

## *Good Intentions & Legal Drafting*

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This is the second of two articles on the topic of Wills.

Words are important, particularly when drafting a Will. If the words in a Will are ambiguous then it may not be clear as to what the testator's intentions were. What usually follows is an application to the Court for declarations and orders as to the testator's intentions and rectification of the Will.

The Court must be satisfied that the Will does not carry out the testator's intentions because of a clerical error or the Will does not give effect to the testator's instructions before it may make an order for rectification.<sup>1</sup> The statutory power of rectification does not allow the Court to make a Will for a deceased but is confined to rectifying a Will to carry out the intentions of the testator.

To ascertain what were the testator's intentions, the starting point is the actual words in the Will. Where there is ambiguity of language then evidence of the surrounding circumstances may be taken into account under what is known as the "armchair principle." The armchair principle, as the name implies, allows the Court to put itself in the position of the deceased and "*take into account his or her family, property, friends and acquaintances in order to determine what was meant by the words in the Will.*"<sup>2</sup>

The Victorian case of *The Matter of the Estate of Daryl Thomas Hely*<sup>3</sup> provides a good example of the importance of words in a Will to carry out the intentions of a testator, particularly, when the Will is complex.

In the *Hely* case, the testator had seven children and died leaving an estate worth about \$25 million. At the date of his death, the deceased owned 14 properties. Two years before his death, the testator had engaged a firm of solicitors to prepare his Will. Those solicitors prepared a draft Will with several testamentary trusts for the benefit of the testator's children which they sent to the testator for his review and further instructions. The draft Will prepared by the solicitors was never finalised.

Later the testator prepared his own Will using parts of the draft Will prepared by the solicitors. The testator wanted to simplify things. He wanted his children's entitlements under this Will to be equal and for capital gains tax to be paid by the estate. The testator used parts of the draft Will prepared by the solicitors to establish testamentary trusts but appeared not to understand the complexity of the draft Will nor the essential elements of a trust.

Unfortunately, his intention to simplify things did not go to plan. After the death of the testator, an application was made to the Court for an order to rectify his Will. There were several deficiencies in his Will, most notably the failure to nominate a beneficiary for each of

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<sup>1</sup> *Succession Act* 2006 (NSW) section 27(1)

<sup>2</sup> *In the Will of Thomas Henry Finch (dec'd)* [2018] QSC 16 [36]

<sup>3</sup> [2018]VSC 614

the seven testamentary trusts. Orders to rectify the relevant clauses of the Will were made and the estate bore the legal costs of the rectification application.

Two lessons may be taken from the *Hely* case. Firstly, modern legal drafting practice advocates the use of plain English. However, caution needs to be exercised when using plain English in legal drafting because there are certain words or phrases that have particular legal meanings which must be adhered to. The appeal of simplicity should not be seen as a substitute for expertise in legal drafting.

Secondly, the temptation to save money by drafting one's own Will can be misguided and costly. A homemade Will is more likely to be the subject of an application for rectification. The costs to apply to the Court for rectification orders will usually be borne by the estate and far exceed what would have been the cost to engage a legal practitioner to prepare a Will.

Contact us at Middleton Gardiner & Associates on telephone 02 8005 4057 or by email [carolyn@middletongardiner.com](mailto:carolyn@middletongardiner.com) if you require advice or assistance on making or updating your Will or estate planning.

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