 on the trust. The Beneficiaries were defined to mean "The Children of the nephews and nieces of Peter Henry Wales and his Deceased Spouse, Wendy Wales, either living or yet to be born". Evidence subsequent to the making of the Will is not part of the surrounding circumstances and cannot aid construction of the Will. For that reason, I have not taken it into account. In any event, I agree with counsel for the 1st to 7th Defendants it can be interpreted in favour of or against either side's position.
32. Although the circumstances of each testator must be considered as unique individually, I have been assisted in considering the issue before me by reading the judgment of The Honourable Mr Justice Goepel (sitting in the Supreme Court of British Columbia) in *In the Estate of Cecil Charles Herbert Holmes* (2007) BCSC 51.

The facts are of some similarity to the present case. The will in that case contained a direction:-

“I hereby direct that the residue of my estate be paid and transferred over to all my nieces and nephews share and share alike for their own use absolutely”.

It was found looking at all the circumstances in that case, which included the fact that in four prior wills the testator had benefitted both his late wife’s family as well as his own, and had inherited the whole of his wife’s estate, that the testator intended to benefit both families. I make clear that I have not based my decision on the facts of that case. The position of each testator falls to be considered individually. I accept too that there may be differences between Canadian and English law. I do however find the decision in line with my determination on the facts of the case before me.

33. It is agreed that the costs of all parties should come out of the Deceased’s estate. The Claimants as Executors and who have remained neutral should recover their costs in due course of administration on the indemnity basis. The costs of the 1st to 7th Defendants and of the 8th and 9th Defendants should also in my view be assessed on the indemnity basis in view of the nature of the issue and the manner in which it has arisen.

34. Under CPR 46.4(2), the general rule is that the court must order a detailed assessment of the costs payable out of money belonging to a child. In this case, six of the Defendants are children. CPR 46.4(3) provides that the court need not order a detailed assessment in the circumstances set out in Practice Direction 46. Paragraph 2.1 of Practice Direction 46 provides that the circumstances in which the court need not order a detailed assessment of costs under rule 46(4)(2) are:-

“(a) where there is no need to do so to protect the interests of the child..”

35. The effect of my determination is that the residuary estate falls to be divided equally between the 15 Defendants. Four of the child Defendants were on one side of the issue; two of the child Defendants on the other. In my view, the interests of the child Defendants should be capable of being protected by the respective solicitors seeking to agree the respective costs to be deducted out of the estate. If those costs cannot be agreed however within 21 days, I would be prepared to carry out a summary assessment.

36. This judgment will be handed down without attendances required at 10am on 17 July 2020. I would be grateful to receive from counsel any suggested typographical corrections or amendments by 4pm on Thursday 16 July 2020.