



Claim No. PT-2020-000246

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND
WALES**

Rolls Building,
Fetter lane,
London EC4A 1NL

**Before:
DEPUTY MASTER LLOYD**

IN THE ESTATE OF ELLEN BEATRICE BRACKSTONE (AS EXECUTOR AND
BENEFICIARY OF THE ESTATE OF ELLEN BEATRICE BRACKSTONE
DECEASED)

BETWEEN

Mrs HOLLY ASHTON

Claimant

-and-

Mr DAVID OWEN BRACKSTONE

(As Executor and Beneficiary of the Estate of Ellen Beatrice Brackstone deceased)

Defendant

Rupert Coe (instructed by Palmers) for the Claimant
The Defendant appeared in person

Hearing date: 4th September 2020

JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no recording shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

Handed down on 23rd September 2020

(Signed) Stephen Lloyd

DEPUTY MASTER LLOYD:

1. The claimant is the only child of Mrs Brackstone's daughter Sandra. The defendant is the son of Ellen Brackstone. By a Part 8 claim form, the claimant seeks declarations, and consequential relief, to the effect that she is entitled by virtue of section 33 Wills Act 1837 to take a one half share of the estate of her grandmother in substitution for her mother who predeceased the testatrix.
2. Mrs Brackstone made her last will on the 22nd November 2017. It was drawn by solicitors who oversaw its execution. It appointed Mr Brackstone and Sandra to be her executors and left her estate to her children in the following terms:

I GIVE DEVISE AND BEQUEATH all of my real and personal property whatsoever and wherever situate to my trustees upon trust...for such of my children as shall survive me in equal shares namely SANDRA MAXINE EVEREST of... and DAVID OWEN BRACKSTONE of..."

3. Mrs Brackstone died on the 7th April 2018. Sandra died on the 5th January 2018, just three months earlier. Mr Brackstone took a grant to his mother's estate on the 27th June 2018. The estate is modest being about £211,000.
4. In pre-action correspondence solicitors for the claimant explained in clear terms that the claimant was entitled to her mother's share by virtue of section 33 Wills Act 1837. Mr Brackstone's position is that he rejects the claimant's claim on the basis that this is not in accordance with his mother's wishes or her instructions to the will draftsman. He has not however made an application to rectify the will and is now well outside the six months' time limit for doing so, thus he could only initiate proceedings if he could persuade a court to give him permission to bring those proceedings out of time.
5. Following the issue and service of the proceedings and receipt of the Acknowledgment of Service the claimant's solicitors asked for the matter to be listed either for directions with a time estimate of 30 minutes or disposal with a time estimate of half a day. It was listed for a half day hearing today but unfortunately the notice of hearing referred to it simply as a directions hearing without reference to disposal. The only direction I would have made today is that it be listed for disposal and therefore Mr Brackstone agreed to my treating this as a disposal hearing thereby saving the costs of a further hearing.
6. Section 33 Wills Act 1837 provides:
 - (1) *Where -*
 - (a) *A will contains a devise or bequest to a child or remoter descendant of the testator; and*

- (b) *The intended beneficiary dies before the testator, leaving issue; and*
 - (c) *Issue of the intended beneficiary are living at the testator's death then, unless a contrary intention appears by the will, the devise or bequest shall take effect as a devise or bequest to the issue living at the testator's death*
- (2) *Where-*
- (a) *a will contains a devise or bequest to a class of person consisting of child or remoter descendant of the testator; and*
 - (b) *a member of the class dies before the testator, leaving issue; and*
 - (c) *issue of the intended beneficiary are living at the testator's death then, unless a contrary intention appears by the will, the devise or bequest shall take effect as if the class included the issue of its deceased member living at the testator's death.*
7. As Mr Coe pointed out there might be some debate whether clause 5 of the will is a gift to the two named individuals or a gift to a class comprising those two individuals but in my judgment that is immaterial to the question I have to decide as, unless excluded, section 33 would operate either way.
8. Section 33 applies “*unless the contrary intention appears by the will*” There are two important consequences of that. First that contrary intention has to be in the will itself; unless section 21 Administration of Justice Act 1982 is engaged extrinsic evidence of the testatrix's intention is not admissible; second absent that contrary intention the section must apply. As Mr Coe put it, a testator must contract out, not contract in.
9. Section 21 administration of Justice Act provides:
- (1) *This section applies to a will-*
 - (a) *in so far as any part of it is meaningless;*
 - (b) *in so far as the language used in any part of it is ambiguous on the face of it;*
 - (c) *In so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.*
 - (2) *In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation.*

Subsection (1) therefore sets out ‘gateway’ provisions to the application of the section. Unless one or other of these provisions is satisfied, evidence of the testator's intention is not admissible. For example, if a testator left a gift to “his children” evidence that he habitually referred to both his own children and his stepchildren as “his children” without distinction, would be admissible to determine if any of the conditions in sub section (1) was satisfied, but not

evidence of what instructions he gave to the will draftsman or what he told others of his testamentary intentions. However, if the court was satisfied that this evidence showed a latent ambiguity satisfying subsection (1)(c), then direct evidence (including his instructions to his solicitors or statements to others) of his intention would be admissible to resolve that ambiguity.

10. Mr Brackstone strongly believes that he knows what his mother intended and that she did not want any of her grandchildren to benefit under her will. He wanted me to consider evidence of conversations he had with his mother and of her instructions to her solicitors. In my judgment such evidence is not admissible. Leaving aside section 21, the correct approach to the construction of wills is set out in *Marley v Rawlings* [2015] A.C. 12 at paragraph 20 which makes clear that the principles of construction applicable to contracts and other unilateral documents apply equally to wills. It is clear from paragraph 19 of the judgment of Lord Neuberger that direct evidence of intention is not admissible to aid construction. As to section 21, as I have noted, such evidence only becomes admissible if one or other of the gateway requirements set out in s 21(1) has been satisfied without regard to such evidence. In my opinion none of those requirements is met in the case of Mrs Brackstone's will. No part of the will is meaningless, or ambiguous or ambiguous in light of surrounding circumstances.
11. Therefore, the matter is simply one of construction of the will, and the question is whether the words "*for such of my children as shall survive me in equal shares absolutely ...*" shows an intention to exclude s 33.
12. In *Ling v Ling* [2002] WLR 553, residue was left "*...for all or any of my children or child living at my death or at the expiry of one calendar month therefrom who attain or shall then have attained the age of twenty one years and if more than one in equal shares absolutely*". Mr Justice Etherton (as he then was) held that they did not exclude section 33. In *Hives v Machin* [2017] EWHC 1414 Mr Timothy Fancourt QC sitting as a deputy Judge (now Mr Justice Fancourt) reached a similar conclusion on words virtually identical to the words of Mrs Brackstone's will. In *Naylor v Barlow* [2019] EWHC 1565 (Ch), (which involved a slightly different issue of construction) *Hives* is mentioned with approval at paragraph 13.
13. Mr Brackstone has relied on a *Rainbird v Smith* [2012] EWHC 4276 (ch) decided after *Ling* and before *Hives* This is a curious case. The claimants sought rectification of the will to exclude section 33, relief which was not opposed. The deputy Judge considered first the effect of the words used in the will. Notwithstanding that they were virtually identical to the words considered in *Ling* he concluded that they were sufficient to exclude section 33 and therefore rectification was not necessary. The parties involved in the litigation

therefore got the result they all wanted though not by the route they had expected. As a secondary line of reasoning the deputy Judge relied on section 21 and admitted extrinsic evidence but without addressing the distinction between paragraphs 21(1) and 21(2). In *Hives* the deputy judge considered the grounds for distinguishing *Ling* to be unconvincing, and he did not follow *Rainbird* preferring the reasoning of Etherton J in *Ling* and his own construction of the will. *Rainbird* was not considered in *Naylor*.

14. In my judgment, the words of Mrs Brackstone's will were not sufficient to exclude section 33. I reach that conclusion as a matter of construction of the will; it is also a construction which is consistent with the cases of *Ling* and *Hives* which in my judgment are to be preferred to *Rainbird*.
15. Therefore, I conclude that Holly is entitled to receive one half of Mrs Brackston's estate and I will make a declaration to that effect.