



## Précis Paper

### Avoiding Uncertainty when Drafting a Will

A discussion of how to avoid uncertainty when drafting a will, through examination of the case of *Arnot v Arnot* [2017] NSWSC 1741.

#### **Discussion Includes**

- Facts of the case
- Issues in the case
- How are the deceased's intentions determined?
- What role did the codicil play in determining the deceased's intentions?
- What role did devise 3 play in the construction of the will?
- Was the interest in the rental of the car space important to the determination?
- What would be the ramifications of finding the flat and car space were described separately?
- If clauses can be interpreted in more than one way, how would this affect the beneficiaries or the executors?
- Outcome of the case
- Will this case play a role in future cases in this area?

# Précis Paper

## Video Title

1. In this edition of BenchTV, Margaret Pringle (Barrister – Chalfont Chambers, Sydney) and Corinne Deall (Solicitor – AR Conolly and Company Lawyers) discuss how to avoid uncertainty when drafting a will, through examination of the case of *Arnot v Arnot* [2017] NSWSC 1741 (“*Arnot*”).

### Facts of the case

2. The deceased, who was ordinarily a resident in the UK, left a will that dealt with her Australian assets. The will specifically devised property in Australia, however, difficulty arose as to how property was described.
3. The deceased owned two lots within the same building - a flat and a car space. There was a question of whether, under the terms of the will, the deceased intended to pass her interest in both the flat and the car space by the one gift even though the car space was not referred to.

### Issues in the case

4. A question arose as to whether the gift of the flat intended to convey the interest in the car space. One of the executors was a beneficiary. The residue of the estate was given to numerous beneficiaries. The other executor was named as residual beneficiary.
5. Executors have duty to treat all beneficiaries even-handedly, and cannot prefer one class of beneficiaries due to imprecision of will.

### How are the deceased's intentions determined?

6. [14]–[16] of *Arnot* contain a discussion of the history of the deceased's use of the property. The flat and the car space were purchased at the same time in the 1970s, and the property was leased after purchase. The deceased used both lots of the property from time to time.
7. In reaching a determination, the judge relied on how the property was used in the deceased's lifetime.

### What role did the codicil play in determining the deceased's intentions?

8. The codicil became part of the problem in the case as it created the other nephew as a beneficiary.

What role did devise 3 play in the construction of the will?

9. The judge's interpretation of the use of the property is key. The devise did not refer to the use of real property. However, reference in the will to interest in real property would have cured the problem.

Was the interest in the rental of the car space important to the determination?

10. The judge determined that the car space could have been used in isolation. Evidence of advertisements for similar car spaces in the building assisted the Court. It was open to the Court to find either way that the car space formed part of the gift or fell to residue.

What would be the ramifications of finding the flat and car space were described separately?

11. The effect would be that the car space would fall to residue.
12. The deceased set up a residual trust with 32 beneficiaries. The car space had a market value of \$70,000. The residuary gift was complex with an uneven split to beneficiaries.

If clauses can be interpreted in more than one way, how would this affect the beneficiaries or the executors?

13. The primary duty falls upon the executors. If an executor renounces or doesn't survive, an alternative person must be found.
14. Application in this case was brought by the executors.
15. Executors have a fiduciary duty to do their very best at all times when administering an estate. They must give an undertaking that they will administer the estate according to law, and a grant will not be given without an undertaking. Courts will hold executors to this standard at all times.
16. Executors have a duty to ensure uncertainty in a will is resolved.
17. This case was resolved by a construction application.
18. An executor may bring an application for rectification under certain circumstances. Rectification may apply due to clerical error or failure of the will to carry out the testator's intentions. Evidence may be required to ascertain the testator's intentions.

19. An executor has an obligation to ensure that the estate is administered according to the will.
20. In *Arnot*, Parker J stated that it was necessary to bring the application. Due to this necessity, all the parties' costs were paid out of the estate.
21. The defendants in *Arnot* did not seek to oppose the application.
22. What steps should a practitioner take when drafting a will to avoid uncertainty? Attention to detail is the most important factor. If the testator's intention is unclear when taking instructions, practitioners are advised to undertake further interrogation. Clarity of language is very important. Practitioners should ensure they have the whole picture of a testator's intentions. In *Arnot*, this situation could be avoided by using more precise language.
23. Conducting a property search may also avoid similar problems to those in *Arnot*.

#### Outcome of the case

24. The Court ruled that the deceased intended to pass interest in the flat and the car space to the two named beneficiaries and did not fall to residue. It further held that the executors had fulfilled their obligation to make reasonable enquiry, and that they did not prefer interests of one class of beneficiaries over another class.

#### What can practitioners take away from this case?

25. Practitioners can take away the following important points: precision in language and attention to detail is critical; searching of property titles is important; and uncertainty was created by separate lots and certificates of title, requiring the Court to make a determination.

#### Will this case play a role in future cases in this area?

26. It is likely that similar cases will occur. The judge used common sense reasons in this case.
27. When taking instructions from a testator, practitioners are advised to never assume, as testators can often give incorrect information on property holdings. Therefore, when taking instructions, practitioners are advised to do property searches to clarify ownership.



## **BIOGRAPHY**

### Margaret Pringle

Barrister, Chalfont Chambers, Sydney

Margaret was admitted as a solicitor in 2001 and called to the Bar in 2010. Prior to this, she worked as a registered nurse. Margaret was then employed at the NSW Trustee & Guardian (formerly the Public Trustee) where she specialised in equity litigation involving deceased estates, particularly matters involving testamentary capacity and claims for family provision. Margaret was most recently recognised in Doyles Guide 2017 NSW as a Leading Junior Counsel in Wills and Estates.

### Corinne Deall

Solicitor, AR Conolly and Company Lawyers, Sydney

Corinne is a solicitor at AR Conolly and Company Lawyers, with advocacy experience in the NSW Civil and Administrative Tribunal. She graduated with a Bachelor of Laws with Honours and a Bachelor of Arts – Psychology from Macquarie University. Corinne is passionate about commercial litigation and is particularly interested in insurance.

## **BIBLIOGRAPHY**

### Focus Case

*Arnot v Arnot* [2017] NSWSC 1741

### Benchmark Link

[https://benchmarkinc.com.au/benchmark/composite/benchmark\\_19-12-2017\\_insurance\\_banking\\_construction\\_government.pdf](https://benchmarkinc.com.au/benchmark/composite/benchmark_19-12-2017_insurance_banking_construction_government.pdf)

### Judgment Link

<https://www.caselaw.nsw.gov.au/decision/5a309a4ee4b058596cbacfc3>

### Legislation

*Succession Act 2006* (NSW)