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Issues with issue

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Focus

- Interpretation of “children” in testamentary documents
- The effect of s.33 of the Wills Act 1837

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Construction of testamentary documents

- *Marley v Rawlings* [2014] UKSC 2; [2015] A.C. 129, at [19]-[23].

  … the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions…

- S.21 of the Administration of Justice Act 1982

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“children”

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Adopted children – from 1976

- Deaths on/after 1 January 1976
  - S.39 of the Adoption Act 1976 – confirms status conferred by adoption, to be treated as child born of marriage or born to adopter in wedlock
  - S.67 of Adoption and Children Act 2002, e.g. s.67(1): an adopted person is to be treated in law as if born as the child of the adopters or adopter.
  - S.69 of the Adoption and Children Act 2002 – rules of interpretation for instruments concerning property

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Adopted children – death prior to 1976

- Wills executed before 1 January 1950 – s.5(2) of the Adoption of Children Act 1926
    - ”children” did not include adopted children without contrary intention shown (not necessarily from will itself)
- Wills executed between 1 January 1950 and 1 April 1959 – ss.13 and 14 of Adoption Act 1950
    - Wills executed after adoption included adopted children “unless the contrary intention appeared”
- Wills executed on/after 1 April 1959 – ss.16 and 17 of Adoption Act 1958
    - No longer necessary for will to be executed after date of adoption

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Illegitimate children – since 1970

- i.e. not born/conceived in marriage valid by English rules of conflict of laws or not legitimate by law of domicile of each parent at DOB
- Wills executed on/after 1 January 1970 – s.15(1) of the Family Law Reform Act 1969
    - Any reference to "child" construed as reference to illegitimate child, unless contrary intention appears
- Wills executed on/after 4 April 1988 – s.19(1) of the Family Law Reform Act 1987
    - References to relationship (express or implied) between two persons to be construed without regard as to whether mother/father of either person had been married, unless contrary intention appears

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Illegitimate children – prior to 1970

- Wills executed before 1 January 1970
  - Common law position – *Wilkinson v Adam* (1813) 1 V. & B. 422: ”child”, “son”, “issue” etc. means legitimate child
  - Illegitimate children generally not included in gifts to children, but there were some exceptions

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Legitimated children

- Pre-1927 – legitimation by subsequent marriage (e.g. *Re Wright's Trusts* (1856) 2 K. & J. 595) – could inherit personal property and real estate under devise to children (e.g. *Re Grey's Trusts* [1892] 3 Ch. 88)
- Legitimacy Act 1926, esp. s.3 – legitimation by subsequent marriage as if born on day legitimated, except for child whose parent was married to a 3rd person when born (s.1(2)), unless contrary intention is shown
- Legitimacy Act 1959, esp. s.5 – repealed exception of s.1(2)
- NB: s.15(1) of the Family Law Reform Act 1969 (illegitimate children)
- Legitimacy Act 1976, esp. s.5 – legitimation by subsequent marriage; can take as if had been born legitimate
- Common law rules continue to exist

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Step-children

- "children" does not include "step-children"

  – see e.g. *Goodrich v AB* [2022] EWHC 81 (Ch)

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Children born by assisted reproduction

- On/after 5 April 2009 – Human Fertilisation and Embryology Act 2008 (artificial insemination and placing of embryos/sperm and eggs)
- Between 1 August 1991 and 4 April 2009 – Human Fertilisation and Embryology Act 1990 (artificial insemination and placing of embryos/sperm and eggs)
- Children born between 4 April 1988 and 31 July 1991 – Family Law Reform Act 1987 (artificial insemination)
- Children born prior to 4 April 1988 – common law (see Law Com. No.118, para.12(1)) (child born by artificial insemination is illegitimate)

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Gender Recognition Act 2004

- S.9(1): after issue of GRC, person's gender becomes acquired gender for all purposes
- S.9(2): subsection (1) does not affect things done or events occurring before issue of certificate, but it does operate for interpretation of instruments and other documents made before certificate is issued
- S.15: fact that a person's gender has become the acquired gender does not affect the disposal or devolution of property under a will or other instrument made before 4 April 2005
- S.18: application to court where disposition affected by acquired gender under GRC

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Human rights issues

- Human Rights Act 1998 and European Convention on Human Rights
- potential infringements of Arts. 8 and 14, and 1 of Protocol 1
- *Re Erskine 1948 Trust* [2012] EWHC 732 (Ch); [2013] Ch. 135
- *Re Hand's Will Trust* [2017] EWHC 533 (Ch); [2017] Ch. 449
- *Re JC Druce Settlement* [2019] EWHC 3701 (Ch)
- *PQ v RS* [2019] EWHC 1643 (Ch); [2019] W.T.L.R. 1015

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Takeaway points

- Step-children not included
- Adopted, illegitimate, legitimated children probably will be included
- But if dealing with historic documents/deaths, look to previous law
- If previous law applies, consider applicability of ECHR and HRA

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s.33 Wills Act 1837

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s.33 of the Wills Act 1837 (*inter alia*)

(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 persons consisting of children or remoter descendants of the testator; and

(b) a member of the class dies before the testator, leaving issue; and

(c) issue of that member 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…

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Case law on s.33 prior to *Hives v Machin*

- *Ling v Ling* [2002] W.T.L.R. 553 – application for a declaration that the claimant was solely entitled under the will in question – no contrary intention
    - "the Bank shall stand possessed of my residuary estate UPON TRUST for all or any of my children or child living at my death"
- *Rainbird v Smith* [2012] EWHC 4276 (Ch); [2013] W.T.L.R. 1609 – unopposed application for the rectification of a will, although judge approached it first by way of construction – contrary intention
    - "I give my estate… to my Trustees… hold the residue remaining and the income thereof… UPON TRUST for such of them my Daughters… as shall survive me and if more than one in equal shares absolutely"
    - Distinguished *Ling v Ling*

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Hives v Machin [2017] EWHC 1414 (Ch)

- application for a declaration that the claimant was entitled under the will in question
  - "I GIVE DEVISE AND BEQUEATH… UPON TRUST for such of my son[s]… who shall be living at the date of my death and if more than one in equal shares absolutely"
  - No contrary intention

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Hives v Machin [2017] EWHC 1414 (Ch)

(1) No requirement that a contrary intention be expressed in particular terms or that there be a reference to s.33.

(2) What is necessary is that the language of the will shows that the devise/bequest should not take effect, in the specified circumstances, as a devise/bequest to the living issue of the deceased beneficiary. e.g., an express provision for a different substitution (or none) in the event of death should be sufficient for contrary intention; but the mere fact that the will would otherwise have a different effect is not.

(3) The question is one of construction, as per *Marley v Rawlings*, at [19]-[21].

(4) The relevant question is not "what does the clause mean?" however, but rather "does the will show an intention that section 33 shall not have effect?"

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Case law since *Hives v Machin*

- *Naylor v Barlow* [2019] EWHC 1565 (Ch); [2019] W.T.L.R. 981
- *Ashton v Brackstone* (23 September 2020, unreported)
- *Burns v Bean [*2021] EWHC 838 (Ch); [2021] W.T.L.R. 795

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Takeaway points in light of s.33

- When drafting testamentary documents, need to show ”contrary intention” clearly, e.g. specific statement that s.33 is not to apply, substitution gift
- When administering wills and/or dealing with issues of construction, bear in mind effect of s.33 and the case law – e.g. gifts to “such of my children… as shall survive me” will not normally show contrary intention
- But, each will has to be considered within its own context e.g. facts known or assumed by deceased at time will was executed
- If applicable, ss. 20 (rectification) and 21 (construction) of AJA 1982 may be used

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