Trial and clerical error

Amanda Edwards examines the courts’ approach to rectifying clerical errors in wills.

Keeping precedents up to date across all legal disciplines is an essential exercise for any law firm, but changes can result in unfortunate mishaps.

Austin v *Woodward and another* is just one example.[1] Mr and Mrs Austin had approached the firm in 2003 to review their 1993 wills. A new partner had recently joined as head of the department and had wanted to bring the will precedents up to date. Unfortunately, an error was made when incorporating the wording of the new precedents into the Austins' wills such that the wills did not reflect their wishes.

The Austins' 1993 wills had left the family home to their daughter, Caroline, absolutely on the death of the surviving spouse. Although there had been no change to their wishes with regard to the family home, the new wills incorporated a life interest trust for Caroline from the new standard precedents, with the remainder to the deceased's two grandchildren, instead of the outright gift of the home they envisaged, as in their 1993 wills. Mr Austin predeceased his wife, and, following Mrs Austin's death in February 2009, Caroline brought a claim for rectification on the basis that her mother's intention was for her to receive the home outright.

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When the matter came before the Chancery Division of the High Court, the solicitor who drafted the wills confirmed that he had received no instructions to alter the provisions of the 1993 will in relation to the family home. The judge was satisfied there was no evidence indicating a positive intention to create such a life interest over the home. All the evidence taken together clearly established that the will did not reflect Mrs Austin's intentions. In the judge's view, the new precedents were used in place of the earlier clause of the 1993 will 'without turning thought to the impact that would have on the dispositions as a whole'.

Fortunately, the adult remainder beneficiaries did not contest Caroline's claim. The main question in the judge's view was whether there was a 'clerical error' – the kind of error that the court is permitted to correct under the statutory jurisdiction of the *Administration of Justice Act 1982*.[2] He concluded there was such an error and made an order for alternative wording to be drawn up and included in the will to reflect the deceased's intentions.

The more recent case of *Brooke* v *Purton* is another example of the use of an inappropriate precedent. The judge in that case helpfully gave the words 'clerical error' a wide meaning.[3]

Simple cases

In a straightforward case, a clerical error may be rectified by an application to the Probate Registry, without a hearing before the court. For example, suppose that an elderly client, Miss A, initially gives instructions for her residuary estate to be held for six charities, but, when a draft of the will is sent to

her, she changes her mind and decides to limit the residuary gift to five charities. The lawyer drafting the will is going on holiday the day the amended instructions arrive. As this is a simple change, he asks a colleague to make and check the necessary amendment and send out the will for signature. The name of the sixth charity is taken out, leaving only five charitable beneficiaries, but the introductory wording to the gift – 'I give to the following six charities' – is not altered. The Probate Registry agrees to rectify the will (to refer to 'the following five charities') on the basis that the reference to six charities does not reflect the deceased's intentions.

Perils of cutting and pasting

Cutting and pasting can cause problems where wishes from an earlier will are carried over without taking changed circumstances into account.

In a US case, *In the matter of Ranftle*,[4] an attorney prepared a new will for his client, Ken Ranftle, amending the main provisions, and simply cut and pasted Ken's declaration of a legal domicile in Florida from an earlier will, without discussing the possible ramifications. Ken had married his partner of almost 20 years, Craig, in Montreal earlier in the year, and had moved back to his former home state of New York, where the Governor had recently issued a directive recognising same-sex marriages in other jurisdictions. The declaration of domicile was crucial because Ken's brothers insisted he had remained domiciled in Florida, where the Montreal marriage would not be recognised, with a view to denying Craig's succession.

The US Court found that the will did not reflect Ken's intentions and that the carrying across of the Florida domicile was a 'scrivener's error'. Although *Ranftle* is a US case and, for English and Welsh law purposes, a declaration of domicile in a will may not be conclusive, it is not difficult to envisage that, in complex cross-border and family circumstances, a declaration of domicile may give rise to unforeseen conflicts.

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1. *[2011] EWHC 2458 (Ch)*
2. *Section 20(1)*
3. *[2014] EWHC 547 (Ch)*
4. *81 AD3d 566 (2011); 917 NYS2d 195*

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