

Judgment 53/2009

**In re Florian Carr (née Winslow) (deceased) – Royal Court
(Civil Action File 1409) – 22 December 2009**

Will of personalty - executors' application to rectify – Guernsey and Jersey authorities considered – rectification a remedy 'which must be used sparingly and with extreme caution' – simple drafting error – Jurats held that there was extrinsic evidence of the testator's intention – application granted.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1409

The 22nd day of December 2009 before John Russel Finch Esquire, Judge of the Royal Court

**In the matter of the
Estate of Florian Carr (née Winslow)**

**Adrian Tristram EELES
Barbara Jean CAREY (née Whaley)
(as Executors of the Personal Estate of the Late Florian Carr)**

Applicants

**NATIONAL ART COLLECTION FUND
(Trading as The Art Fund)**

First Respondent

**NATIONAL GALLERY OF ART,
WASHINGTON, DC**

Second Respondent

**J P MORGAN CHASE BANK NA
(As Trustees of an Irrevocable Trust settled by
The late Florian Carr on 14 December 1979)**

Third Respondent

Whereas on the 30th November Judge of the Royal Court John Russel Finch and Jurats Derek Martin Le Page, Michael John Tanguy and Terence George Snell considered an application for the rectification of a will of personalty and heard thereon Advocates R. G. Shepherd C. J. Hay and J.A.S. White Counsel for the Applicants, First Respondent and Second Respondent respectively. (The Third Respondent did not appear and was not represented) and whereas the Court granted the said application and reserved its reasons the Court this day handed down the said reasons in the terms attached hereto.

**S M D ROSS
H M Deputy Greffier**

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

**In the matter of the
Estate of Florian Carr (née Winslow)**

Between

**Adrian Tristram EELES
Barbara Jean CAREY (née Whaley)
(as Executors of the Personal Estate of the Late Florian
Carr)**

Applicants

-And -

**NATIONAL ART COLLECTION FUND
(Trading as The Art Fund)**

First Respondent

**NATIONAL GALLERY OF ART,
WASHINGTON, DC**

Second Respondent

**J P MORGAN CHASE BANK NA
(As Trustees of an Irrevocable Trust settled by
The late Florian Carr on 14 December 1979)**

Third Respondent

**APPLICATION FOR RECTIFICATION OF
WILL OF PERSONALTY**

Case heard on: 30th November 2009

Decision handed down: 22nd December 2009

**Before: John Russell FINCH Esquire, Judge of the Royal Court
And Jurats of the Royal Court
D M Le Page, M J Tanguy and T G Snell, Esquires,**

**Counsel for the Applicants: R G Shepherd
Counsel for the First Respondent: C J Hay
Counsel for the Second Respondent: J A S White
(The Third Respondent did not appear and was not represented)**

Cases

Wright and Westcott v Evans and O'Donnell (re: Middlebrock, deceased) (2006) Royal Court, Civil
Action File 988

Re Vautier [2002] JLR 351

Re Vibert [1987-88] JLR 96

Decision

1. This is an application brought by the Executor of the Will of Personalty of the late Mrs Florian Carr (Née Winslow), (hereafter referred to as “T”). The application seeks rectification of her last Will of Personalty, dated 17th July 2000 (pages 52 – 57 of the bundle) by substituting the words “Article FIRST” for “Article THIRD II” in Clause 7.2 of the Will and directing the Third Respondent pays the balance of the principal of the Trust Fund created by Article FIRST of the Irrevocable Trust settled by the late Mrs Carr on 14th December, 1979 to the Second Respondent.
2. The First Respondent adopts a strictly neutral approach and the Second Respondent is in full agreement with the application. The Third Respondent, although aware of the proceedings, did not appear, but is involved as Trustee of the Irrevocable Trust only. The parties are in agreement as to the law applicable to the application and as to the questions the Court needs to determine. Accordingly, the hearing took place for just under half a day.
3. The background to the application has been set out in painstaking detail in the documents produced in the bundle. To understand the position of the various legal entities under consideration a helpful chart was produced at page 60. The problem can be set out shortly, and is alluded to in various parts of the bundle, e.g. para 20 of the Applicants’ Skeleton Argument in Tab 9. There was a simple drafting error, as is accepted by everyone. It is necessary to bear in mind that in 1995, T altered her Will to leave the balance of the principal of her Trust Fund to the Second Respondent, instead of the First Respondent. That intention was also manifested in her last Will, the subject of this application. The problem is that the reference to Article THIRD II in Clause 7.2 of the last Will of Personalty is an error. Article THIRD II of the Irrevocable Trust provided for the enjoyment of the Trust Fund by T’s spouse, Mr Carr, during his life-time, should T have predeceased him. Mr Carr in fact predeceased T, on 16th August 1998. T died on 2nd May 2007. As T’s husband died before her there could have been no trust created by Article THIRD II in the current Will of Personalty and no point in referring to such a trust in Clause 7.2 of the Will. It is submitted that there is clear and convincing evidence that T’s intention when she executed her last Will in 2000 was to leave the balance of the principal of the Trust Fund to the Second Respondent.

Legal Principles

4. In the Guernsey Royal Court case of *MIDDLEBROOK (2006)*, Sir de Vic Carey LB, held that rectification was open to the Court and evidence could be heard before the Court decided to exercise its discretion. Carey LB quoted passages from the Jersey case of *Re VIBERT [1987-88] JLR 96* to the effect that assistance must be derived from the French authorities such as Pothier and Dalloz, the normal authorities being silent as to detail. The *VIBERT* judgment cited states:

“[Dalloz] 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” Si ces termes ne sont pas suffisamment clairs, la jurisprudence admet qu’on peut recourir a des circonstances extrinseques pour interpreter le testament.”

5. Carey LB went on (at para 17), to adopt the “*very clear summary of reasons*” in the Jersey case of *re VAUTIER*, starting at page 360 of the Report, which he cited. The last paragraph he quoted is of particular significance, as it indicates that rectification of wills is a remedy “*which must be used sparingly and with extreme caution. The testator is no longer present to tell the Court what he intended*”. However, if 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*”. There must be full and frank disclosure.

Questions for the Court

6. The Judge was asked, with the agreement of the parties present to decide:
 - (i) Is there power in existence to amend the Will?
 - and
 - (ii) Is there a mistake in the face of the Will?
7. The answer to both questions was in the affirmative. The authorities are clear and reflected in other cases mentioned in the bundle but not cited specifically to the Court. It is also as plain as a pikestaff, that there was a simple drafting error on the face of the Will, Mr Carr, T’s husband having already died. Hence the reference to Article THIRD II was devoid of meaning.
8. The Jurats were then asked to consider (iii) whether there was extrinsic evidence of T’s intention. The material in the bundle relating to this was not disputed. Relevant paperwork is exhibited to Advocate Bainbridge’s affidavit, pages 42 – 60. T’s own letters, wholly consistent with this intention and unambiguous on their face, are at pages 64 – 86, culminating in a handwritten letter dated 17.3.05. The Jurats unanimously concluded that this evidence admitted of no other conclusion than the one put forward in the application.
9. Accordingly the application was granted as requested in the exercise of the Court’s discretion.

Costs

10. These were dealt with by the Judge alone. Having heard submissions it was decided that neither the First nor Second Respondents should be put at any disadvantage for being in a situation that was not of their making and were entitled to indemnity costs as against the Applicants, who have their own remedy in due course, should it be necessary (which one doubts). This also means that the Fund in question will not suffer.

Envoi

11. The Royal Court was grateful to Counsel for their helpful approach and expresses appreciation in particular to Advocate Shepherd for his lucid and thorough oral submission, which assisted in what could otherwise have been a difficult and protracted task. The Court gave its decision on 30th November, 2009 and indicated its reasons would follow, as they do here.