TAKE CARE HOW YOU WORD YOUR WILL AND TRUST DOCUMENT WHEN MAKING PROVISION FOR DESCENDANTS

Harvey NO and Others v Crawford NO and Others (1016/2017) [2018] ZASCA 147 (17 October 2018)

This judgment deals with a stinging issue: where a trust donor made provision that his children's descendants or' issue' would inherit, would this include the adopted children of his daughter who never had her own children? At the time the Trust deed was executed (1953), the Wills Act required that such will or trust deed should clearly convey an intention to include them, otherwise they would be excluded. The applicable legislative provisions have changed over time, but our law still upholds the principle of freedom of testation.

The Judgment can be viewed here.

FACTS

Mr Druiff (the trust founder) executed a trust deed in 1953 which provided that, on his death, the trust income should be paid to his children; and at the death of each child, that child's share of the trust's capital should be paid to the child's 'descendants'. If a child had no 'issue', its share of the capital would devolve to the other children or their descendants.

Mrs Harvey was one of Mr Druiff's four children. Each of her siblings had children, but after she had two miscarriages, she confided in her father that she was considering adopting. He responded by advising her not to make a hasty decision, as she was still young.

Subsequently, after her father's death, she adopted two children.

Some time later, after her siblings had all passed away and their shares paid over to their children, she applied to the Western Cape High Court for a declaration that the reference to 'descendants' and 'issue' in the trust deed, included also (her) adopted children. The Western Cape High Court dismissed the application. Having had regard to the accepted dictionary meaning of the words 'descendant', 'progeny' and 'issue', the Court held that the trust deed had the effect that only the biological descendants of the donor's children were beneficiaries of the trust. The High Court was satisfied that that was the clear intention of the donor.

Mrs Harvey passed away soon after and it was therefore her executor who appealed to the Supreme Court of Appeal (SCA).

In particular, the SCA was tasked with determining whether a donor, by using the words 'children', 'issue', 'descendant', 'legal descendant' in the trust deed intended to benefit adopted children. The executor in Mrs Harvey's estate argued that the trust deed should be interpreted to include adopted children and not merely the donor's biological descendants. It was stated that an interpretation that would have the effect of the donor's biological descendants being the only ones benefiting from the trust deed would bring about consequences that the donor did not contemplate or foresee.

On the other hand, the respondents (the children of Mrs Harvey's siblings) contended that the donor enjoyed legal assistance in the execution of the trust deed and in spite of that, he did not take steps to make express provision for the inclusion of adopted children in the trust deed. They argued further that the fact that the donor had made specific provision for an eventuality of a beneficiary dying without issue, and that he did not expressly make provision for adopted children despite a discussion he had had with Ms Harper regarding her inability to carry a baby to term, fortified the submission that the donor did not intend to benefit adoptive children.

HELD:

- Section 71(2) of the 1937 Wills Act (that was in operation at the time the donor created the trust) is central to the issues in the appeal, and provided as follows:

  'Subject to the provisions of section 79, an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent: Provided that an adopted child shall not by virtue of the adoption –

  (a) become entitled to any property devolving on any child of his adoptive parent by virtue of any instrument executed prior to the date of the order of adoption (whether the instrument takes effect inter vivos or mortis causa), unless the instrument clearly conveys the intention that that property shall devolve upon the adopted child;

  (b) inherit any property ab intestato from any relative of his adoptive parent.'

- The effect of the above provisions was clear: adopted children were not entitled to any property unless the instrument clearly conveys the intention that the property shall devolve upon the adopted child. The test is 'not whether they were specifically excluded by the will, but rather whether the will clearly conveyed an intention to include them (so that any property under the will might devolve upon them).' This is the provision that was applicable when the trust deed was executed. (The legal provisions regulating adoption were changed in later years.)

- It is a principle of trust law that ‘the trustee must give effect to the trust instrument, properly interpreted, as far as it is lawful and effective. A trust deed must be construed in accordance with the well-known and time honoured rules regarding the interpretation of written contracts, the point of departure always being to interpret the grammatical or ordinary meaning of the words used, read within the context of the trust deed as a whole.’

- The trust ‘speaks’ from the time of its execution and must be interpreted as at that time. It is the settlor’s intention at that time that must be ascertained from the language he used in the circumstances then existing. Subsequent events (and in these are included statutes) cannot be used to alter that intention.

- Therefore, taking account of the provisions of section 71(2) of the 1937 Children’s Act, which was operative at the time that the trust deed was executed, it was necessary for the trust deed to have clearly conveyed an intention to include adopted children, which it did not do. If the donor had intended to include adopted children he would presumably have been advised of the need to expressly include them. The omission to do so was indicative of the fact that he had no such intention.

- It could not be said that such a construction was contrary to public policy. Our law, and most international jurisdictions, uphold the principle of freedom of testation and in line with section 25 of our Constitution, a testator is free to do with his property as he wishes, in his will.

- The executor however contended that the High Court failed ‘to take into consideration the radical developments which have taken place in our law . . . which indicate an overall shift in public policy’. ‘Public policy’, so the argument proceeds, ‘has been shaped, since 1994, by the values incorporated into the Constitution’. That may be so, but it had to be remembered that the Court here dealt with a will having private effect within a private relationship. Further, the relief sought by the executor was far-reaching; in effect it is sought to have a court intervene in the right of an owner to dispose of his property as he desires to a far greater extent than any court in this country has previously done. South African courts enjoy no general jurisdiction to authorise a variation of the terms of a will or trust deed. It has always been recognised that effect will not be given to a provision that is contrary to public policy. It is so that some testamentary provisions that have been accepted as valid in the past, may no longer pass muster in light of our Constitution’s equality and non-discrimination imperatives.

- However, freedom of testation, which is an important facet of the right to dignity, protects an individual's right not only to unconditionally dispose of her property, but also to choose her beneficiaries as she wishes. The donor in this case was thus free to expressly exclude adopted children, if he so desired. He was equally free to expressly exclude one or more of his biological children. In any unfairness analysis the extent to which rights and interests have been affected is relevant. No beneficiary has a fundamental right to benefit. Here one is dealing with free gifts to which no person has any entitlement. Benefitting a class necessarily entails excluding persons who do not belong to that class. But, there is a subtle, yet significant, distinction between making that sort of choice and discriminating against people who do not belong to that class.

In the premises, the appeal was dismissed.

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