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# Précis Paper

## Construction of Wills

Gillian and Nicholas were on opposing sides in this case of *Edmonds v Morrissey* [2016] NSWSC 342. Gillian represented the son of the testator's son and Nicholas represented the daughter of the testator's son. Two children of the other daughter of the testator's son were also represented as defendants. There was argument by the latter on the meaning of 'issue' which failed. This is a very interesting discussion by two experienced counsel.

**Discussion Includes**

- What principles apply to the construction of wills?
- Are there any special principles that apply to construction of wills that were made a significant time before the case is before the court?
- What role does precedent play in interpreting words used in a will, where similar words have been used in past cases?
- Where it is contended that the will should be read as though it contains different words that are actually used, what standard applies?
- What costs principles apply in will construction cases?

# Précis Paper

# Construction of Wills

1. In this edition of BenchTV, Gillian Mahony (Barrister) and Nicholas Confos (Barrister) discuss the recent NSW Supreme Court's (Darke J) decision in *Edmonds v Morrissey* [2016] NSWSC 342, in which both Mahony and Confos appeared on opposing sides. Mr Confos appeared for the plaintiff Ms Nola Edmonds and Ms Mahony appeared for the first defendant Mr John Morrissey.

Material Facts and Issues of *Edmonds v Morrissey*

2. Ms Edmonds grandfather (testator) made a will in July 1945 where he left his estate to his son Thomas Patrick Morrissey (testator's son) and on his death to his living children. Thomas Patrick Morrissey had three children including the plaintiff (sister), the first defendant (brother) and a third child (sister) who predeceased him.

3. The question arose as to whether the third share which was otherwise going to the deceased child would go to her children or whether it would fall back to the surviving children (i.e. her siblings). There was a question of whether an expression in the will, "issue children", operated to exclude the grandchildren (i.e. the children of the deceased child).

Distinction between Request for Judicial Advice and a Construction Case

4. An issue raised by his Honour Darke J on the first day of the proceeding was whether the case should have been brought as a request for judicial advice or as a construction case. Mr Confos was brought into the case at an earlier stage to advise on the construction of the will. At that time he was told that the first defendant had failed to correspond to joining a round-table conference and was being recalcitrant. Thus, Confos decided to proceed by way of judicial advice, anticipating that the first defendant would not participate in the proceedings at all.

5. However, as the first defendant did become involved with competing views, it should have proceeded as a construction case where the two opposing views could be aired before the court and then a judicial determination made. This also allows any other parties which have an interest to be notified of the proceedings and for them to participate as well. Two children of the deceased child (the second and third defendants) did actively participate in the proceedings but towards the end of them.

Positions of Each Party

6. The position of the first defendant was that only the plaintiff and the first defendant should share the estate as tenants in common.

7. On the other hand, the position of the plaintiff was that the plaintiff should take a third of the estate, the first defendant should take a third of the estate and the remaining third share of the estate should be divided between the remaining two children of the deceased sister as tenants in common. It should be noted that this position is actually to the plaintiff's financial detriment in comparison with the position taken by the first defendant.

8. In contrast, the representatives of the children of the deceased sister (the second and third defendants) propounded that it was each and every grandchild of the testator's son which took an interest in the estate as tenants in common. This meant they did not take an interest from their parent's share but rather their own interest as tenants in common. The flow on effect of this would be that the estate, instead of being divided three ways, would be divided by the three children plus the number of grandchildren which were alive at the death of the testator's son and had attained the age of 21. This position meant that the plaintiff and first defendant would take a far smaller share by virtue of the fact that their sister did not survive their father. Mr Confos notes that this clearly was not what the testator had intended.

Principles for the Construction of Wills

9. There are very well settled principles that apply to the construction of wills and estates. One of the primary principles is to construe the language of the instrument (i.e. the will or trust document) as a whole in order to determine the testator's intention, including the grammar, phraseology, and punctuation of the instrument. When construing the words, one must apply their ordinary grammatical meaning, except where context indicates an alternative meaning.

10. The case of *Edmonds v Morrissey* required construction of the word "issue", which has a very specific natural meaning as all lineal descendants. Ms Mahony argued on behalf of the first defendant that the context indicated an alternative meaning since the word "issue" in two lines of the will was immediately followed by the word "children", with the effect that "issue children" narrowed the usual meaning of the word "issue".

11. Another principle of construction is that one can depart from the ordinary meaning of a word where it does not make sense, or does not give effect to the testator's intention. However, where a word appears to have been used in error, there must be sufficient evidence that it was in error before the will can be read as though a different word was used.

12. In the case of *Reinhard v Bell* [2015] NSWSC 818, there was a question as to whether the word "of" meant "of" or "or". When looking at the whole of the will, his Honour came to the conclusion that in that circumstance "of" had been inserted in error and that the "of" ought to have been an "or". The will was thus rectified as such.

13. Precedent does not really assist in construction cases since the court looks at the entire instrument and each instrument will not be identical from case to case.

Evidence

14. It is possible that in certain cases evidence can be ascertained which rebuts an instrument or provides insight into the intention of the testator. For example, a solicitor who drafted a will may be able to provide evidence as to discussions with a testator so the intention of the testator can be taken into account in circumstances where the clarity of the intention is not present in the document itself. On those occasions the court will be called on to assess that evidence, give it appropriate weight and make a finding regarding how to construe the testamentary document.

15. However, in *Edmonds v Morrissey*, there was an agreed set of facts and there was no cross-examination or extrinsic evidence apart from the will itself as to what the testator's intention was. This was because the will was drafted in July 1945 and it could not be expected that the solicitor or anyone who knew the testator could provide evidence of what the testator intended. Consequently, there were no competing evidentiary positions that the court had to make a ruling on.

Issues with Older Wills

16. There can be difficulty construing what is in fact meant in older wills. Ms Mahony believes the problem arises by reason of the fact that in past times, plain language was not applied in wills. There was often the use of convoluted sentences and the use of the word "AND" instead of a full stop. Additionally, drafters did not like numbering paragraphs. This has impacted significantly on modern day beneficiaries trying to understand what their entitlement is under older wills. As the passage of time progresses and the intention of the testator fades, there are families with multiple beneficiaries for an old estate confused as to what they are entitled to and each coming to their own conclusions. Consequently, older wills are more likely to come before the courts on construction points compared to wills drafted in the modern drafting style which is usually more clear and simple (with the use of full stops and numbered paragraphs).

Findings in *Edmonds v Morrissey*

17. In preparation for the case of *Edmonds v Morrissey*, Ms Mahony attributed a number to each line of the will for ease of reference. The judge refers to this extract at [8] in order to draw attention to the three lines (lines 27, 29 and 31) which brought the matter to court:

> *The point of construction primarily concerns the meaning of the words "issue children". Those words appear three times (at lines 27, 29 and 31 of the Will) in the provision that deals with the testator's real estate.*

18. Lines 25- 31 are as follows:

> *[25] …I DIRECT my*
> *[26] Trustees to transfer and convey my said Real Estate to such of the*
> *[27] issue children of the said Thomas Patrick Morrissey as shall be alive*
> *[28] at the date of his death and shall live to attain the age of twenty*
> *[29] one years and if more than one such issue children then to them in*
> *[30] equal shares as Tenants in Common AND in the event of there being no*
> *[31] issue children or grand-children of my said Son Thomas Patrick*

19. Lines 27 and 29 referred to "issue children of my said son Thomas Patrick Morrissey" but line 31 said "my issue children or grandchildren" and that is where the construction issue arose. The question was whether the words "or grandchildren" were included in error or whether the error was in omitting the words "or grandchildren" in lines 27 and 29.

20. The High Court decision of *Matthews v Williams* [1941] HCA 32; 65 CLR 639 is authority for the proposition that the word "issue" is not to be given a restricted meaning but rather a liberal meaning in that "issue" means all lineal descendants including children, grandchildren and great-grandchildren. While it is necessary to assess each case on its own words, this decision makes it very clear that unless there are other words that limit the use of the word "issue", "issue" is to be taken to be every lineal descendent.

21. In *Edmonds v Morrissey,* Darke J did limit the meaning of the word "issue", taking the constructive view of Ms Mahony who appeared for the first defendant. Mr Confos believes that his Honour did not adequately explain his choice as to the meaning of "issue" in his judgment.

22. Ms Mahony also contended that the court need not look at the words following "AND" in line 30, i.e. "in the event of there being no issue children or grandchildren", because it could be simply satisfied by looking at the initial gift to the issue children, and by reading beyond what Ms Mahony argues is a full stop is not necessary because issue children had a clear meaning

within the context of the will. This argument, however, was not touched upon in the judgment.

23. Mr Confos admitted that he doubted his interpretation during the trial after hearing Ms Mahony's arguments since on proper construction of lines 27 and 29, the word "children" following the word "issue" limits the construction of the word "issue", meaning one should not apply the ordinary or customary meaning of "issue", that is all lineal descendants.

24. There was a remaining question of why the words "or grandchildren" were included by the testator in line 31. From Ms Mahony's perspective, it was a clumsily-worded alternate distribution such that if there were no issue children alive, the estate would go to the grandchildren of the issue children. However, Ms Mahony notes that there is no certainty as to meaning or operation since the line was so poorly drafted. Darke J made mention of Ms Mahony's position but ultimately formed the view that the words "or grandchildren" were inserted in error and it was more likely that they were inserted in error than there being an omission of "or grandchildren" on two occasions in lines 27 and 29,

25. The decision can be split into two separate parts. Firstly, at [15], Darke J states that the will shows an intention that the usual meaning of the word "issue" ought to be narrowed. Secondly, at [35], Darke J confirms his earlier position at [15] and states that the proper construction of the will provides that the usual meaning of "children" will apply and the expression "issue children" is related only to the children of the testator's son. The result of this was that the three parcels of property which were subject to the gift in remainder are to be divided between the two surviving children, that is the plaintiff and the first defendant, and they are to receive them as tenants in common.

Costs

26. The usual rule in proceedings is that costs follow the event, that is the successful party is usually entitled to their costs. However, this approach was not taken in these proceedings. It should be noted that typicial plaintiffs bringing these types of proceedings are usually acting as a trustee or executor, not acting for personal gain. This has the effect of removing the usual cost provision that would be found in typical commercial, equitable or personal injury cases in the Supreme Court. At the pre-hearing directions, the plaintiff and first defendant raised with Darke J an agreement for costs which was readily accepted. The plaintiff and the first defendant, as trustees under the will, had their costs paid out of the trust estate on an indemnity basis.

27. The second and third defendants were also given costs from the estate but payable on the ordinary basis. Ms Mahony was surprised by this as the question of their costs was not raised

with the other parties, the positions propounded by the plaintiff and first respondent had already covered the field (Ms Mahony was surprised more submissions were made at all) and lastly there was nothing in the will which supported such a broad reading of the expression "issue children or grand-children". Ms Mahony believes the costs order could have been open to a contest as to whether or not costs ought to have been paid out of the estate. Mr Confos agreed with Ms Mahony and believed the second and third respondents were very lucky in getting costs.

Construction of a Trust Instrument or Will?

28. The plaintiff and first defendant were in essence both a trustee and beneficiary under the will as they were originally the executors of the will and after probate they became trustees because they were given a number of tasks to perform. Mr Confos notes that this technically meant the case was not a will construction case even though it involved a will, but rather a case involving the construction of a trust instrument which was contained in a will. This is partly due to the fact that the older will gave so many duties to the trustees, unlike modern wills where the executorial and trustee duties are usually completed in a short amount of time. Additionally, where there is a long period of postponement between the death of the testator and the vesting of the estate, it is more likely for parties to be dealing with the construction of a trust instrument as opposed to the construction of a will.

**BIOGRAPHY**

Gillian Mahony

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Gillian Mahony came to the NSW Bar in 2006. Her primary practise is in commercial law, public and administrative law, equity, and coronial inquests.

Nicholas Confos

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Nicholas Confos came to the Bar in 1989. His primary practice is in criminal law, probate, equity, commercial, contract, building and construction law, property and alternative dispute resolution. He is a Mediator of the Supreme Court of NSW.

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Focus Case

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Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_05-04-2016_insurance_banking_construction_government.pdf

Judgment Link

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Cases

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