

Will construction—failure of trust (Jeffreys and others v Scruton and others)

12/03/2020

Private Client analysis: The Will established a discretionary trust for the testatrix's issue with a standard power to add any person as an additional beneficiary during the 80-year trust period and wide powers to appoint and apply capital and income. It directed that 'in default of and subject to any exercise of' those powers, the trustees should hold the trust fund (i) on expiry of the trust period for her issue (if any) then living and (ii) 'if at any time the trusts declared by the foregoing provisions fail' on trust for her nephews and nieces absolutely (subject to attaining age 18 or previously marrying). The testatrix had one child, who predeceased her. The question raised by the trustees was whether the power to add a beneficiary remained exercisable, or whether the trust fund was held exclusively for the nephews and nieces. The court held that upon the testatrix's death the discretionary trusts had failed—that the power to add was not exercisable—and that the trust fund was accordingly held on trust for the class of nephews and nieces entitled under Clause 5(c)(iii) of the Will. Written by Thomas Seymour, barrister at Wilberforce Chambers and counsel to the first, second and tenth to seventeenth defendants.

Jeffreys and others v Scruton and others [\[2020\] EWHC 536 \(Ch\)](#)

What are the practical implications of this case?

The question whether a trust has failed for lack of beneficiaries ultimately depends on construing the trust instrument. Draftsman of discretionary trusts sometimes insert an ultimate trust for charity to ensure that there is a default beneficiary so that the trust cannot fail. In this instance, the Will had been explicitly drafted so that the ultimate trust for nephews and nieces only took effect if the preceding trusts had failed. For a Will draftsman, it demonstrates the value of stating in clear terms the event upon which the ultimate trust is intended to take effect. Had the clause simply stated 'subject to the above' rather than predicating the failure of the preceding trusts, there would arguably have been a single trust, and the power to add further beneficiaries would have remained exercisable.

The case is also of interest to practitioners in that it confirms:

- that in a professionally drafted Will, legal words should generally be construed according to their legal or technical meaning
- that extrinsic evidence should not be admitted to contradict or rewrite part of the Will, that being only possible under the rectification procedure under [section 20](#) of the Administration of Justice Act 1982 ([AJA 1982](#))
- that, for the purposes of [AJA 1982, s 21](#), the court will not accept that there is an ambiguity, justifying admission of extrinsic evidence merely because different arguments are advanced as to the construction of the Will. If ambiguity is relied on, it is necessary either that the language used is ambiguous on the face of it, or that evidence (other than of the testator's intention) shows that the language used in the Will is ambiguous in light of surrounding circumstances

What was the background?

The testatrix, who died aged 51, had only one severely disabled child considered incapable of marrying or having issue, who in the event predeceased her. The trustees considered that the testatrix was well aware that there was no possibility of issue and that it was quite likely her son would predecease her, and that she must have intended that the power to add beneficiaries to be available in those circumstances. It was argued that extrinsic evidence should be admitted ([AJA 1982, s 21](#)) as the Will was ambiguous or the surrounding circumstances made it ambiguous.

What did the court decide?

The court held that there was no ambiguity in the Will or surrounding circumstances: that the draftsman had clearly specified that the ultimate trust only took effect on failure of the preceding trusts: so that the nephews and nieces could not be treated as beneficiaries of the preceding discretionary trust to save it from failure, but that the trust fund was held on trust for the class of nephews and nieces entitled under Clause 5(c)(iii) of the Will.

The court nevertheless reviewed the extrinsic evidence and Will file, and concluded that it did not establish that the testatrix had any intention that the power to add should remain exercisable.

Case details:

- Court: Chancery Division
- Judge: His Honour Judge Halliwell (sitting as a High Court judge)
- Date of judgment: 9 March 2020

Thomas Seymour is a barrister at Wilberforce Chambers. If you have any questions about membership of LexisPSL's Case Analysis Expert Panels, please contact caseanalysis@lexisnexis.co.uk.

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