The Representation of Vera Caroline Le Cras (Nee Resch)

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	28 November 2013
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Text

[2013] JRC 240

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Kt., Bailiff, **sitting alone.**

IN THE MATTER OF THE REPRESENTATION OF VERA CAROLINE LE CRAS (NEE RESCH)
AND IN THE MATTER OF THE ESTATE OF ARNOLD GOTTFRIED RESCH (DECEASED)

Advocate D. J. Benest **for the Representor.**

Advocate S. A. Franckel **for the minor and unborn beneficiaries.**

Authorities

Re Amy [2000] JLR 237 .

Theobald on Wills (17th edition).

Williams on Wills (8th edition).

Wills and Successions (Jersey) Law 1993.

Re Earle's Settlement [1971] 1 WLR 1118 .

Probate — ruling sought by the representor from the court relating to correct interpretation of trusts established under two wills.

Bailiff

THE

1 In this case, the Representor ("Mrs Le Cras") seeks a ruling from the Court as to the correct interpretation of certain will trusts established under two Wills made by her late father.

The Wills

2 Arnold Gottfried Resch ("the testator") died on 20 th February, 1942, domiciled in Jersey. He left two Wills relevant for present purposes. The first was of his personal estate and the second was of his real estate situated outside Jersey. Both were made in 1937. The residuary bequest under both Wills is, so far as material, identical and I therefore propose simply to set out that in the Will of personal estate.

3 The Wills contain no numbering and this makes it difficult to clarify what part of a will one is referring to when discussing particular passages. I have therefore added paragraph numbering but of course this has no effect on the proper construction. The relevant provisions of the residuary bequest of the Will of personal estate (with added numbering) are as follows:–

> *"1. AND TO THE REST AND RESIDUE of my said personal property of whatever kind or nature the same may be and wheresoever placed or situate at the time of my decease I dispose of the same in the manner following, that is to say:– my wife the said Tottie Resch (née Dennis) is to have the one-third of such rest and residue of my said personal property to which she is entitled by the Law of Jersey as my Widow.*
>
> *2. The second third of my residuary personal estate shall devolve to my*

child or children or other descendants according to the Law of Jersey.

3. And as to the remaining third of my residuary personal estate over which by the Law of Jersey I have testamentary power and control … I give and bequeath the rest and residue of such said remaining third of my residuary personal estate over which I have testamentary power and control … unto my Trustees upon Trust at their discretion invest the said moneys with power from time to time to vary such investments. And shall stand possessed of the said moneys and investments for the time being representing the same (hereinafter called "the residuary, Trust Fund") Upon Trust to pay the income arising therefrom as follows:

(i) One half thereof to my wife during her life if she shall so long remain my widow and one half thereof to my child or children (as the case may be) and if more than one child then equally between them. Should my wife re-marry then in such event and from the date of my wife's second marriage my said Trustees shall pay the income arising from the said residuary Trust Fund as follows: one quarter thereof to my said wife during the remainder of her life and three quarters thereof to my child or children (as the case may be) and if more than one child then equally between them.

(ii) And from and after the decease of my said wife then Upon Trust to pay the income thereof to my child if there be only one child. Should there be more than one child then Upon Trust to divide the residuary Trust Fund into proportionate parts, that is to say one part for each child and shall pay the income arising from each such part to the child to whom each part is allocated.

(iii) And from and after the decease of each one of my children my Trustees shall stand possessed of the proportionate part of the residuary Trust Fund so held upon Trust for the benefit of such said deceased child of mine In Trust for the issue of such deceased child of mine. [Emphasis added]

(iv) PROVIDED ALWAYS that if such deceased child of mine shall die without issue then in such event the said proportionate part of the residuary Trust Fund allocated to such child of mine as shall so die without issue shall accrue in equal shares for the benefit of my other children who may at that time be alive and be subject to the Trusts in respect of such surviving children of mine.

(v) PROVIDED ALWAYS that should no child of mine leave issue of them my children my Trustees shall divide the residuary Trust Fund into one hundred parts. And to hold ten of such parts Upon Trust to pay the income arising therefrom to Alice Mary Webb (my wife's mother) and upon the death of the said Alice Mary Webb IN TRUST for my said wife absolutely. To hold ten of such parts IN TRUST for

Emma Bridgeford daughter of Emil Resch of Melbourne. To hold ten of such parts IN TRUST for Lina Wilhelm daughter of the said Emil Resch. To hold ten of such parts IN TRUST for Julie Resch daughter of the said Emil Resch. To hold eight of such parts IN TRUST for Bertha Resch daughter of the said Emil Resch. To hold fifteen of such parts IN TRUST for Carl Resch son of the said Emil Resch. To hold four of such parts IN TRUST for Adèle Bridgeford daughter of the said Emil Resch. To hold six of such parts IN TRUST for Bonaventura Guileaume of Hamburg Germany. To hold five of such parts IN TRUST for Paul Guilleaume of Cologne Germany. To hold six of such parts IN TRUST for Edmund Guilleaume of Rodenkirchen near Cologne Germany. To hold six of such parts IN TRUST for Ernst Guilleaume of the same place. And to hold ten of such parts IN TRUST for Godfrey Chesworth Scott son of Louise Mary Scott.

(vi) And I declare that upon the death of any of the persons named in this clause leaving a child or children him or her surviving such child or children and equally between them if more than one shall take the share which his her or their parent would have taken had such parent survived.

(vii) And in the event of any of the persons named in this clause dying without leaving a child or children him surviving the share which such person would have taken had such person survived shall go to and be divisible equally amongst the survivors of them in the proportions hereinbefore mentioned."

Principles of interpretation

4 The approach to be applied when interpreting a will under Jersey law was authoritatively stated by the Court of Appeal in *Re Amy* [2000] JLR 237 where Southwell JA said this at 243:–

> ***"I again adopt what the Deputy Bailiff, on the basis of the commentators already cited, stated as being the correct approach to interpretation (2000 JLR at 98–99).*** The court's primary duty is to construe the will so as to give effect to the testator's intention. That primary duty is ***emphasised strongly in the Norman and French texts.*** That intention is, however, to be ascertained from the wording of the will together with any evidence of surrounding circumstances and other evidence properly admissible. In construing the will, the court is not to use an unduly narrow grammatical approach. It should adopt a generous and benevolent approach (see Pothier, op.cit., at para 150). But where the will so construed is plain and unambiguous, the court must give effect to it. It is not entitled to re-write the will merely because it strongly suspects that the testator did not mean what he plainly said. Where there is ambiguity, the

court should adopt that interpretation which best gives effect to the testator's intention as ascertained from the terms of the will and the surrounding circumstances (including any extrinsic evidence admissible)."

The question

5 The testator was survived by his widow ("Mrs Resch") and by their one child, Mrs Le Cras. Mrs Le Cras has in turn two adult daughters Caroline and Alice. Caroline currently has two minor children ("the great grandchildren"). Alice has no children at present. HSBC Trustee (CI) Limited is the trustee of both Will trusts. Mrs Resch died in 1997.

6 At present therefore, Mrs Le Cras is the sole life tenant of both Will trusts in accordance with the provisions of clause 3(ii). However, there is uncertainty as to how the trust funds should be dealt with after her death. Accordingly Mrs Le Cras, with the agreement of the trustee, has brought these proceedings to obtain a ruling from the Court so that all concerned know how the residuary estate should be dealt with in due course. Mrs Le Cras, Caroline and Alice all rest on the wisdom of the Court. Advocate Franckel has been appointed to represent the interests of the minor and unborn beneficiaries.

7 The uncertainty arises in this way. As can be seen from the emphasised wording shown in paragraph 3 above, Clause 3(iii) of both Wills provides that, after the death of Mrs Le Cras, the trust fund will be held for her *"issue"*. Two queries have arisen:–

I shall consider each of these questions in turn.

(i) Does issue in this context mean children or descendants?

(ii) If it means the latter, is the residuary estate to pass to the issue *par souche* (*per stirpes*) or *par tête* (per capita)?

(i) Does issue in clause 3(iii) mean children or descendants?

8 Counsel's researches have not unearthed any Jersey authority which assists on the interpretation of the word *"issue"* when used in a will. In England, on the other hand, it is clear that a bequest to issue *prima facie* includes descendants of every degree (see Theobald on Wills (17th edition) 25–013; Williams on Wills (8th edition) at 731). However, that is subject to the context and issue will be confined to children if, reading the Will as a whole in the light of the surrounding circumstances, it appears that the testator meant by *"issue"* children.

9 I have come to the clear conclusion that the word *"issue"* in clause 3(iii) means descendants through all degrees. My reasons for so concluding are as follows:–

(i) *"Issue"* is a word which is undoubtedly capable of carrying either meaning. For example, Article 7(2) of the Wills and Successions (Jersey) Law 1993 ("the 1993 Law"), which deals with *légitime*, provides, so far as relevant, as follows:–

> ***"(2) Subject to the provisions of Article 8, where a person dies testate as to movable estate and is survived by –***
>
> > ***(a) a spouse but no issue, the surviving spouse shall be entitled to claim as légitime –***
> >
> > > ***(i) …***
> > >
> > > ***(ii) …***
> >
> > ***(b) a spouse and issue –***
> >
> > > ***(i) …***
> > >
> > > ***(ii) the issue shall be entitled to claim as légitime one-third of the rest of the net movable estate;***
> >
> > ***(c) issue but no spouse, the issue shall be entitled to claim as légitime two-thirds of the net movable estate***
>
> ***(3) For the purposes of this Article, the division of movable estate among issue shall be par souche."***

In that Article, the word ***"issue"*** clearly means descendants through all degrees. Conversely, Article 8C(1) of the 1993 Law provides that ***"an illegitimate child shall have the same rights of succession as if he or she were the legitimate issue of his or her parents."*** In that context, the word ***"issue"*** is clearly confined to a child.

(ii) Nevertheless, in my judgment, the position in relation to the meaning of ***"issue"*** in Jersey law is the same as at English law. The *prima facie* meaning of issue in a legal context is that it means descendants through all degrees. However, this is always subject to the context in which the word is used and that context may lead to the conclusion that the testator was using the word to mean children.

(iii) In this case, there are a number of aspects which indicate that the testator intended the word issue in clause 3(iii) to include more than one generation. Thus:–

> (a) The testator regularly uses the word *"child"* or *"children"* when that is what he means, e.g. clauses 2, 3(i), (ii), (iii) and (iv), (vi) and (viii). It would be strange if, in clause 3(iii) he used the word *"issue"* to mean children, when he used the latter word elsewhere in the Will where he intended to confine the provision in question to children.
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> (b) This is particularly compelling in clause 3(iv) which provides what should happen if a child of the testator should die without issue. Clearly, in that context, the word *"issue"* is a reference back to the bequest to issue in clause 3(iii) and

must therefore bear the same meaning. If in clause 3(iv), the word *"issue"* is confined to *"children"*, it would follow that, if Caroline were to pre-decease Mrs Le Cras, the entire residuary estate would pass to Alice, as the great-grandchildren would not fall within the definition of *"issue"*. It is hard to credit the testator with such an intention.

(c) Similarly, the word *"issue"* in clause 3(v) must bear the same meaning as in clause 3(iii) (because it is dealing with what happens if a child of the testator dies without issue). The result of construing *"issue"* in that provision as meaning children would mean that if both Caroline and Alice were to pre-decease Mrs Le Cras, the residuary estate would pass to the various distant relatives described in clause 3(v) notwithstanding the existence of the great-grandchildren. It is very hard to believe that the testator intended his estate to pass to distant collateral relatives when lineal descendants were still in existence.

(d) In clause 3(vii), which deals with what happens if one of the collateral relatives mentioned in clause 3(v) fails to survive, the testator is specific in saying that this gift over applies where the person concerned dies without leaving *"a child or children"* him surviving. That is consistent with the wording in clause 3(iv) which provides that, in the event of the death of one of the collateral relatives, his or her share would pass to his or her child or children. The clear inference is that he must have meant something different when he used the word *"issue"* in clauses 3(iii), (iv) and (v).

10 For these reasons, I conclude that the word *"issue"* in clause 3(iii) refers to direct descendants of the testator through all degrees. It therefore includes the great-grandchildren.

(ii) Is the gift to issue in clause 3(iii) *par souche or par tête?*

11 Having concluded that the expression *"issue"* in clause 3(iii) includes descendants through all degrees, the question then arises as to how the residuary estate is to be divided amongst the issue living at the date of Mrs Le Cras' death. Assuming that the number of living issue remains unchanged at the date of her death, a distribution *par souche* would result in the estate being divided equally between Caroline and Alice. If, on the other hand, distribution were to be *par tête*, the residuary estate would be divided into four equal parts with one part going to Alice, one part to Caroline and one part to each of the great-grandchildren. Thus three-quarters of the estate would pass to Caroline's side of the family.

12 Again, counsel's researches have not unearthed any authority in Jersey which assists on this aspect. I have been referred to a substantial number of English cases but it is difficult to extract any principle from them. Although *Theobald* states at 26–085 that there is a *prima facie* rule that distribution to issue is to be per capita, it seems clear that it all depends on the construction of the particular Will. Indeed it has been said on a number of occasions that it is dangerous to look at the decision in another case and decide that, because the

wording of the Will appears to be somewhat similar, it should be followed. Thus is *Re Earle's Settlement* [1971] 1 WLR 1118 Goff J said this at 1123:–

> ***"Moreover, I bear in mind the warning against looking at what other judges have said, about similar words in other wills, given by Lord Macmillan in*** *Mackintosh v Gerrard* [1947] AC 461 , ***473, repeating the words of Lord Halsbury in****Gorringe v Mahlstedt* [1907] AC 225, ***226.*** Lord Macmillan said:–
>
> > ***'Your Lordships have been exhorted, times without number and by the highest authority, when construing a will, to read the document by itself and to 'give the natural meaning to the words and the sentences therein contained.'*** So said the Earl of Halsbury in *Gorringe v Mahlstedt* , ***and added: 'I believe that half the difficulties have arisen by adopting some words that learned judges have used on another occasion with reference to another will as if it was a canon of construction for all wills.***'"

13 In my judgment, the correct interpretation of clause 3(iii) is that the distribution is to *be par souche.* I have reached this conclusion for the following reasons:–

(i) The bequest does not provide specifically that it should be *"equally for the issue …"*. I can see that, with such wording, there is greater force in favour of a distribution *par tête* as this would result in each member of the class of issue taking an equal share. However, the gift in this case is simply *"for the issue"*.

(ii) More importantly, there are a number of other indicators in the Will that the testator envisaged distributions *par souche*:–

(a) In clause 2, he provides that a second one-third of his estate shall devolve to his child or children or other descendants according to the law of Jersey. At customary law, the right of *légitime*, in a direct succession, was that issue were entitled *par souche*. This is now reflected in Article 7(3) of the 1993 Law set out above at paragraph 9.

(b) Clause 3(ii) provides that, after the death of Mrs Resch, the residuary estate is divided into the number of shares that there are children. Clause 3(iv) provides that if a child dies without issue, that child's share would accrue in equal shares for the benefit of his other children. This is all suggestive of *par souche* distribution.

(c) That is reflected in clause 3(iii) itself which provides that the share of a deceased child will pass to that child's issue. In other words there is one share per child which will pass down the chain to that child's descendants.

(iii) In summary, I consider that the general thrust of the provisions made by the testator were in favour of establishing *souches* at the level of his children and in my judgment it is reasonable to infer an intention that he intended a similar manner of

distribution to apply in relation to succeeding generations.

14 For these reasons, I conclude that the correct construction of clause 3(iii) of both Wills is that the distribution amongst the issue should be *par souche*.

15 As agreed, I order that the costs of all the parties should come out of the residuary estate on the indemnity basis.