At your disposal?

John Dickinson and Natasha Dzameh look at the circumstances in which a disposition to an executor constitutes an absolute gift

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Practitioners contending with wills and probate matters are fully aware of the distinct difficulties involved in drafting a will which not only ensures that the testator's estate is disposed of in accordance with their wishes, but is also incapable of being contested. Nonetheless, in recent years it has become increasingly common for individuals to avoid engaging the services of a legal professional for the drafting of such an important document and instead to trust a homemade or internet-inspired document to dispose of their estate. The availability of online templates and general information on will drafting is such that laypersons mistakenly believe that they are capable of drafting a will with the requisite care and skill required to ensure that their estate will pass safely to their intended beneficiaries.

Ambiguous language within a will creates problems for executors and can create family disharmony over who is to inherit what. Determining the correct construction of the language within the will can be a difficult issue. This is more problematic when dealing with homemade wills, where there is no solicitor's will file or attendance note to which to refer. Homemade wills are often ambiguous, due to laypersons assuming that the meaning of the words they have chosen is straightforward when in fact their use of English language, grammar and punctuation may allow for numerous interpretations. Consequently, homemade wills are rarely efficacious and determining the proper construction of an ambiguous homemade will can be a complex, intricate and intellectually arduous task. The ensuing litigation will have inevitable adverse costs consequences for the estate.

A particular complication that laypersons are unlikely to be aware of is the status of gifts to an executor. This is a thorny issue even for the most fastidious of practitioners. There exists a plethora of case law, some of which is noted below, addressing whether executors have acquired a beneficial interest or hold the asset on trust for whomever would benefit on an intestacy. A homemade will purporting to dispose of the entire estate was executed in the case of *Amiee Shannon Steed (a Child by her litigation friend, Marilyn Joy Winn) v Christopher John Steed* (2016). The aim of this article is to set out an analysis from that case to help practitioners address the issue of precisely which factors the court is concerned with when there is a disposition to an executor, in deciding whether the disposition takes effect as a gift to the executor.

Facts

This was a two day will construction trial on 16 and 17 March 2016 before Mr Justice Newey in the Chancery Division of the High Court, Bristol District Registry.

Jason John Steed (the deceased) died on 16 April 2014 as a result of a brain aneurysm. He had executed a homemade will dated 28 February 2014, which had been witnessed by two neighbours of his father. The content of the will is as follows:

> To whom it may concern,
>
> In the event of my death, I Jason John Steed give authority to my Father to dispose of all my possessions and affairs as he feels appropriate.
>
> I am of sound mind and make this decision of my own free will.
>
> Yours faithfully...

The deceased's father, Christopher Steed, was the executor (the executor) of the will.

The claimant, the deceased's daughter born on 6 March 2006, was represented by Barbara Rich, who asserted that the will should not be construed as an absolute gift of the estate to the executor. Nor should it be construed as a general power of appointment to the executor equivalent to an absolute gift. She contended that the will should be construed as an attempt to create a trust of the deceased's entire estate, under which the executor has a discretionary power to select from an unlimited class of objects. Her position was that such a trust would fail due to administrative unworkability or the uncertainty of its objects. The result of the trust failing was that the claimant would take the benefit of the entire estate upon an intestacy. In the alternative she considered the deceased to have exercised an impermissible delegation of testamentary power which would cause either a gift or a trust to fail. The executor, represented by the author John Dickinson, maintained that the will provided for an absolute gift to him and there was no delegation of testamentary powers.

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Extrinsic evidence as to the background circumstances of the execution of the will was available from the executor and the two witnesses to the will. The executor's evidence was that the Christmas before the deceased died he had informed the executor that everything was to be put in to the executor's name. The executor had responded that this was the wrong way around. The executor was later informed that the deceased had been experiencing health problems at around that time. The witnesses to the execution of the will confirmed that they had discussed the contents of the deceased's will with him and he was clear that his intention was for everything he owned to pass to the executor.

Analysis

The relevant criteria in relation to the construction of a will are set out in the case of *Marley v Rawlings* [2014]. The guidance in para 19 is that the court will seek to identify 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.

Section 21 of the Administration of Justice Act 1982 specifies instances in which extrinsic evidence, including evidence as to the testator's intention, may be admitted to assist with the interpretation of a will. One such instance is where the language used in the will is sufficiently ambiguous on its face. Although the claimant had initially disputed this aspect, it was conceded by the date of trial that the language used in the will was sufficiently ambiguous on its face to admit extrinsic evidence. Nonetheless, the parties were not in agreement as to the probative value of such evidence.

Trust or gift?

Counsel for the claimant contended that the deceased had used the verb 'give' in reference to and tied to the 'authority' given to the executor. The verb 'give' had not been used in relation to a noun which described property or an interest in property. The authority referred to was the authority to 'dispose of all my possessions and affairs', which was asserted to be inconsistent with the concept of the deceased providing the executor with an absolute gift of property. She submitted that despite the lack of the word 'trust', the creation of a trust was the most obvious meaning of 'give authority… to dispose of'.

Conversely, the defendant's counsel submitted that the relevant factors from *Marley* pointed to the testator bestowing beneficial ownership upon his father, the executor, as opposed to attempting to create a trust. It was not appropriate to analyse sections of the phrase 'give authority to my Father to dispose of all my possessions and affairs' when attempting to ascertain the natural and ordinary meaning of those words. They had to be read together. The word 'give' must be construed in relation to the remainder of the sentence, not solely the word 'authority' as the claimant contended. The phrase clearly appointed the executor as the executor of the estate and it also gifted to him ownership of the estate in his capacity as an individual. The statement that the executor was to dispose of

the estate as he felt appropriate was simply confirmation of his ownership. It was highlighted that the deceased had not qualified the provision by specifying 'but not for his own benefit'. The overall purpose of the will was to dispose of the deceased's estate and common sense dictated that he had sought to do so by way of a gift rather than by creation of a trust for unnamed beneficiaries. The deceased had used no words of trust or fiduciary obligation and there was a complete lack of precatory or recommendatory words. The case law supported the use of the word 'dispose' as part of an intention to make an absolute gift and the extrinsic evidence reinforced the executor's position.

Both counsel referred to the cases of *Paice v Archbishop of Canterbury* [1807] (in which the will stated 'and any thing not specified I commit to the discretion of my executors') and *Gibbs v Rumsey* [1813] (disposition 'unto such Person and Persons and in such Manner and Form and in such Sum and Sums of Money as they in their Discretion shall think proper and expedient'). The defendant's counsel submitted that the cases of both *Paice* and *Gibbs* confirmed that a disposition to an executor which contains a discretionary component is capable of constituting an absolute gift to the executor. The claimant's counsel sought to distinguish these cases, on the basis that they were decided prior to the commencement of the Executors Act 1830, under which the executors were to be deemed to be trustees for the persons who would take on an intestacy. The preamble to the 1830 Act provides:

> Testators by their wills frequently appoint executors, without making any express disposition of the residue of their personal estate: And whereas executors so appointed become by law entitled to the whole residue of such personal estate; and Courts of Equity have so far followed the law as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case they are held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions, if the testator has died intestate: And whereas it is desirable that the law should be extended in that respect; Be it therefore enacted...

Section 1 provides:

> That when any person shall die, after the first day of September next after the passing of this Act, having by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by Courts of Equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will, or any codicil thereto, the person or persons so appointed executor or executors was or were intended to take such residue beneficially.

The claimant's counsel asserted that prior to the Executors Act 1830 executors were considered to be beneficially entitled to the residue of the testator's personal estate, unless the courts of equity could, from the wording, deem the executors to be trustees for the next of kin. She further submitted that the cases of *Paice* and *Gibbs* were unsafe to rely upon because of the legislative changes thereafter and that the deceased's will must be construed as an attempt to create a trust.

Counsel for the claimant noted that the deceased's will lacked clear words of absolute gift and further noted the cases of:

- *Daniels v Daniels Estate* [1992], 'All the residue of my estate not hereinbefore disposed of I devise and bequeath unto my executors to distribute as they see fit'; and
- *Re Pugh's Will Trusts* [1967], '… unto my trustee absolutely and I direct him to dispose of the same in accordance with any letters or memoranda which I may leave with this my will and otherwise in such manner as he may in his absolute discretion think fit'. There were no letters found.

It was submitted that these two cases evidenced situations in which the courts had held that similar words had been construed as an attempt to create a trust in favour of the executor which failed for uncertainty as to the objects of the trust.

The defendant's counsel submitted that the relevant factors from Marley *pointed to the testator bestowing beneficial ownership upon his father, the executor, as opposed to attempting to create a trust.*

Counsel for the defendant referred to the following cases in which the dispositions in the wills were held to be valid gifts to the executors:

- *Lambe v Eames* [1871], 'to be at her disposal in any way she may think best, for the benefit of herself and family';
- *Re Messenger's Estate* [1937], 'I give and bequeath to my daughter Mrs. E. A. Chaplin'; and
- *Re Harrison* [1885]: there was an incomplete will template form by which the testatrix gave all her property 'unto [blank] to and for her own use and benefit absolutely, and I nominate, constitute and appoint my niece Catherine Hellard to be executrix of this my last will and testament'. In this case the proposition was formulated of a golden rule that a testator, in executing a will, did not intend to make it a

solemn farce by dying intestate, thus if possible the will should be read to result in testacy and not an intestacy.

- In *Re Howell* [1915], in which it was stated that 'the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal', it was held at first instance that the executor held the residuary estate as trustee for the next of kin and not as a beneficiary. That decision was overturned by the Court of Appeal, which held the will made a gift of the residuary estate to the executor. Lord Cozens-Hardy MR was clear that the lack of an express or implied declaration of trust indicated that there was the intention to make a gift to the executor. He referred to the key significance of there being a sole executor, rather than two or more executors, which ultimately meant that the executor must take beneficially.

In short, both counsel referred to a number of cases to assert that the precatory words or discretionary element either constituted an attempt to create a trust or was a clear gift to the executor. There were four key elements considered in this case:

- the disposition to the executor contained a discretionary component;
- the disposition was to a sole executor;
- the disposition was stated to be 'to my Father' so as to identify him in a personal capacity rather than through his role as the executor; and
- the operation of the above referred to the golden rule to seek to avoid an intestacy if possible. In addition the impact of the extrinsic evidence was considered.

Delegation of testamentary powers

The claimant's counsel referred to the well-established principle that a testator cannot delegate their testamentary power. She contended that the deceased, in leaving it to the executor to decide the identity of the ultimate beneficiaries, had failed to exercise his testamentary power. The only exception so as to allow a delegation of testamentary powers, as referred to in *Chichester Diocesan Board of Finance v Simpson* [1944], was where the testator sought to bestow their estate upon charitable objects. The case of *Re Beatty* [1990] determined that the rule against such delegation of testamentary powers did not invalidate a special, general or immediate power in a will where it would have been valid if made in a lifetime settlement. In fact, Hoffman J asserted:

> It seems to me, however, that a common law rule against testamentary delegation, in the sense of a restriction on the scope of testamentary powers, is a chimera, a shadow cast by the rule of certainty, having no independent existence.

Nonetheless counsel for the claimant contended that Hoffman J could not render the bar on testamentary delegation a nugatory principle.

The defendant's counsel asserted that there was no such delegation. The deceased had selected the executor as the beneficiary. It was irrelevant whether or not the deceased had any expectation as to the executor's actions after he took beneficial ownership of the estate. The fact that the executor could do as he wished with the property, including making gifts to others, was simply a reflection of his ownership and not a delegation of testamentary power.

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Judgment

In his judgment Mr Justice Newey confirmed that *Marley* provided the relevant guidance as to the approach to take in the construction of a will and that s21 of the Administration of Justice Act 1982 applied. He distinguished the claimant's cases as noted below.

In relation to *Re Pugh*, Mr Justice Newey drew attention to the fact that the gift was to the trustee who was not named and was in fact the solicitor who had drafted the will. He referred to the passage of Pennycuick J:

> If the gift had been 'I give my residuary estate unto my trustee absolutely to dispose of the same in such manner as he may in his absolute discretion think fit' that would be construed as a beneficial gift to Mr. Marten.

This indicated that the deceased's disposition should be interpreted as a beneficial gift to the executor.

Pennycuick J continued:

> But the interposition of the direction to dispose of the residuary estate in accordance with letters or memoranda seems to me, as I have said, necessarily to import a trust, and the trust must be applicable to both limbs of the direction, that is the primary direction, 'to dispose of the same in accordance with any letters or memoranda,' and the default direction, to dispose of it 'otherwise in such manner as he may in his absolute discretion think fit.'

Newey J observed that in the deceased's will no such obligation was imposed upon the executor.

Daniels was distinguished on the basis that there were two executors in that case and there was no provision regarding the division of the residuary estate between the two of them should they decide to distribute it to themselves.

Mr Justice Newey noted that the deceased had simply referred to a characteristic of the beneficial ownership the executor was to have, namely that he was able to dispose of it as he felt appropriate. It is a characteristic of ownership that the person is able to do as they wish with the property. This supported the purpose of the disposition as being a gift to the executor and not the attempted creation of a trust. He found support from *Paice* and *Gibbs*. Mr Justice Newey found comments made by Lord Cozens-Hardy in the Court of Appeal in *Re Howell* were of great assistance:

> I know of no case which in any way applies to a will like this, in which there was no trust declared either expressly or by implication prior to the gift of residue to the executor, and there was a sole executor, and it was held that the executor did not take beneficially.

Mr Justice Newey considered the golden rule to be particularly significant in relation to the construction of the will, so as to avoid an intestacy. That the will should be construed as an absolute gift was supported by the defendant's evidence. In particular, the witnesses to the deceased's will confirmed that they had questioned the deceased and he had said that he intended everything he owned to pass to the executor.

Insofar as the issue of the delegation of the deceased's testamentary powers was concerned, Mr Justice Newey formed the view that it was unclear precisely how far the bar on delegation of testamentary powers extended in light of Hoffman J's comments in *Re Beatty*. Mr Justice Newey stated that he found it difficult to envisage any gift that is not an absolute gift or a trust or a power of appointment. He held that there could be no question of delegation of testamentary power in the case of a true absolute gift. He provided the example of a father leaving a gift to his wife in the expectation that she would subsequently gift it between their children. In his view this would not be an impermissible delegation of testamentary power. He also referred to Hoffman J's comment that no delegation was involved in the creation of a general power of appointment, because the exercise of the power was a disposal of the donee's own property.

Mr Justice Newey therefore concluded that the will constituted an absolute gift to the executor and there was no impermissible delegation of the deceased's testamentary powers.

The claimant's counsel referred to the well-established principle that a testator cannot delegate their testamentary power.

Conclusion for practitioners

The safest method of ensuring an executor takes beneficially is by way of an explicit statement to that effect. Where this has not occurred, the court will consider the following factors along with the general principles of construction set out in *Marley* in order to decide if there is an absolute gift:

- whether there are any words which indicate a gift or trust;
- the capacity in which the executor is referred to ie by name, relationship (mother, father etc) or simply as the executor;
- any discretionary component of the disposition;
- the number of executors (where there is a sole executor a gift is more likely);
- the number of dispositions; and
- whether a determination that the will does not provide for a gift would result in an intestacy.

Finally, a mere expectation that a beneficiary will act in a particular way does not constitute a delegation of testamentary power where there is no explicit mention of such expectation. ■

Amiee Shannon Steed (a Child by her litigation friend, Marilyn Joy Winn) v Christopher John Steed (2016) unreported, Newey J, Chancery Division of the Bristol District Registry, 17 March

Re Beatty [1990] 1 WLR 1503

Chichester Diocesan Board of Finance v Simpson [1944] UKHL 2

Daniels v Daniels Estate [1992] 2 WWR 697 Alb CA (Canadian case – Court of Appeal of Alberta)

Gibbs v Rumsey (1813) 2 Vesey & Beames 294

Re Harrison (1885) 30 Ch D 390

Re Howell [1914] 2 Ch 73

Re Howell [1915] 1 Ch 241

Lambe v Eames (1871) LR 6 Ch App 597

Marley v Rawlings [2014] WTLR 299 SC

Re Messenger's Estate [1937] 1 All ER 355

Paice v Archbishop of Canterbury (1807) 14 Ves Jun 364

Re Pugh's Will Trusts [1967] 1 WLR 1262