

## Rectification of a deed of variation

Synopsis: In *Ashcroft -v- Barnsdale* (2010) the court agreed to rectify a deed of variation of a will on the grounds that it had mistakenly created adverse inheritance tax consequences.

Date posted: 12.11.10

What are the remedies if a deed is executed with the intention that it should have certain consequences but the actual consequences of the deed as executed are completely different?

This would usually happen if there is a mistake somewhere in the deed or in the way it has been executed. The remedy of rectification may be available to put the record straight.

There are generally two remedies available when things go wrong because of a mistake: one is rectification and the other involves setting the transaction aside.

Previous Prescient papers have covered the possibility of setting a transaction aside because of unintended tax consequences where the transaction is made by the trustees. For trustees who make mistakes, the remedy is founded on the principle in the rule in *Hastings-Bass*. The case of *Futter -v- Futter* (2010), is just one of the numerous recent examples of where trustees' transactions were set aside under this rule. However, this rule only applies to trustees and not to individuals.

Where individuals make mistakes, there are rules that allow to set aside a disposition provided the mistake is of the right kind. The general rule is that, to be set aside, a mistake must be as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it. On this basis, unforeseen tax consequences do not provide a ground for setting aside a disposition.

In the High Court case of *Ashcroft -v- Barnsdale* (2010) the deceased's will gave her farm to her husband and her residue to her children. To reduce inheritance tax, the will was varied by a deed of variation to instead give the farm to the children, utilising agricultural property relief, plus a cash legacy while the husband received the residue. An error in the deed of variation meant that the tax on the cash legacy was payable from the residue and not out of the legacy as intended. This resulted in an IHT liability whereas, if the deed had been drafted correctly, there would have been no IHT at all.

Because the mistake was in the drafting, the widower executed a deed of rectification. HMRC refused to accept it without a Court order hence the High Court proceedings. The Court agreed to rectify the deed on the grounds that it did not embody the true intentions of the family members.

However, the judgement makes clear that 'the Court cannot rectify a document merely because it fails to achieve the fiscal objectives of the parties to it...if the parties' rights will be unaffected and the only effect of the order will be to secure a fiscal benefit for one or more of them'.

The effect of the rectification was that the document continued in effect but as rewritten.

### **Comment**

The remedy of rectification is obviously useful. However, it can only be used in circumstances where there is a genuine mistake. It has been said that rectification is about putting the record straight. In the case of a voluntary settlement, rectification involves bringing the trust document into line with the true intentions of the settlor as held by him or her at the date when he or she executed the document. Any person seeking rectification must be able to show that they understand what the transaction was intended to achieve but that, as a result of a mistake in the form of the document, the desired result is not achieved.

Different rules apply depending on the type of mistake: in some circumstances rectification would be sought and in others setting a transaction aside. Whilst it is good to know that, if genuine mistakes occur, it is possible to rectify them, it should be noted that the Court in this case stressed again that a mistake as to the fiscal consequences of a deed will not suffice to rectify a deed.

Professional advice should always be sought when entering into transactions of this kind.

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