THE CONSTRUCTION OF CONDITIONS ATTACHING TO GIFTS IN WILLS

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INTRODUCTION

When construing a will, the primary duty of the court is to ascertain and give effect to the intention of the testator. This is the one fundamental rule of construction of wills. It was stated by Dixon J. in *Robinson v. Moore*[1] that: "[i]t is impossible to reconcile the cases on the basis of such a rule but it is not impossible to reconcile them on the basis of a rule less generally stated and more in accordance with fundamental principles in the interpretation of Wills of endeavouring to ascertain and give effect to the intention of the Testator".[2]

As the words used by the testator will be deemed to have expressed his intention, the meaning of the words, or the meaning ascribed to them by the testator, will provide the key to the discovery of intention.[3] The court will not however give a literal meaning to the words, especially if such a meaning tends to frustrate the testator's intention.[4] Furthermore, the court when attempting to uphold a will may rely on the general presumption against intestacy but in doing so it cannot redraft the will. In relation to the latter matter, O'Flaherty J. in *Re Curtin* warned

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[1] [1962-63] Ir. Jur. Rep. 29.

[2] [1962-63] Ir. Jur. Rep. 29 at 36; see *Re Curtin* [1991] 2 I.R. 562 at 573; *Corrigan v. Corrigan & Anor* [2007] I.E.H.C. 367; *Re O'Toole* (High Court, unreported, Barrington J., 26 June, 1980); *Williams and O'Donnell v. Shuel and Barham* (High Court, unreported, Morris P., 6 May, 1997); see Keating, *The Construction of Wills* (Dublin: Round Hall Sweet & Maxwell, 2001), ch. 1; Keating, *Keating on Probate* (Dublin: Thomson Round Hall, 2007), ch. 18; Keating, *Equitable Succession Rights* (Dublin: Thomson Round Hall, 2005), ch. 18.

[3] See *Heron v. Ulster Bank Limited* [1974] N.I. 44 at 52; *Howell v. Howell* [1992] 1 I.R. 290.

[4] *Re Patterson, Dunlop v. Greer* [1899] 1 I.R. 324; *Re Curtin* [1991] 2 I.R. 562 at 573.

that: "[a] judge is to tread cautiously so as not to offend against the judicial inheritance which is that one is entitled to construe a will but not to make one".[5]

Extrinsic evidence may also be adduced and admitted by section 90 of the Succession Act, 1965 "… to show the intention of the testator and to assist in the construction of, or to explain any contradiction in, a will". In *Rowe v. Law*[6] Griffin J. stated that "… on the correct construction of s. 90, extrinsic evidence is to be admitted only for the stated purpose of assisting in the construction of, or to explain any contradiction in a will, and not for the purposes of replacing the dispositive intention of the testator as expressed in the will – for that would be outside the range of purpose permitted by the section".[7]

The courts may also resort to the rule of interpretation in section 99 of the Succession Act, 1965 which provides that "[i]f the purport of a devise or legacy admits of more than one interpretation, then, in case of doubt, the interpretation according to which the devise or bequest will be operative will be preferred". The tenor of section 99 would seem to suggest that the court is obliged to apply the "doubt" rule in section 99 in an appropriate case.[8] The same general principles of construction will be applied by the courts when construing a condition attached to a gift in a will.

However, when determining the validity of the condition the testator has attached to a gift, the courts must "see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine".[9] The terms of the condition will also determine whether the condition is a condition precedent or a condition subsequent. Where the condition purports to suspend the vesting of a gift until it has been satisfied, the condition will be classified as a condition

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[5] [1991] 2 I.R. 562 at 573.
[6] [1978] I.R. 55.
[7] [1978] I.R. 55, at 77; *O'Connell v. Bank of Ireland* [1998] 2 I.R. 596.
[8] See Keating, "The Testator's Intention and 'Doubt' Principle" (2006) 24 I.L.T. 54.
[9] *Clavering v. Ellison* (1859) 7 H.L.C. 707 at 725; *Re McKenna* [1947] I.R. 277; *Re McDonnell* [1965] I.R. 354 at 358; see also *Re Coughlan* [1963] I.R. 246.

precedent. Where, on the other hand, it purports to divest a beneficiary of the gift if he fails to satisfy the terms of the condition, the condition will be classified as a condition subsequent. The practical effect of the distinction between a condition precedent and a condition subsequent is that "a gift made subject to a condition precedent fails altogether, as a rule, if the condition is found to be void, but, if a gift is made subject to a condition subsequent which is found to be void or inapplicable, the condition disappears and the gift takes effect independently of the condition".[10] In the case of a condition precedent, futurity is annexed to the substance of the gift and the vesting is suspended until the event occurs.[11] Where, however, there is any doubt as to the nature of the condition, the court will lean "towards a construction which will hold it to be a condition subsequent, for that construction will lead to an early vesting of the gift, and there is a presumption in favour of early vesting".[12] Thus, the court *prima facie* treats the condition as subsequent.[13] But where a condition subsequent (or indeed a condition precedent) is clear and certain in its expression and operation the court will uphold it even where it results in the forfeiture of the gift.[14] It appears then that the terms of the condition will determine the nature of the condition, together with the nature of the condition, will determine the efficacy of the gift.

I. GENERAL PRINCIPLES OF CONSTRUCTION

The general principles applied by the courts when construing a will are similarly applicable when they are asked to construe the terms of a condition attaching to a gift in the will. In *Corrigan v. Corrigan & Anor*[15] McGovern J. summarised these principles as follows:

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[10] *Re Burke* [1951] I.R. 216 at 224 *per* Gavan Duffy J.
[11] *Re Farrelly* [1941] I.R. 261 at 268 *per* Gavan Duffy J.
[12] *Re Porter* [1975] N.I. 157 at 160 *per* Lowry L.C.J.; see also *Re McDonnell* [1965] I.R. 354.
[13] *Re McDonnell* [1965] I.R. 354 at 358; *Mackessy v. Fitzgibbon* [1993] 1 I.R. 520 at 522; *McGowan v. Kelly* [2007] I.E.H.C. 228.
[14] See *Fitzsimons v. Fitzsimons* [1992] I.R. 295.
[15] [2007] I.E.H.C. 367.

In considering the authorities on this subject it seems that the following principles apply:

(i) The court will strive as far as it can to give effect to the intention of the testator insofar as this can be ascertained from the will. In limited circumstances the court is permitted to rectify a will to save it from bad drafting. See *Curtin v. O'Mahony* [1991] 2 I.R. 566.

(ii) The court considers the will by placing itself in the position of the testator sitting in his armchair shortly before his death to see what he was setting out to achieve.

(iii) As a general rule the court will give legal or technical words used in a will their legal or technical meaning.

(iv) The guidelines suggested by Lowry L.C.J. in *Heron v. Ulster Bank Limited* [1974] N.I. 44 at 52 were approved and adopted by Carroll J. in *Howell v. Howell* [1992] 1 I.R. 290. These are as follows:-

1. Read the immediate relevant portion of the will as a piece of English and decide, if possible, what it means.

2. Look at the other material parts of the will and see whether they tend to confirm the apparently plain meaning of the immediately relevant portion or whether they suggest the need for modification in order to make harmonious sense of the whole or, alternatively, whether an ambiguity in the immediately relevant portion can be resolved.

If ambiguity persists, have regard to the scheme of the will and consider what the testator was trying to do.

3. One may at this stage have resort to rules of construction, where applicable, and aids, such as the presumption of early vesting and the presumptions against intestacy and in favour of equality.

4. Then see whether any rule of law prevents a particular interpretation from being adopted.

5. Finally, and, I suggest, not until the disputed passage has been exhaustively studied, one may get

> help from the opinions of other courts and judges on similar words, rarely as binding precedents, since it has been well said that 'no will has a twin brother' (per Werner J. in *Matter of King* 200 N.Y. 189, 192 (1910)), but more often as examples (sometimes of the highest authority) of how judicial minds nurtured in the same discipline have interpreted words in similar contexts.[16]

As mentioned above, the courts, when construing a condition, may also allow the admission of extrinsic evidence in accordance with the provisions of section 90 of the Succession Act, 1965. Section 90 provides that extrinsic evidence may be admissible "to show the intention of the testator *and* to assist in the construction of, or to explain any contradiction in the will". The conjunctive "and" in section 90 has been interpreted to connote "a duality of purpose as a condition for the admission under the section of extrinsic evidence".[17] In *Rowe v. Law*[18] Henchy J. stated that section 90 "allows the extrinsic evidence to be drawn on so as to give the unclear or contradictory words in the will a meaning which accords with the testator's intention as thus ascertained. The section does not empower the Court to rewrite the will in whole or in part".[19]

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[16] [2007] I.E.H.C. 367, at para. 17.
[17] *Rowe v. Law* [1978] I.R. 55, at 73; see also *O'Connell v. Bank of Ireland* [1998] 2 I.R. 596; *Corrigan v. Corrigan & Anor* [2007] I.E.H.C. 367.
[18] *Rowe v. Law* [1978] I.R. 55.
[19] *Rowe v. Law* [1978] I.R. 55, at 73.

II. THE TEST OF VALIDITY

It was stated by Gavan Duffy J. in *Re McKenna*[20] that the test for a valid condition subsequent:-

> [H]as never been more tersely and more simply formulated than it was in the words of that master of Equity, the late Lord Parker, in *In Re Sandbrook, Noel v. Sandbrook* [1912] 2 Ch. 471 at 477: '… conditions subsequent,' he said, 'in order to defeat vested estates, or cause a forfeiture, must be such that from the moment of their creation the Court can say with reasonable certainty in what events the forfeiture will occur'; the fatal event or events must be described in clear language; so much the law exacts, but it lays down no requirements as to facility of proof, if a forfeiture is alleged to have been incurred.[21]

Conditions of this kind will therefore be construed "with strictness and before an interest which has become vested will be defeated it is essential that it be proved that the condition upon which defeasance is to occur has come into operation".[22] As already mentioned, there is also a presumption in favour of early vesting, and where doubt persists as to whether a condition is a condition precedent or subsequent, the court will *prima facie* treat it as a condition subsequent.[23]

The authorities are replete with illustrations of this approach by the courts. In *Re McDonnell*[24] the testator left all his property to his executors and trustees in trust for his wife for life with remainder to his son provided that he behaved in a way satisfactory to the executors. The testator went on to direct that his property be held in trust for another son in the event of the beneficiary failing to behave to the satisfaction of the executors.

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[20] [1947] I.R. 277.

[21] *Re McKenna* [1947] I.R. 277, at 284-285; see also *Clavering v. Ellison* (1859) 7 H.L.C. 707.

[22] *Re McDonnell* [1965] I.R. 354 at 358; see Keating, *The Construction of Wills* (Dublin: Round Hall Sweet & Maxwell, 2001), ch. 6; Keating, *Keating on Probate* (Dublin: Thomson Round Hall, 2007), ch. 18; Keating, *Equitable Succession Rights* (Dublin: Thomson Round Hall, 2005), ch. 2.

[23] *Mackessy v. Fitzgibbon* [1993] 1 I.R. 520 at 522; *McGowan v. Kelly* [2007] I.E.H.C. 228. See also Succession Act, 1965, s.99.

[24] [1965] I.R. 354; see also *In re Hennessy* (1963) 98 I.L.T.R. 39, at 45.

The son died without any decision on his behaviour by the executors. He made a will devising the property left to him by his father to the plaintiff. It was held by Budd J. that the condition relating to the behaviour of the testator's son was a condition subsequent, and on the death of the testator the son had acquired a vested interest in the remainder, and as he had not been divested by the operation of the condition, he became entitled to an absolute interest at the date of his death. In *Mackessy v. Fitzgibbon*[25] the testator devised his farm to his grandnephew "provided he lives and works on the land",[26] but if he did not then to his niece absolutely. Carroll J. stated that where there is a doubt about whether a condition is a condition precedent or a condition subsequent, the court *prima facie* treats it as subsequent. As a result she was satisfied that the condition requiring the grandnephew to live and work on the land was a condition subsequent.

Even where a condition is difficult to satisfy or particularly onerous, it can still stand if the court can ascertain the precise requirements for its satisfaction – where the condition is "precise and unambiguous in its scope" it will not be declared void for uncertainty (although it will have to fulfil all other requirements for validity, such as public policy compatibility). In *Fitzsimons v. Fitzsimons*[27] the testator during made an *inter vivos* transfer of part of his farm to one of his sons. Under his will he devised the remainder of the farm on trust to his wife for life, and after her death on trust to the same son subject to the condition that the son retained all of the acres that the testator had transferred to him during his lifetime. A question arose as to whether the son would forfeit the remainder of the farm if he sold part of the land transferred to him by the testator. Keane J. found that the condition was "precise and unambiguous in its scope"[28] and not void for uncertainty. He stated that:

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[25] [1993] 1 I.R. 520.
[26] *Mackessy v. Fitzgibbon* [1993] 1 I.R. 520 at 522.
[27] [1992] I.R. 295.
[28] *Fitzsimons v. Fitzsimons* [1992] I.R. 295, at 299.

> If one were to construe the clauses as permitting the sale of part only of the lands, the question would immediately arise as to the extent to which any sale would be permissible under the terms of the will. On any view, the sale of a substantial part of the lands would be a breach of the condition. How then is one to determine the extent of a sale necessary to bring the condition into operation? This result would be to create rather than to avoid uncertainty.[29]

III. MIXED AND COMPOSITE CONDITIONS

Where a condition precedent attached to a gift involves not only the performance of some act by a beneficiary but also by a third party, the condition may be regarded as being a mixed one. Where, however, the condition is impossible to perform because of the third party's refusal to co-operate, the gift may be allowed to stand shorn of the condition. The matter of a mixed condition precedent was first addressed by Swinburne, and he thought the following two rules were applicable to such conditions, (1), that an impossible condition "hindereth not the legatary", and (2), that a possible condition must first be satisfied before the "legatary" can recover his legacy.[30] In *Re Farrelly*[31] the testator who was an agent for an insurance company bequeathed his interest in a collecting book to two of his nephews. Under the Rules of the Insurance Society, an agent had an express contractual right to nominate a successor to his interest in the collecting book and, on the nominee's approval, the retiring agent was entitled to receive an agreed premium. But the property in the book remained vested in the Society's trustees notwithstanding an agent's contractual right to nominate. At the date of the testator's death, the two nephews were minors, and the society declined to appoint either of them as agent, and refused to allow the agency to be held in trust for them until they attained majority, and required the testator's interest in the book to be sold immediately. Gavan Duffy J., acting on the principle as stated by Swinburne that when

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[29] [1992] I.R. 295, at 299.
[30] Swinburne, *Swinburne on Wills* (Dublin, 1793) Part IV, Section VI, pp. 256-257.
[31] [1941] I.R. 261.

a mixed condition is not performed by a third party whose co-operation is essential "then it is reputed in law, as if it were fulfilled indeed".[32] He considered that the interest of the two nephews in the legacy had become an absolute one, as the condition precedent was incapable of being fulfilled due to the qualification having "lost the whole of its *raison d'être*".[33]

Where a testator attaches a condition subsequent which is comprised of two eventualities, and one of the eventualities is void, the court may use the doctrine of severance to excise the void eventuality and enforce the valid one. A condition of this nature has been described as a composite condition.[34] But where both eventualities are void and the doctrine of severance has no part to play the gift may be held to be a valid one. This effect of a composite condition was considered in *Re Coughlan*[35] where the testator left his farm, dwelling and stock in trust for his nephew provided that the nephew should marry (if not married at the testator's death) and reside on the farm within one year from the date of his death, and in the event of the nephew not marrying, the farm, dwelling and stock were to be held in trust for sale and the proceeds of sale were then to be given for the celebration of masses. Kingsmill Moore J. in his judgment stated that: "[b]oth conditions – or the composite condition – are conditions subsequent, and conditions subsequent which would operate to defeat a vested estate are to be construed strictly".[36] As a result the two eventualities in the composite condition were incapable of severance and therefore void, leaving a valid and effective gift remaining.

IV. CONDITIONS CONTRARY TO PUBLIC POLICY

As already stated, a gift made subject to such a condition precedent will fail to take effect if the condition is found to be void or inapplicable, and this includes a condition that is contrary

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[32] *Re Farrelly* [1941] I.R. 261 at 272 *per* Gavan Duffy J.
[33] *Re Farrelly* [1941] I.R. 261 at 272 *per* Gavan Duffy J.
[34] *Re Coughlan* [1963] I.R. 246.
[35] [1963] I.R. 246.
[36] [1963] I.R. 246 at 251-252; see *Clavering v. Ellison* (1859) 7 H.L.C. 707.

to public policy. Where, for instance, a condition is found to be contrary to public policy, not only will the condition be void, but the gift to which it is attached may also fail. This was the conclusion of the court in *Re Blake*.[37] In that case the testator left a legacy in trust to apply the income arising from it for or towards the maintenance and education of his daughter's children, provided they were brought up in the Roman Catholic faith. In the event of this proviso not being satisfied the legacy was to fall into residue. A question arose as to the validity of the provision requiring his daughter's children to be brought up as Roman Catholics.

Dixon J. in the course of his judgment found that:

> [T]he element of an unlawful attempt to dictate the religious education of the children and to trammel the exclusive responsibility of the parents again obtrudes, and again it is an attempt the court will not aid. It was clearly not the intention of the testator that the income should be applied for the benefit of the children unless they were being brought up as he desired, and therefore they cannot have the income during the whole of their minority on the basis of disregarding his definition of the period of enjoyment except so far as it contemplated minority. This would not only disregard that definition and turn a limited gift into an unqualified one but would defeat his clear wishes.[38]

He was therefore of the opinion that the gift of the income failed by reason of it being contrary to public policy. He then turned to the question of whether the gift of the capital also failed, the condition upon which it depended being void. He found that the provisions in the will constituted an attempt to interfere with or fetter the right and duty guaranteed to parents by the Constitution to provide for the education, including the religious education, of their children. As such, the provisions were opposed to the policy of the law and could not be enforced or given effect. They were void and unenforceable conditions and the gifts of both capital and income, being dependent on the provisions being carried out,

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[37] [1955] I.R. 89; see also *Re Burke* [1951] I.R. 216.
[38] *Re Blake* [1955] I.R. 89 at 98-99.

were also void and unenforceable. The gifts to the children therefore failed and the legacy fell into the residue of the estate.[39]

V. A CONSTRUCTIVE EXERCISE

In *McGowan v. Kelly*[40] Laffoy J. had to construe the following provision in the testator's will:

> I give devise and bequeath my house and farm at Carraghs, Ballinlough, County Roscommon to my sister Hilda McGowan of Carraghs, Ballinlough, County Roscommon in trust and on condition that she (Hilda McGowan) transfers, conveys the said house and farm at Carraghs to my nephew Brian Kelly, Birmingham, England, son of my late brother William Kelly, provided he returns to live there, but if he does not wish to take it on that condition then otherwise I give devise and bequeath my house and farm above to my sister Hilda absolutely.[41]

The plaintiff was the executor of the will to whom probate of the will was granted. Brian Kelly named in the provision was the defendant. The testator also devised the residue of his estate to the plaintiff in trust for his three nephews to be divided equally in three shares. The plaintiff contended that the condition in the provision requiring the defendant to return to live on the farm at Carraghs was a condition precedent; was void for uncertainty; and that consequently the gift over in favour of the plaintiff took effect. The defendant argued that the condition was a condition subsequent, and because it was void for uncertainty, the gift to the defendant took effect independently of the condition.

In the course of her judgment, Laffoy J. thought that the fact that the testator devised the house and farm to the plaintiff in trust for and to transfer it to the plaintiff was immaterial to the determination of the issue of whether the condition that the defendant return to live there was a condition precedent or a condition subsequent. It was a limitation of the beneficial interest,

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[39] See *Re Johnson* [1986] N.I.Y.B. 16; *Re Doherty* [1950] N.I. 83.
[40] [2007] I.E.H.C. 228.
[41] [2007] I.E.H.C. 228, at para. 1.

including the gift over, not the limitation of the legal estate, which required construction. She found that there was "a welter of authority" for the proposition that such a condition was a condition subsequent.[42] Referring in particular to *Mackessy v. Fitzgibbon*[43] she found that there was no difference in substance between the condition under consideration in that case and the condition imposed by the testator in his will. Carroll J. in that case stated that there is a presumption in favour of early vesting, so that, if there is a doubt about whether a condition is precedent or subsequent, the court *prima facie* treats it as subsequent. Adopting the view of Carroll J., she went on to find that the condition imposed by the testator was a condition subsequent.[44] Regarding the question of uncertainty, she thought that the authorities cited in support of the finding that the condition in the will of the testator was a condition subsequent also supported the proposition that the condition was void for uncertainty. She referred in particular to the speech of Lord Cranworth in *Clavering v. Ellison*[45] where he said:

> I consider that, from the earliest times, one of the cardinal rules on the subject has been this: that 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 the preceding vested estate was to determine.[46]

She also referred to *Moffat v. M'Cleary*[47], *Sifton v. Sifton*[48], *Re Coughlan*[49], *In re Hennessy*[50] and *Mackessy v. Fitzgibbon*[51], and

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[42] [2007] I.E.H.C. 228, at para. 7. See *Moffat v. M'Cleary* [1923] 1 I.R. 16; *Sifton v. Sifton* [1938] A.C. 656; *Re Coughlan*, [1963] I.R. 246; *In re Hennessy* (1963) 98 I.L.T.R. 39; *Mackessy v. Fitzgibbon* [1993] 1 I.R. 520.
[43] [1993] 1 I.R. 520.
[44] See *In re Hennessy* (1963) 98 I.L.T.R. 39 at 45 *per* Budd J.
[45] (1859) 7 H.L.C. 707.
[46] *Clavering v. Ellison* (1859) 7 H.L.C. 707 at 725.
[47] [1923] 1 I.R. 16.
[48] [1938] A.C. 656.
[49] [1963] I.R. 246.
[50] (1963) 98 I.L.T.R. 39.
[51] [1993] 1 I.R. 520.

concluded that: "[b]y parity of reasoning, it seems to me that the condition imposed by the Testator on the defendant is too vague, imprecise and uncertain. So the condition is void for uncertainty".[52] She also found that the condition imposed by the testator on the defendant was a condition subsequent in addition to being void for uncertainty. The practical effect of that was that the defendant took the farm at Carraghs free of the condition.

CONCLUSION

The primary duty of the court when construing a will is to ascertain and give effect to the testator's intention. The primary source of reference for this purpose will of course be the will itself, and where there is a will, there will be also a presumption against intestacy. The language used by the testator will provide the evidence of intention, and where the language used by him is unclear the court may apply the principles of construction to ascertain his intention. Where, however, the will contains contradictions the court may admit extrinsic evidence of intention but only in the circumstances envisaged by section 90 of the Succession Act, 1965. As a result of the Supreme Court decisions in *Rowe v. Law* and *O'Connell v. Bank of Ireland* extrinsic evidence may only be adduced and admitted where it serves the dual purpose of not only showing the testator's intention but also assisting in the construction of, or to explain a contradiction in the will.

The foregoing principles of construction may also be applied to conditions attaching to gifts in wills. However, additionally, in the case of such gifts their efficacy may depend on whether the condition is construed as a condition precedent or a condition subsequent, which in turn is determined by the terms of the condition itself. Where the condition is classified as a condition precedent, and the terms of the condition are found to be void, the gift will also fail. Where the condition is classified as a condition subsequent, and the terms of the condition are void, the gift may yet be deemed valid, as the efficacy of a gift is not dependent on the success or failure of such a condition. However,

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[52] [2007] I.E.H.C. 228, at para. 14.

where there is some doubt about the classification of a condition as precedent or subsequent, the courts will lean "towards a construction which will hold it to be a condition subsequent, for that construction will lead to an early vesting of the gift, and there is a presumption in favour of early vesting".[53] The courts will *prima facie* treat the condition as subsequent. While the courts may construe a condition precedent or a condition subsequent with "strictness", it may still be upheld if it is "certain in its expression and in its operation". However, where the condition is found to be void for uncertainty, and the condition is a condition precedent, the gift to which it is attached will fail. Where the invalid condition is a condition subsequent, the gift to which it is attached will take effect independently of the condition.

[53] *Re Porter* [1975] N.I. 157 at 160; see also *Re McDonnell* [1965] I.R. 354 at 357.