Neutral Citation no. [2004] NICh 5 | *Ref:* MORF4165

Judgment: approved by the Court for handing down | *Delivered:* **21.05.04**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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BETWEEN:

JONATHAN BROWN, LAURA BROWN, ALEXANDRA BROWN, CHARLES MEGAW, DAVID MEGAW, and HANNA MEGAW AND JOHN ALEXANDER AND STEWART ALEXANDER

Plaintiffs;

-and-

IAN WOODS ALEXANDER, HELEN BROWN, LORNA MEGAW, PETER WOODS AND DOROTHY JOAN WOODS

Defendants.

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MORGAN J

[1] The testator, John Woods, died on 21 July 2002. He made a will on 3 October 1986 in which he disposed of his residuary estate as follows:-

> "ALL the rest residue and remainder of my said estate – after payment of my just debts funeral and testamentary expenses and Inheritance Tax or tax of a similar nature – I LEAVE DEVISE and BEQUEATH to my trustees UPON trust for my son Peter Woods for life and then on his death to his children in equal shares absolutely.
>
> IN the event of the said Peter Woods predeceasing me or of us both dying in circumstances which it is impossible to ascertain the survivor THEN to the children of my daughter Dorothy Joan Woods in equal share absolutely.

> IN the event of the said Peter Woods and the said Dorothy Joan Woods predeceasing me without children then to the children of the said Ian Woods Alexander, the said Helen Brown and the said Lorna Megaw in equal shares absolutely, when they attain the age of Eighteen years."

[2] The first three named Defendants were cousins of the deceased and are the executors of his estate. The fourth and fifth named Defendants are the children of the deceased and the Plaintiffs are the children of the executors.

[3] The parties agreed a statement of facts relevant to some of the issues in the case the material parts of which are as follows:-

> "1. The will executed by the late John Woods ('the Testator') on 3 October 1986 ('the Will') is the Testator's last will and its formal validity is not in dispute.
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> **Distribution of Testator's residue under the terms of the Will**
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> 2. The Will gives, *inter alia*, a life interest in the residue of the Testator's son Peter Woods ('Peter') with the remainder interest to Peter's children. The Will then makes substitutionary gifts which take effect in the event of Peter predeceasing the Testator or dying at the same time as the Testator and also in the event of both Peter and the Testator's daughter John Woods ('Joan') predeceasing the Testator or dying at the same time as the Testator. As both Peter and Joan have survived the Testator these substitutionary gifts have no effect.
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> 3. The Will as drafted is therefore incomplete in that it does not dispose of the remainder interest in the residue in the circumstances which pertain at present, namely that Peter has survived the Testator but does not currently have children. If Peter is survived by children clearly they will be entitled to the residue.
>
> 4. However if Peter remains childless to his death the remainder interest in the residue results back to the Testator's estate. The consequence is that it is

held for those entitled under the intestacy rules at the date of the Testator's death. The persons who would take if the Testator died intestate are his only children, Peter and Joan, in equal shares. If they are dead, as Peter inevitably will be, their respective estates will be entitled to their one half share.

5. The children of the Testator's cousins Ian Woods Alexander, Helen Brown and Lorna Megaw do not take any benefit under the Will.

The Testator's Intentions

6. It is conceded by Joan (the 5th named Defendant) that the attendance note and draft wills prepared by the Testator's solicitor indicate that the Testator's testamentary intention was that the residue would go to Peter for like and thereafter to his children but in the event of there being no such children the remainder would go to Joan's children. Ultimately, in the event of this gift failing as well, the Testator intended the remainder in the residue to go to the children of the Testator's cousins.

Failure of Will to carry out the Testator's intentions

7. The Will therefore fails to carry out the Testator's intentions as these were at the time when the Will was made.

8. The solicitor who drafted the Will was entirely clear about the Testator's instructions so the failure of the Will to carry out his intentions was not due to the solicitor's failure to understand those instructions. Article 29(1)(b) of the Wills and Administration Proceedings (NI) Order 1994 is of no relevance.

9. The Will may be rectified only under Article 29(1)(a), namely that the failure to carry out the Testator's intentions is the consequence of a 'clerical error'."

[4] The Plaintiffs sought rectification of the will pursuant to article 29(1) of the Wills and Administration Proceedings (Northern Ireland) Order 1994 which provides:-

> "If the Court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence –
>
> (a) of a clerical error; or
>
> (b) of a failure to understand his instructions
>
> It may order that the will shall be rectified so as to carry out his intention."

[5] In an affidavit sworn in support of the application Joan Cynthia Baxter stated that she had been a partner in a firm of solicitors in Bangor in September 1986 when the testator and his wife came to see her about making new wills. Her attendance note of the consultation recorded the testator's instructions in respect of the residue in the following terms:-

> "Leave interest in farm to trustees upon trust for Peter for life – on his death to his children – if no claim to Joan's children – if neither have any children to the children of Ian Helen Lorna."

[6] The inference which I draw from these facts is that the draughtsman of the will made an error while transcribing the instructions into the form of a standard will in omitting the conditional devise to Dorothy's children (if any) in the event that Peter died without children. That error was compounded by the use of the words "predeceasing me" in the next paragraph when the word "dying" was intended. It seems probable that the word "predeceasing" was copied from the preceding paragraph.

[7] Accordingly I am satisfied that the error in this case is a clerical error in the ordinary meaning of those everyday words. I do not consider it necessary or appropriate to refine the statutory language and in a case of this kind the task of the court is to apply words the meaning of which is clear from ordinary usage.

[8] In the course of her very helpful skeleton argument and submissions Miss Grattan BL sought to persuade me that an inappropriately wide approach to clerical errors had been taken in some of the cases. In deference to the careful arguments advanced by the parties I will deal briefly with them.

[9] I consider that there is force in the submission that not every inadvertent mistake can be characterised as a clerical error and support for that view can readily be found at paragraphs 19 to 23 of the nineteenth report of the Law Reform Committee (Cmnd. 5301) on the interpretation of wills

where a distinction appears to be drawn between clerical errors and other inadvertent mistakes.

[10] For the Plaintiffs Mr. Lockhart BL relies on the judgment of Chadwick J in In Re Segelman (1996) 2 WLR 173 at 182 where he said:-

> "The question is whether that mistake can properly be regarded as a clerical error for the purposes of section 20(1).
>
> In this context I find assistance in the passage in *Mortimer's Probate Practice*, 2nd ed. (1927), pp. 91-92, which is cited with approval by Latey J in *In re Morris, decd* [1971] P. 62, 80. The editor of *Mortimer* suggests a distinction between two types of case:
>
> > '*First*. Where the mind of the draftsman has really been applied to the particular clause, then, whether the error has arisen from the fact that he misunderstood the instructions of the testator, or, having understood the instructions, has used inappropriate language in seeking to give effect to them, the testator who executes the will is – in the absence of fraud – bound by the error so made as if it were his own, even if the mistakes were not directly brought to his notice; and the court will not omit from the probate the words so introduced into the will. *Secondly*. Where the mind of the draftsman has never really been applied to the words in a particular clause, and the words are introduced into the will per incuriam, without advertence to their significance and effect, by a mere clerical error on the part of the draftsman or engrosser, the testator is not bound by the mistake unless the introduction of such words was directly brought to his notice.'
>
> The distinction between (i) the introduction of words into a will per incuriam without advertence to their significance and effect (described in that passage as 'a mere clerical error'), (ii) the introduction of words to

> which the draftsman has applied his mind but in relation to which he has failed to understand his instructions and (iii) the introduction of words to which the draftsman has applied his mind with a proper understanding of his instruction but which (perhaps through failure properly to understand the law) do not achieve the objective which he and the testator intended was preserved when the law relating to the rectification of wills was altered by section 20(1) of the Act of 1982."

That led to his conclusion at 184 as follows:-

> "In my view, the jurisdiction conferred by section 20(1), through paragraph (*a*), extends to cases where the relevant provision in the will, by reason of which the will is so expressed that it fails to carry out the testator's intentions, has been introduced, or, as in the present case, has not been deleted, in circumstances in which the draftsman has not applied his mind to its significance or effect."

[11] I consider that the ordinary meaning of the term "clerical error" is not limited to errors in transcribing but extends to cases where the draughtsman has not appreciated the significance or effect of the inclusion or omission of the words in issue. That view is supported at paragraph 41-02 of the 18th Edition of Williams, Mortimer and Sunnucks Executors, Administrators and Probate and paragraph 6.2 of the 8th Edition of Williams on Wills and the cases therein cited.

[12] My conclusion on this aspect is consistent with the judgment of Girvan J in In Re Heak (2001) NI Ch 14 **.** There the error occurred because the solicitor's transcription of his client's instructions adopted the wording of an inappropriate precedent. The application would clearly have fallen within the statute on any analysis but in that case which was unopposed the learned judge appeared to approve the conclusion in In Re Segelman set out above.

[13] Accordingly the application to rectify succeeds. I will hear counsel on the extent of rectification appropriate and the question of costs.