Conditional Gifts in Wills

In this month's CPD we will be examine conditional gifts made within gifts in a will to ensure we understand how these work. In essence a condition may be a condition precedent or a condition subsequent depending on the wording of the clause but must be well thought out to ensure its validity. By necessity this will be a very case law heavy paper as much of the law on the validity of conditional gifts in wills stems from cases where conditions have been challenged. As such full case references have been provided and the reader is encouraged to read further into the judgements referred to.

WHAT IS A CONDITION?

Conditions themselves are not uncommon in wills. At some point every will writer is likely to have included a condition of some description in a will they have drafted, likely an age condition or a requirement for a beneficiary to survive the testator by a set period of time before they can inherit. Simply put, a condition is some requirement that a beneficiary must meet in order to receive their benefit from the will.

Conditions may be a condition precedent or a condition subsequent. A condition precedent is a condition that the beneficiary must meet in order to qualify for the gift. A condition subsequent on the other hand is a condition that will have the effect of terminating the beneficiary's entitlement to enjoy a gift already received.

An example would be if a testator leaves all his estate to his son provided the son erects a monument in the testator's memory; the condition is precedent. The testator does not wish his son to take the legacy unless he erects an appropriate monument. The most common condition precedent in practice is the requirement that a beneficiary should reach a certain age; this is particularly common for testators leaving a benefit to their young children.

PRECEDENT OR SUBSEQUENT – DOES IT MATTER?

Although the fact that different conditions are either precedent or subsequent is clear in theory, it may sometimes be difficult in practice to determine to which category a condition belongs. The question is one of construction and the court must construe the testator's intention expressed in the will.

However, where the condition requires that something be done which may take considerable time, the condition is more likely to be considered subsequent because of the law's preference for early vesting. The courts in general prefer in cases of doubt to hold a condition to be subsequent as was seen in *Re Greenwood* [1903] 1 Ch 749 CA.

This raises the question of whether it matters if a condition is precedent or subsequent? It does for three reasons. First, the consequences of failing to satisfy the condition differ: if a condition precedent is not satisfied, the beneficiary receives no benefit at all, whereas with a condition subsequent the beneficiary takes the gift but loses it perhaps long afterwards by breaching the condition.

Secondly, different consequences follow when the condition itself fails, i.e. if it is illegal, or contrary to public policy, or uncertain or impossible to perform. An example of impossibility was seen in the case of *Watson v National Children's Home* (1995) The Times 31/10/1995. In this case the testator had left a legacy and placed a condition upon the legacy that the intended beneficiary should care for the testator's pets. In this case the condition was held by the court to be void due to the impossibility since the pets had predeceased the testator. As a result, the beneficiary took the legacy free of any condition.

The general rule is if a condition precedent is void then the gift itself fails and passes to according to any substitute clause or failing that into residue or failing that under the rules of intestacy. But if a condition subsequent is void then the legacy becomes unconditional and the beneficiary cannot be deprived of their benefit.

Thirdly the conditions subsequent must be expressed with greater precision than conditions precedent; thus the latter are less likely to fail for uncertainty. Uncertainty is the ground on which conditions are most likely to fail. With a condition precedent the requirement of certainty is satisfied if the condition is sufficiently clear to enable the condition. In *Re Allen* [1953] Ch 810 CA a gift conditional on the beneficiary being 'a member of the Church of England and adherent to the doctrine of the Church' was held not to be void for uncertainty.

In the above-mentioned case Lord Evershed MR stated:

> *"All that the claiming devisee has to do is at the relevant date to establish, if he can, that he satisfies the condition or qualification whatever be the appropriate test….I am not persuaded that where a formula constitutes a condition or qualification void for uncertainty so as thereby to defeat all possible claimants to the gift unless the terms of the condition or qualifications are such that it is impossible to give them any meaning at all, or such that they involve repugnance's or inconsistencies in the possible tests which they postulate, for example, from mere problems of degree."*

The approach has been consistently followed in subsequent cases. In *Re Selby* [1965] 3 All ER 386 the testator provided that no beneficiary benefits under his will 'who shall have married, or who before, or on attaining a vested interest shall marry out of the Jewish faith shall take any interest or benefit under this my will'. The court held that the condition (which was held to be precedent) was not void for uncertainty since membership of the Jewish faith was a sufficiently defined concept to enable the court to determine in many instances whether a particular claimant satisfied the condition.

On the other hand, in *Re Tarnpolsk* [1958] 3 All ER 479, gifts made to the testator's grandchildren on the condition of their marriage to a 'person of Jewish race' were held to be invalid since it was impossible to say whether or not a given person satisfied the condition.

The fact that conditions subsequent must be expressed in a greater degree of certainty is best explained by Lord Cranworth in *Clavering v Ellison* (1859) 7 HL Cas 707; 11 ER 282:

> *"Where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested was to determine."*

Although a greater degree of precision is required for a condition subsequent than for a condition precedent the court has the right to judge the degree of certainty 'with some measure of common sense and knowledge and without excessive astuteness to discover ambiguities' as stated by Lord Wilberforce in *Blathwaryt v Baron Cawley* [1976] AC 397 where a condition divesting any potential tenant for life if he became 'a Roman Catholic' was held not to fail for uncertainty. What was also made clear in this case is that the court will consider what is public policy with regard to social changing circumstances, which does lend a degree of uncertainty as what was decided void on public policy grounds many years ago may differ today.

Examples of conditions that have been held to fail for uncertainty are numerous: a few must suffice. In *Re Jones* [1953] Ch 125 a provision whereby a beneficiary was to forfeit half of her annuity payments if in the opinion of trustees she had a 'social or other relationship' with a certain named person was held to be void for uncertainty.

In *Clayton v Ramsden* [1943] AC 320was concerned with a condition whereby a gift was forfeited if the beneficiary married a person 'not of Jewish parentage or of the Jewish faith'. The House of Lords was unanimous in holding that 'Jewish parentage' was too uncertain and the majority also decided on the same in regards to 'Jewish faith'.

The difference in the degree of certainty required for conditions precedent and subsequent is clearly demonstrated by *Re Abrahams* (no citation available). In this case the testators will contained a condition in clause 18 of the will divesting a beneficiary of the residuary estate in the event of his 'remarrying a person who shall not profess the Jewish faith'.

Clause 17 of the same will stated the beneficiary could take an additional gift if he 'married a person professing the Jewish faith'. The court held that the condition subsequent in clause 18 was void for uncertainty, but that the condition precedent in clause 17 was sufficiently certain. Thus, the same phrase was sufficiently certain for one purpose but not for the other. Justifying his decision to uphold the condition precedent, Cross J stated:

> *"In some cases, no doubt there may be difficulty in saying whether the person in question is professing the Jewish faith or not, and it is because of that possibility that the condition subsequent in clause 18 is void, but I do not think that the expression 'professing the Jewish faith' is meaningless. One can say of some persons that without a doubt they process the Jewish faith. It would, for example, be absurd to say that one could be unsure whether the Chief Rabbi was a person professing the Jewish Faith."*

WHEN IS A CONDITION VOID?

Conditions will be deemed to be void in the following circumstances:

a) If they are against public policy or illegal,
b) Repugnant to the interest given to the beneficiary or other gifts or provisions in the will,
c) Too uncertain to perform,
d) Impossible to perform,
e) Made against the beneficiary 'in terrorem'.

A condition is deemed to be void if the condition is deemed to go against public policy and it is in the interest of the state that this condition should not be performed, example of this type of conditions are seen below:

a) A condition inciting a beneficiary to commit a crime,
b) A condition requiring a beneficiary to exert their influence in a political manner,
c) A condition tending to induce the future separation of a husband and wife,
d) A condition in total or virtual restraints of marriage. Partial restraints, for example a condition prohibiting a person's marriage with a papist or a Scotsman, have been allowed. If the purpose of the condition is not to restrain marriage, but to provide for the beneficiary until marriage, then the condition is allowed.

Therefore a clause in the will terminating a beneficiary's interest in the event of their future marriage is allowable. This shows an intention that the beneficiary should be provided for up until their future marriage but is not placing a restraint on them.

Conditions that are made 'in terrorem' of the beneficiary are void. These are conditions that are intended to threaten the beneficiary to induce them to comply with the condition. This rule does not apply to freeholds, or to legacies charged on freeholds, or to personality directed to be paid out in the purchase of land.

The court may, however, avoid the question of the validity of such words by construing them not as a condition but as limitations on a trust (see *Page v Hayward* (1705) 11 Mod Rep 61). Examples of such a construction include:

a) A gift to a person so long as that person remains unmarried,
b) A gift subject to marriage with consent,
c) A reduction of an annuity on marriage,
d) A proviso against alienation.

In the case of *Nathan v Leonard* [2003] 1 WLR 827 a forfeiture clause which would only take effect if the will is challenged by a beneficiary was challenged. The argument was advanced that the condition could not stand because its effect was to deter an applicant from a making a claim under the Inheritance (Family Provision for Dependents) Act 1975 for fear of losing the benefit given to him by the will and this was arguably in terrorem of the beneficiary. The court held that such a clause was valid. Although the inclusion of the clause was likely to make a claim under the 1975 Act less likely it did not prevent the beneficiary making a claim. The beneficiary remained free to do so and, if he did, the court would take the lack of provision in the will into account when determining whether or not to make an award.

OTHER DRAFTING CONSIDERATIONS

Assuming the condition the testator wishes to include in their will is valid and not likely to be void on any of the grounds discussed above, great care still needs to be taken by the drafter to ensure the condition takes effect in the manner intended and the testator's wishes are very clear to the executors.

The fairly recent case of *Naylor & Amat v Barlow & Others* [2019] EWHC 1565 (Ch) a testator gifted his interest in his farm to his wife and two of his sons. The sons' legacy was conditional upon them each

paying £15,000 to the testator's other two children within 9 months of his death. If they failed to do this then the gift of the farm would fail and would pass to the other two children instead.

One of the sons receiving the farm predeceased the testator leaving a spouse and two children of his own. The children would inherit their late father's share in the testator's estate by virtue of s33 of the Wills Act 1837. The children were not informed of the condition within 9 months of the testator's death. This then raised the question of whether or not the children inheriting as a result of s33 were subject to the same condition as the original beneficiary of the will. Did they have to pay their father's siblings £15,000 in order to inherit a share of the farm?

The High Court confirmed that where a testator makes a gift subject to a contingency then the substitute beneficiaries are subjected to the same contingencies as the original beneficiary unless the will clearly states otherwise. In his judgement HHJ Hodge QC also confirmed that this is the case even if the condition is seemingly impossible for the substitute beneficiary to perform. In this case the children were not made aware of the condition within 9 months of the testator's death, but it was held that ignorance of the condition does not make it impossible to perform and it would be contrary to testamentary freedom to make the gift free of the condition that the testator had so clearly intended. The condition looked set to fail from the outset, considering that probate was not taken out until 3 years after the testator had died.

Be careful when drafting conditions and make sure that the implications of a condition or its failure are fully understood. In this case had the testator made it clear whether or not the condition was intended to apply only to the gifts to the sons or whether it should apply to those taking in substitution then this could have been avoided. If there is a timescale for fulfilling a condition, make sure that it is clear when the clock starts and when the executors are obliged to inform a beneficiary of the condition by.

It is also important to ensure that how the executors enforce the condition is clear. Conditions that on the surface appear straightforward can be difficult in practice for the executors to enforce. Take for example the seemingly straightforward condition that a beneficiary should be 'clean of his drug addiction for one year following my death'. To make this anywhere near enforceable the following would need to be considered:

- Should the clause stipulate that the drugs test should be administered by a qualified medical practitioner?
- Should the clause stipulate that the test must be administered in the presence of one of the personal representatives or their agent?
- Should the clause be precise about which drugs are being tested for?
- Should the condition be negated if the beneficiary is in rehabilitation or on a methadone program?
- Should a positive test for drugs that have been prescribed to the beneficiary at the time as treatment for a specific illness be excluded?
- Should the satisfactoriness of the evidence of the test be left to the discretion of the personal representatives?

In some cases, if a condition carries the risk of being hard to enforce or potentially uncertain the drafter should consider if the testator's wishes could be better carried out via a trust. Discretionary trusts supported by a well written letter of wishes can be a valuable tool in carrying out the testator's wishes

and allowing trustees to impose conditions that the will may otherwise have struggled to structure in an enforceable manner, such as with the drugs example above.

CONCLUSION

What we have seen in this paper is the effect of drafting conditional gifts in wills can have adverse effects and we now know what we can and what we cannot do. We have also established that depending on what type of condition is drafted into the testator's will the condition will be either a condition precedent or a condition subsequent and what the consequences of failure of each type of condition is.

The way the condition is structured is also very important as this will have an impact on whether the condition will work or whether it is enforceable in the first place, i.e. is it against public policy or is simply impossible for the beneficiary to perform what is asked of them.

The main point to take away is the fact that when clients ask to restrict gifts in their wills we need to examine if these conditions will actually work in the eyes of the law and if so how it can be made certain enough for the trustees of the estate to properly enforce it before drafting.