

**Judgment 19/2006 Wright and Westcott v Evans and O'Donnell (re Phyllis Elizabeth Middlebrook deceased) – Royal Court (Civil Action File 988) – 3<sup>rd</sup> April, 2006**

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**Will of realty application for rectification – review of Jersey, Norman and English authorities – held that the Court had power to rectify the will – evidence to be called as to the intention of the testator – adjourned for hearing before the Jurats**

**IN THE ROYAL COURT OF GUERNSEY**

**The** 3<sup>rd</sup> day of April, 2006 before Sir de Vic Carey, Lieutenant Bailiff; sitting alone

In the matter of:

(1) JACQUELINE ANN WRIGHT  
(2) JANE MARY WESTCOTT  
As Administrators of the Will of Personal Estate  
of the late John Middlebrook  
(Appellants)

v.

(1) MARGARET CAROL CALLISON EVANS  
(2) CYNTHIA LINDA O'DONNELL  
(Respondents)

Whereas on 17<sup>th</sup> March 2006 the Lieutenant Bailiff considered a preliminary point as to whether the Court has power to consider an application for rectification and whether it is entitled to consider extrinsic evidence in connection therewith and heard thereon Advocates J. D. Loveridge and J. A. S. White, Counsel for the Applicant and Respondent respectively.

The Lieutenant Bailiff this day handed down judgment in the terms attached hereto and held that it is open to the Court to hear evidence of the circumstances that are deposed to by the Representors and the former advocate of Mrs Middlebrook and to decide whether in the light of that evidence and any representations the Respondents may wish to make if it is appropriate to rectify the Will in the way sought by the Representors.

S. M. D. ROSS  
Her Majesty's Deputy Greffier

Final Judgment  
3 April 2006

**IN THE ROYAL COURT OF  
GUERNSEY  
ORDINARY DIVISION**

**Between**

**(1) Jacqueline Ann Wright  
(2) Jane Mary Westcott  
As Administrators of the Will of Personal  
Estate of the late John Middlebrook**

**Applicants**

**v**

**(1) Margaret Carol Callison Evans  
(2) Cynthia Linda O'Donnell**

**Respondents**

**In the Matter of an Application**

- 1. To register; and**
- 2. To rectify the Will of Real Estates of the late Phyllis Elizabeth Middlebrook nee O'Donnell dated 20<sup>th</sup> July, 1992**

**Judgment of Lieutenant Bailiff Carey on the preliminary point as to whether the Court has power to consider an application for rectification and whether it is entitled to consider extrinsic evidence in connection therewith.**

Advocate for the Applicants: J D Loveridge  
Advocate for the Respondents: J A S White

Date of Hearing: 17<sup>th</sup> March 2006  
Date Judgment handed down: 3<sup>rd</sup> April 2006

**The factual background**

1. Mrs Phyllis Elizabeth Middlebrook died on 27<sup>th</sup> March 2003 and her husband John survived her for slightly in excess of one year, himself dying on 5<sup>th</sup> September 2004. They had no children. In 1992 they both executed Wills of Personalty and Realty providing for disposal of their property on their respective deaths.
2. Dealing first with the Wills of Personalty, over which there is no point arising, both Mr and Mrs Middlebrook appointed the surviving spouse as Executor and bequeathed the whole of the personal estate to the surviving spouse. In the case of the second of the parties to die the Will appointed a Bank as Executor and made identical provisions for the benefit of certain legatees and for a charitable institution to take the residue. As is often the wont of such institutions today the Bank renounced and the Applicants who were old friends

of the Middlebrooks have proved Mr Middlebrook's Will of Personalty as Administratrices with will annexed

3. The Wills of Realty appear on the face of them to be of similar effect. These both provided that in the event of the death of the survivor of the husband or the wife the real estate was to pass to the Executors of the Will of personal estate to be sold and disposed of as directed in the Will of Personal Estate. Although the argument in this case turns on what evidence the Court is entitled to look at in connection with this application I am going to set out the full history of the matter so that the problem can be clearly identified.
4. Mrs Middlebrook was the sole owner of the dwelling, Greendale at Les Pequeries, Vale in which she and her husband had lived for many years. She and her brother, Racster had inherited this property from their mother. She had then acquired his interest so as to become the sole owner. Her brother, who died in 1999 and was the adoptive Father of the Respondents.
5. I am advised that in 1972 Mrs Middlebrook made a Will leaving her Real Estate to her husband and if he pre-deceased her to her brother and then if he pre-deceased her to the Executors of her Will of Personal Estate. We know from the papers before the Court that when Mr and Mrs Middlebrook went to instruct Advocate Barnes in connection with the preparation of the new Wills in 1992 Advocate Barnes made a note to the effect that Mrs Middlebrook's Will of Realty was to provide for her Realty to be left to Mr Middlebrook and if he predeceased he to the Executors of her Will of Personal Estate.
6. Erroneously the prior bequest to the Husband was omitted from the draft and the error not spotted at the time. We therefore have an apparent intestacy on the Wife's estate, which only arises if the Husband survives her. I say an apparent intestacy because if Mr Loveridge's application succeeds, this defect will be remedied by the inclusion of a devise of the Real Estate to Mr Middlebrook as set out in the application. This explains why the Court is faced with an application to register and rectify at the same time because it would clearly not be appropriate for the Will to be registered if it is not to be rectified, as then the Applicants would have no interest in the matter.

### **Procedural History**

7. When Mr Loveridge first tabled this application before me (as Bailiff) in March 2005, I gave certain directions, which I handed down formally on 9 June 2005. The gist of these directions was that the heirs of Mrs Middlebrook should if possible be traced and given the opportunity to be heard thereon. Mr Loveridge managed to trace and serve the Respondents who as I have said are the adopted daughters of Mrs Middlebrook's brother Racster. It is accepted that the American adoptions are Convention adoptions for the purposes of section 5 of the Adoptions (Guernsey) Law 1970. Affidavits have been filed on both sides relating to the factual background.
8. It is further accepted that if I decide that as a matter of law the rectification application should be entertained then it will be for the Jurats to decide with me whether as a matter of discretion the court should grant it. When Miss White first appeared for the Respondents, I indicated as I had to Mr Loveridge earlier, that the reasonable costs of her representing the Respondents would be a charge against the Estate of Mr Middlebrook in the event that the application

for rectification succeeded as I felt that it was wrong in a case where there was no clear Guernsey authority for the Respondents to be put at financial risk in a situation like this. I considered that it was proper for them to be represented and heard on the issues of law concerned.

### **Summary of the Contentions of the Parties**

9. Briefly Mr Loveridge seeks rectification on the grounds that this will meet the clear intentions of Mrs Middlebrook as to where her property was to pass on her death. Miss White does not challenge the power of the Court to entertain an application for rectification, rightly in my view as there is clear persuasive authority to that effect from a number of cases in Jersey. Further although in no way binding on this Court, there has been a recent case in Alderney (*re Winlaw*) where the Court of Alderney was satisfied that it had power to rectify a drafting error in a Will of Personalty.
10. Miss White also accepts that I am entitled to take judicial notice of the fact that according to the public records, Mrs Middlebrook was the sole owner of the property Greendale. Miss White however argues that unless it is evident on the face of the will that a mistake has been made or that there is some ambiguity or absurdity or there is extrinsic evidence (other than that of the testatrix's intention) that a mistake has been made the Court cannot admit evidence of the testatrix's intention in order to entertain an application for rectification.
11. In order to do justice to Miss White's argument therefore I have to close my mind to what might appear to be the compelling evidence that a mistake has been made by those responsible for drafting this Will.

### **The Law**

12. This being a case concerning the disposition by Will of Real Property it is to the Norman Customary Law which I am to look. As I shall briefly touch on later in this judgment, English law on the rectification of Wills developed in a somewhat artificial and unjust way so that in the end Parliament had to intervene by enacting the provisions of the Administration of the Estates Act 1982. If English law were to apply this Court would have to be looking at the matter in the way that it approached other situations where English Statute Law had developed and altered the Common Law position, which had, in that particular area, reached a position where the strict Common Law was causing substantial injustice. (See judgment of the Court of Appeal in *Morton v Paint (21 GLJ 61)* and of the Royal Court in *Vidamour v. Hood (16GLJ 68)* for examples of difficulties arising where the States of Guernsey had not followed Parliament in addressing these kinds of situations). Happily therefore I can look at the Norman authorities and I find as Dorey, Commissioner did in *re Vibert 1987- 88 JLR page 96* that the starting point is to be found in Pothier in that assistance has to be obtained from French Authorities, the Norman Authorities being silent in the detail. I quote from page 102 of Commissioner Dorey's judgment:

*"However, Pothier, 2 Coutumes d'Orléans, para. 150, at 497 (1821 ed.), clearly lays down the principle that it was of paramount importance to ascertain what was the intention of the testator: "on doit principalement s'attacher à découvrir quelle a été la volonté du testateur." The author*

*goes on to give a positive example in illustration of this principle, from which it is clear that extrinsic evidence could be introduced in order to ascertain the intention of the testateur, and that on the basis of that extrinsic evidence additional words might be read into a will (op. cit., para. 154, at 499-500):”*

13. On page 103 he continues:

*“A similar principle is laid down in Dalloz, Nouveau Répertoire, 1<sup>st</sup> ed., Testaments, para. 109, at 500: “En principe, il appartient aux juges du fond de déterminer souverainement le sens véritable des intentions du testateur”.*

*“The author goes on to say that the judges must steep themselves above all in the actual terms of the will. If these terms are not sufficiently clear, one may have recourse to extrinsic circumstances to interpret the will (para. 116 at 500) “si ces termes ne sont pas suffisamment clairs, la jurisprudence admet qu’on peut recourir à des circonstances extrinseques pour inter-préter le testament.” It is important to note that neither in Dalloz nor in Pothier is there found the artificial distinction between “patent ambiguity” and “latent ambiguity” that had grown up in English law”*

14. The whole issue of rectification was addressed again in Jersey in a judgment of Birt D B in Re Vautier 2000 JLR 351. The facts of that case, which do not appear to be so unusual as they have arisen in other jurisdictions, were that the husband and wife went along to the Advocate to sign their Wills. Neither they nor the witnesses noticed that the wife executed the husband’s Will and the husband executed the wife’s Will. The Jersey Royal Court was faced with two alternative applications.

15. The first was to register the Will prepared for the wife and signed by the husband. Under strict Norman Law this would have been possible, but Jersey Law like Guernsey Law had developed to make it mandatory that Wills be signed and witnessed and whilst defective and unsigned copies of Wills had on occasion been registered that was only where the Court had been satisfied that the testator had originally executed an original and by signing it and having it witnessed if it was not holographic. The Royal Court of Jersey therefore declined to register the Will signed by the husband, but it did entertain and grant an application to rectify the Will prepared for the husband but signed by the wife so as to give effect to the real intention of the parties, by making the necessary changes to the wording.

16. Before quoting the conclusions of the Royal Court of Jersey I should explain what the problem was with the Law of England. This stemmed from the way in which the Courts there interpreted the Wills Act 1834 over the years. The problem identified was that the power to alter a Will was expressly limited therein to one of omission rather than the addition of words. This defect was as I have said remedied by the Administration of Estates Act 1982.

17. I adopt the very clear summary of reasons of the Royal Court of Jersey *In Vautier* starting at the foot of page 360 of the Report:

*“(a) It is clear that courts in several countries have asserted a jurisdiction to delete words from a will before accepting it for probate. Once a court has power to make any “change” to a will, we see no reason or justification for drawing a distinction between a deletion and any other change. If the court can make one type of change (a deletion) so as to correct a manifest error and make the will accord with the testator’s clear intentions, why should it not be able to make another type of change (e.g. a substitution or addition) to achieve exactly the same result?”*

*(b) The inability of the English courts to go beyond the power to delete seems to have been based upon the wording of the Wills Act and upon precedents established by the courts many years ago. The dicta from some of the cases suggests that, given a free hand, the courts, in more recent times, would have striven to find a power of rectification. The Wills Act is of no application in Jersey and there are no precedents in Jersey which deny a power of rectification.*

*(c) The Canadian courts have established a common law jurisdiction to rectify a will. This court has historically exercised a wide inherent jurisdiction in many areas of law and we see no reason to restrict our jurisdiction to that of the English courts rather than that of the Canadian courts. On the contrary, the present case shows the desirability of the wider power.*

*(d) Policy considerations point in favour of such a jurisdiction. It is clear that the English judges regarded the common law position as unsatisfactory and statute has now intervened in England to achieve the same result as would be achieved by the court accepting a general power of rectification. It does not seem to us to be in the public interest for the court to have to stand idly by and let the testator’s clear intentions be thwarted because of a clerical or other mistake.*

*(e) We support the approach of Maher, J. in Bohachewski (1) when he asked whether there was anything which prohibited him from rectifying the will by altering it. We find there is nothing which prohibits us from holding that the court has jurisdiction to grant rectification. On the contrary, for the reasons which we have summarized above, we think that there are strong grounds for holding that the court has such a power.*

*In the case of wills, the remedy of rectification is one which must be used sparingly and with extreme caution. The testator is no longer present to tell the court what he intended. The parties before the court may have reasons of their own for seeking to “change” the wording used by the testator. The court must, therefore, be very careful before altering the words used by the testator. However, where it is satisfied by clear and compelling evidence that a mistake has been made and that the words used do not reflect the testator’s intentions, the court may grant the discretionary remedy of rectification so as to alter the wording (whether by deletion, substitution or addition) so as to carry out those intentions. As in the case of trusts, any applicant will have to make full and frank disclosure of all material facts.”*

18. The above authorities were cited by Mr Loveridge in his contentions. Miss White has carried out research into other cases in Jersey and reviewed the

position in England and in the Commonwealth. She first cites *In re. Wardlaw Milne [1970] JJ 1539* as authority that extrinsic evidence is not admissible in these circumstances. However, the case is not really on the point that we have here. The testator left a bequest to the “the London boys home” which was shown not to exist. Extrinsic evidence was admitted to support the view that “London” was a typographical slip for “Gordon” and there was an Order for rectification accordingly. *In Re Power [1966] JJ 643* concerned a bequest of specific shares and the issue was whether the testator was referring to the shares that he owned at the time he made his Will or those which he was in possession of at the time of his death. I do not think I need to dwell on the fairly narrow point, which the court was called on to decide. However, there is a useful reference to a decision of the House of Lords in *Perrin v Morgan [1943] AC 399* and I repeat the words of Lord Romer at 420:

*“I take it to be a cardinal rule of construction that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. To understand the language employed the Court is entitled, to use a familiar expression to sit in the testator’s armchair. When seated there, however, the Court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he plainly said”.*

19. She further cited *Re Reynette James [1975] 3 All ER 1037*. In that case there was clear evidence of the omission of certain words as a result of an error made by the Secretary to the Solicitor’s Clerk who prepared the Will. Templeman J was faced with the Law as it was before 1982, but he was able to correct the error that had been made to some extent by expressly omitting certain words of bequest. However, the important point of the decision, so far as concerns what I have to decide is his acceptance of the fact that there was on the face of the Will something odd and wrong about the clauses that appeared in the Will because there would be no provision made for the destination of capital or income between the death of one Life Tenant and that of the other.
20. Miss White goes on to make reference to *Wordingham v. The Royal Exchange Trust Company Limited 1992 3All ER 204*. This case centred on the provisions of Section 20 of the Administration of Estates Act 1982. This again is not really on the point, but it is of interest that the Court readily accepted the clerical error on the part of the Solicitor drafting the Will and agreed to rectification. Miss White suggested that it is wrongly decided. In the circumstances of the law pertaining in England I am not so persuaded, but I do not think the issue of whether or not it was correctly decided, will assist me greatly in reaching a conclusion in the matter before me, save that it is supportive of the principle of rectification for clerical errors on the part of lawyers, who with the complexity of modern life, seem to be prone to falling into error when drafting Wills.
21. Miss White also draws attention to the Jersey case of the *Estate of Father Amy [2000] JLR 80 and 237*. This is of interest in that the decision of the Deputy Bailiff was reviewed and upheld by the Court of Appeal. However, it really turns on issues of ademption. Father Amy had a large holding of shares in the Guernsey Press Company Ltd, which were the subject of a takeover, which was perfected shortly before Father Amy’s death by issue of new shares in the

Jersey Company which took over the Guernsey Company and a cash payment. The dispute was over whether the cash payment, the cheque for which had not been presented at the time of death, was deemed into the residuary Estate or was still part of the specific bequest. This decision pre dated that in Vautier. Again, this is a case not directly on the point at issue here, but I do gain assistance from the approach of both Birt DB who was reluctant to limit the meaning of the word 'ambiguity'. (See his Judgment at page 99) and also the general endorsement of the judgment of the Deputy Bailiff as expressed by Southwell J A in the last two pages of his judgment (pages 243 to 245).

## **Conclusion**

22. I am not persuaded that in the circumstances of this case it is right for the Court to be approaching this application in the somewhat artificial way argued by Miss White. I acknowledge that the position with construing wills which has been the task before the Court in many of the cases cited is quite different from the position over applications for rectification, but the construction cases, if I may call them that, point me to adopting the position argued by Mr. Loveridge
23. I am satisfied, armed with the information that I have, to the effect that she was the owner of her Guernsey realty, which was vested in her alone, that there is an ambiguity apparent on the face of the Will of Mrs Middlebrook and I am persuaded by the authorities which I have quoted that it is open to the Court to hear evidence of the circumstances that are deposed to by the Representors and the former Advocate of Mrs Middlebrook and decide whether in the light of that evidence and any representations the Respondents may wish to make, it is appropriate to rectify the Will in the way sought by the Representors.
24. As I have already stated, this at the end of the day is a matter of the Court's discretion and in order to exercise that discretion, the Court will reconvene with Jurats on a date convenient to the Court and Counsel.