WILL DRAFTING: TIPS AND TRAPS

by
Professor Lesley King

lesley.king888@gmail.com

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CONTENTS

Objectives

After completing this training you will be:

- aware of problems and pitfalls when will drafting, and
- able to adapt your procedures and practice in the light of them.

I. A VERY BADLY DRAWN WILL

Tedford v Clarke and Others **[2025] EWHC 816 (Ch)**

A VERY badly drafted Will gave rise to an enormous number of queries as to its construction. The case is also important for those dealing with executors facing a conflict of interest as it approves the approach taken. Where the interpretation of a Will is disputed and agreement cannot be reached, the correct procedure is for the executor to make an application to court. Where the executor is also a beneficiary, evidence presented *as executor* should be non-partisan.

The facts

A testatrix, Vera, died a widow. She was survived by two of her six siblings. Four predeceased her, leaving children. One of the children of the predeceased siblings predeceased Vera, leaving two children of her own. Vera's husband had nine siblings, five of whom predeceased Vera. There was no evidence before the court as to whether or not any of his deceased siblings had issue.

The Will appointed as executors, her surviving brother, William, and the son of a predeceased sister, Henry,

Henry took the grant with power reserved for William to prove at a later date.

The appointment of Henry as an executor subsequently presented a problem as one of the matters in issue was whether or not children of a predeceased sibling were entitled to take the share their parent would have taken.

Henry brought an application to determine the various issues arising from the Will. William and Vera's surviving sister, Leila , applied to have Henry removed.

After revocation and the appointment of the two executors, the Will continued:

> *"**3.** **I GIVE** the following specific legacies:*
>
> *(i) to all surviving brothers and sisters of my late husband Albert Edward Clarke 50% of my estate in equal shares*
>
> *(ii) to all surviving brothers and sisters of myself 50% of my estate in equal shares*
>
> *(iii) to all my surviving brothers and sisters the proceeds of my saving account held by the Abbey National Bank and in equal shares PROVIDED THAT if any of the forementioned relatives shall predecease me then their share of my estate shall go between their children and in equal shares*
>
> ***4.** **I GIVE DEVISE AND BEQUEATH** all my real and personal estate of whatsoever nature and wheresoever situate not otherwise disposed of by this Will or any Codicil to it (including any property over which I may*

have a general power of appointment or disposition by will) to my Trustees upon trust to sell call in and convert the same into money with full power in their absolute and uncontrolled discretion to postpone such sale calling in and conversion for so long a period as they shall think fit without being responsible for loss

5. ***MY TRUSTEES*** *shall hold the net proceeds of such sale calling in and conversion together with my ready money and any property for the time being remaining unconverted upon the following trusts:*

(a) Upon trust to pay thereout all my just debts legacies funeral and testamentary expenses and to any trusts declared earlier and subject thereto [unfinished]"

Vera's estate consisted of:

(1) the property at 50 Mount Crescent, North Park, Liverpool, L32 2BB ("the property"), the net proceeds of sale of which were £147,592.00

(2) the following Santander Accounts:-

(3) 09012835975233 opened 22nd October 2012 'Bank Account':- £14,925.48

(4) 090126 55641556 opened 19.4.2000 'Cash ISA':- £30,150.25

(5) 001520536960529029 ISA:- £115,068.98

(6) X08368243 opened 13.4.1993 'Instant Saver':- £81,875.33

(7) R25158622 opened 22.10.2012 'Flexible Saver' – £79,572.11.

Abbey National branches were renamed Santander in January 2010.

On 22nd October 2014 (the date of the will) the investment accounts of Vera consisted of an ISA SM1080477-002 £13,039.93 and an Investment Account SM1080477-003 £98,982.23.

The decision

1. How should clauses 3, 4 and 5 be read together?

Mr Justice Cadwallader was understandably critical of the drafting of the Will (see below). Clause 3 was headed '*specific gifts'* but sub-clauses (i) and (ii) purported to dispose of 100% of '*the estate'*. Sub-clause (iii) was a genuine specific gift. He concluded that the provisions in Clause 3 dividing *'my estate'* in half echoed the reference to the estate of Vera in Clause 4. He considered that '*estate*' had the same meaning in both Clauses, save that common sense required it to mean the net estate, after payments of debts legacies funeral and testamentary expenses, as held by the Trustees under Clause 5.

Accordingly, the gifts of 50% of the estate of the testatrix in Clause 3(i) and (ii) of the will were gifts of shares in residue. The beginning of Clause 3 described them as specific legacies, but that was a simple misdescription, which did not affect the nature or extent of the gift, and reflected the ignorance of the

draughtsman rather than the intention of the testatrix.

Clause 3(iii) was a genuine specific legacy. The gifts of shares in *'my estate'* in Clauses 3 (i) and (ii) should be read subject to Clause 3(iii), notwithstanding that it followed those provisions within Clause 3, and they were not expressly made subject to it. Cadwallader J considered that clause 3(iii) could be read as an exception from the estate, because

(i) its specificity overrode the generality of the reference to 'my estate',

(ii) effect could not be given to it otherwise, and

(iii) it could be understood as a legacy of the kind to which Clause 5 (a) referred, to be paid before the disposition of residue.

Thus *'my estate'* in Clauses 3 (i) and (ii) meant the net residuary estate of the testatrix after payment of debts funeral and testamentary expenses and of the gift in Clause 3(iii).

2. What passed under clause 3(iii)?

The Abbey National Bank had been rebranded as Santander UK in 2010, before the will was even written. The reference in Clause 3(iii) of the will to Abbey National Bank was a simple misdescription, and Vera must have meant Santander.

The reference in Clause 3(iii) of the will to *'my saving account'* was, on its face, to a single account. It would have been a more natural use of language to refer to 'my savings [plural] account'. Both at the date of death and the date of the will, Vera had more than one account capable of meeting the description of a savings account. There was no reason to distinguish between them on the face of the will, and so an ambiguity potentially arose. Subject to the effect of any extrinsic evidence, Cadwallader J considered that Vera must have meant to refer to all her savings accounts.

Two of the accounts were specifically described as savings accounts, namely X08368243 ('Instant Saver') and R25158622 ('Flexible Saver'), and (subject to the resolution of the ambiguity mentioned in the preceding paragraph) they certainly fell within the terms of the gift as did the ISAs. The remaining account, 090128 35975233, was simply described as *'a bank account' and* could not be regarded as a '*savings*' account. The proceeds of that account therefore fell into residue.

3. Could children of a predeceased sibling benefit under clause 3?

The gifts in Clause 3 of the Will were all *'to all surviving brothers and sisters'* of either Vera or her late husband. That would ordinarily be understood to mean brothers and sisters surviving at the date of death of the deceased.

But the proviso must have been intended to do something and Cadwallader J

considered that it was "*plainly intended to substitute a gift to children if a relative who would otherwise take is not surviving*".

The second question arising from that proviso was whether it qualified, not only Clause 3(iii), but also (i) and (ii) as well.

Cadwallader J considered that the proviso was intended to qualify each part of Clause 3. The formatting on the page might suggest that it qualified only Clause 3(iii); but formatting is not necessarily a good indicator of intention, as noted in *Sammut v Manzi*. The reference to *'forementioned relatives'* was capable of extending to siblings not only of Vera but also of her late husband. There was no evident reason to distinguish between the gifts of Santander balances on the one hand and the gifts of shares of residue on the other in relation to this point: a gift over was just as sensible for each.

The reference to '*children*' of a predeceased sibling meant that children of a predeceased child of a predeceased sibling could not take. The share was divided amongst the other class members.

Comment

The Will was exceptionally badly drafted. Cadwallader J said at [13]:

> "*For a will to give rise to quite so many genuine questions of interpretation is unusual. This will is drafted badly. This dispute has no doubt caused at least some of the parties untold anguish, substantial expense and delay, and destroyed family relationships. The evidence suggests that the will was prepared by an apparently unqualified person holding himself out as a will writer, perhaps for money. This case demonstrates the perils of trying to save expense by using the services of unqualified persons to write wills."*

- In the light of that comment, it is somewhat sad that research conducted by IRN Legal Reports found that of the consumers surveyed just under half, 49%, used solicitors for wills, down from 50% last year and 56% in 2020. The proportion using will writers also fell this year to 19% from 21% in 2024. The median fixed fee for a will was £130, up from £125. The percentage writing their own DIY will increased to 13% – it was only 8% in 2023 – and there was also an increase in unbundling, where consumers wrote some of the will themselves but handed "*the more complicated parts*" to lawyers. (A RECIPE FOR DISASTER I'D SAY!)
- The case is a reminder that Wills are not easy to draft and require specialist knowledge and experience.

II. WILLS BILL

1. HISTORY

The Law Commission's Wills project began in 2016. A Consultation Paper, Making a Will, was published in July 2017.The project was paused in 2019, following a request from the Government to prioritise work on the law governing weddings.

Work re-commenced in July 2022 and in October 2023, a Supplementary Consultation Paper was published dealing with two discrete issues: electronic wills and the rule that a marriage or civil partnership revokes an existing Will.

On 16 May 2025, the final Report was published, Modernising Wills Law. The Report contains two volumes: Volume I contains recommendations for reform, and Volume II contains a draft Bill for a new Wills Act giving effect to the recommendations.

The Law Commission says that its recommendations are aimed primarily at supporting testamentary freedom, protecting testators (including from undue influence and fraud), and increasing clarity and certainty in the law where possible.

The Government responded to the Report saying:

> *"The reforms proposed by the Law Commission are significant and wide ranging. They deserve detailed consideration. The Government recognises that the current law is outdated, and we must embrace change, but the guiding principle in doing so will be to ensure that reform does not compromise existing freedoms or protecting the elderly and vulnerable in society from undue influence.*
>
> *The Government will make further announcements in due course, once it has given the report the detailed consideration it deserves."*

It is worth noting that the Report is concerned with the law governing Wills rather than the law governing intestacy.

2. ELECTRONIC WILLS

This will probably be the most generally eye-catching of the recommendations and is discussed in more detail below. The Commission's view is that whether a Will is in paper or electronic form is a matter of form, and so exclusively a matter of the formality requirements. Accordingly, so long as the formal requirements are met, paper and electronic Wills will be equally valid, and will be able to alter, revoke and revive each other. Electronic Wills should be required to comply with the same formality requirements that apply to paper Wills, except that the requirement of *"presence*" should be capable of being satisfied by remote presence.

However, electronic Wills will have to

(1) comply with additional requirements in order to be valid, specifically that a reliable system must be used in order to link the testator (or the person

signing on the testator's behalf) and the witnesses with their signatures at the time of signing;

(2) identify the original or authentic Will so that it can be distinguished from any copies; and

(3) protect the original or authentic Will from alteration or destruction other than by the testator or a person authorised or directed by the testator to alter or destroy the will.

3. PREDATORY MARRIAGE

Recognising concerns about predatory marriages and the fact that many people are unaware of the legal position, the rule that marriage or civil partnership revokes a Will should be abolished. This is achieved by simply not having a provision in the Wills Bill stating that marriage revokes a will.

There is a possibility that not revoking a will causes different problems.

III. DRAFTING NIL RATE BAND (NRB) LEGACIES

1. ALWAYS EXPLAIN THE RISKS OF A NRB LEGACY

The purpose of a NRB gift is normally to ensure that the whole estate is free of IHT (leaving the residuary estate to an exempt beneficiary.

Because it is necessarily uncertain what the value of the available NRB will be at the testator's death, NRB gifts invariably use a definition that provides a formula to quantify the amount to pass.

Explain to clients that the amount of a formula NRB legacy is uncertain.

The amount can be increased by transferred NRB, by RNRB, transferred RNRB, downsizing allowance and apportioned BPR/APR.

Any of the following will reduce its value:

- gifts in the will to non-exempt beneficiaries
- lifetime gifts which become chargeable,
- property passing by survivorship to non-exempt beneficiaries,
- qualifying interests in possession where the remainder passes to non-exempt beneficiaries.

It may well be that there is nothing left to pass under the NRB gift , as was the case in ***Royal Commonwealth Society for the Blind v Beasant*** [2021] EWHC 351 (Ch).

Royal Commonwealth Society For The Blind v Beasant **[2021] EWHC 2315 (Ch)**

Clause 4 of the deceased's will gave her friend and executor a legacy of the '*NIL Rate Sum'*. Nil Rate Sum was then defined as:

> "*the largest sum of cash which could be given on the trusts of this clause without any inheritance tax becoming due in respect of the transfer of the value of my estate which I am deemed to make immediately before my death*"

Clauses 5 and 6 then made gifts of a property and a shareholding. These gifts were expressed to be 'free of tax' and at the date of death were valued at £240,000 and £218,000. Clause 8 gave pecuniary legacies totalling £45,000 and expressed to be free of tax to 6 individuals. The residue was left to charity. The deceased's available nil rate band was only £325,000 with the result that on a strict reading of clause 4, the executor took nothing.

Counsel for the aggrieved executor argued that clause 4 should be read as a gift equal to the nil rate band in force at the date of death but Master Shuman refused:

> "*I go back to the language of the will. If the deceased intended to gift the nil rate band to the first defendant the will could simply have said that. Mr Vucicevic could easily have drawn up the will which gifted an amount to the*

first defendant equal to the nil rate band and expressed that to be free of IHT, as the gifts to the first defendant under clauses 5, 6 and 7 provided. There would have been no need to include the definition in sub-clause 4.1, and yet the will did include it."

Comment:
No correspondence was produced so we do not know whether the deceased understood the way the will worked nor whether the will drafter spelled out the possibility that the executor would get nothing in the interview. It is unlikely that the case would have been brought had such a written explanation existed.

2. THE DEFINITION

The definition should make clear which of the following elements are included, if available on the testator's death:

- The basic NRB.
- The transferred NRB.
- Any RNRB downsizing allowance
- The RNRB if a gift of a residential property interest to lineal descendants is included in the will (unusual). This creates a problem because the RNRB is simply an additional NRB available to the estate. For example, a wife leaves her son a residence worth £200,000 and her daughter a legacy equal to the most she can leave without IHT becoming payable, residue to her husband. On the wife's death she has a full NRB and RNRB available (£500,000) so the NRB legacy is £300,000. Will the husband have enough for his needs?
- Agricultural or business assets. Watch out for IHTA 1984, s39A which may inflate the amount passing under the gift.

Example s39A

If property eligible for relief passes as part of the residue of the estate (as opposed to under a specific gift), the benefit of the relief has to be apportioned across all the gifts. So if an estate consists of £500K of relievable property and £500K of non-relievable property and the will leaves a pecuniary legacy of £500,000 to spouse, residue to a niece, £250K of the relief is allocated to the exempt legacy and wasted.

If the legacy was a NRB legacy, worded as '*the maximum that can pass without IHT*' to a niece, residue to spouse, the amount passing to the niece would be £650K which may be unpopular with the spouse.

It is preferable to make a specific gift of such assets. In the case of a specific gift the relief attaches entirely to the gift.

3. CAPPING THE GIFT

Consider with the testator the likely size of the NRB gift and whether to include a cap on the maximum value of the gift. A cap may be desirable because:

- The NRB gift could be unexpectedly large, for example, because the testator acquires assets qualifying for APR or BPR after making the will so there is no specific gift, or because the upper limit of the basic NRB is raised substantially (exceptionally unlikely!)).
- Any increase in the NRB gift results in a corresponding decrease in the amount passing to the beneficiaries of the testator's residuary estate. This may not be a concern if the residuary estate passes to the spouse or civil partner, and the NRB gift is held in a discretionary trust of which they are a beneficiary. However, the testator may want to be confident that the survivor will receive substantial assets outright, rather than as a member of a class of discretionary beneficiaries

4. WHETHER PRS MUST MAKE CLAIMS

The following potential elements of a NRB gift must be claimed, rather than applying automatically if available:

- Transferred NRB and RNRB.
- Downsizing addition.

The decision about claiming can have a significant effect on the amounts passing to the respective beneficiaries. This could cause problems for PRs, particularly if a PR is also a beneficiary whose own entitlement would be affected. The Court of Appeal in ***Loring v The Woodland Trust*** [2014] EWCA Civ 1314 considered that, unless the will provides otherwise, PRs can use their discretion as to whether to claim.

Therefore, it is advisable for the will to make clear whether the testator wants to require the PRs to make claims or to give them discretion. The testator may prefer to impose an obligation on the PRs to claim these elements to ensure that the beneficiaries of the NRB gift receive all the elements that the testator intends to be included. See **APPENDIX 1**, Clause 7(2).

It would be unusual to give the PRs discretion but, if the testator wants to do this, leave a letter of wishes explaining why and in what circumstances they would not want the PRs to make a claim, for example, where the administrative time and cost outweighs the benefit.

5. PRIORITY OF GIFTS

After quantifying the NRB gift, if the estate is solvent but not large enough to meet all the non-residuary gifts, it may be necessary to apply the abatement rules. Where necessary, gifts of money abate proportionately. Most testators would probably want a NRB gift to take effect only if other non-residuary gifts were satisfied in full. If this is what the testator wants, the will should make it clear. See **APPENDIX 1**, Clause 7(7).

IV. ADEMPTION AND OTHER ISSUES

1. ADEMPTION

Ademption arises where an asset which is left to a specific beneficiary no longer forms part of the estate at death. This could be the result of a sale, lifetime gift, destruction or a change of substance (eg, as a result of a company takeover or merger). Unless the will provides otherwise, the legatee gets nothing to compensate for the lost asset. Houses and cars are particularly prone to ademption and it is possible to guard against the possibility to some extent by drafting widely. For example, by defining a residence as:

> *"any property which I have occupied as a residence at any time and own or in which I have a beneficial interest at the date of my death, and in the event that I have more than one such property at the date of my death, my Trustees shall select such property as they see fit at their absolute discretion"*

Even then, the gift will fail if no such property is owned at death. It is possible to provide for a substitutional gift but deciding how much is difficult.

Often a residence is sold when a person goes into care. An attorney or deputy may be unaware of the terms of the will and by selling bring about ademption. There used to be uncertainty as to whether the duty of confidentiality prevented solicitors disclosing the terms of the will to deputies and attorneys. However, on 13 March 2017 the SRA in conjunction with STEP, the Court of Protection, the OPG, the Legal Ombudsman issued guidance "*Access to and disclosure of an incapacitated person's will*" which states that a will forms part of the donor's financial affairs, so their attorney is entitled to a copy of this unless the donor has provided instructions to the contrary.

Note: Mental Capacity Act 2005, sch 2, para 8

> This deals with sales by a deputy or under an order of the Court of Protection. It provides that a person would have taken an interest in the property but for the disposal, takes the same interest, so far as circumstances allow, in any

2. PROTECTING MEANS TESTED BENEFITS

Where a beneficiary is in receipt of means tested benefits, an absolute gift or IPDI of any size is likely to cause loss of benefits. A discretionary trust will not.

If the wrong sort of gift is made, it is probably not possible to put the matter right by means of a post-death variation. See the discussion in ***FSS v LMS (by her litigation friend, the OSS)*** [2020] EWCOP 52. Claimants are treated as notionally entitled to income and capital of which they have deprived themselves for the for the purpose of obtaining the benefit.

The principles determining whether a disposal of capital is a deliberate act for the purposes of means-tested benefits were considered by Mr Howell QC then a Social Security Commissioner in ***R(H)1/06*** at paragraphs 20 to 23:

"the correct test to be applied in determining whether the claimant is shown to have deprived himself of capital for the purpose of securing entitlement to housing benefit is the well-established one applied on similar wording in the main social security legislation, namely whether the securing of such entitlement is shown to have been a 'significant operative purpose' of the claimant's relevant actions in disposing of his capital."

However, a discretionary trust will give rise to an entry charge (if created by lifetime transfer, anniversary charges and exit charges which may be unattractive if the amount involved is significant.

If the beneficiary is 'disabled' within the meaning of FA 2005, sched 1A a trust complying with IHTA 1984, s89 will protect benefits without attracting charges.

Benefits of a s89 trust

- Because the settlement is discretionary and the beneficiary has no right to receive income or capital, means tested benefits are not prejudiced.
- The beneficiary is treated for IHT purposes as having a qualifying interest in possession, there are no IHT charges during the lifetime of the beneficiary (although it is part of their IHT estate on death).

What is a 'disabled' person for purposes of s89?

The schedule provides that '*disabled person*' means:

(a) a person who by reason of mental disorder[1] within the meaning of the Mental Health Act 1983 is incapable of administering his or her property or managing his or her affairs,

(b) a person in receipt of attendance allowance,

(c) a person in receipt of a disability living allowance by virtue of entitlement to:
  (i) the care component at the highest or middle rate, or
  (ii) the mobility component at the higher rate,

(d) a person in receipt of personal independence payment,

(e) a person in receipt of an increased disablement pension,

(f) a person in receipt of constant attendance allowance, or

(g) a person in receipt of armed forces independence payment.

A trust which fulfils the requirements of IHTA 1984, s89 is treated for IHT purposes as a deemed qualifying interest in possession.

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[1] Section 1(2) provides that "*mental disorder*" means any disorder or disability of the mind but s1(3) provides that dependence on alcohol or drugs is not considered to be a disorder or disability of the mind for the purposes of s1(2).

The terms of a s89 trust

The terms of the settlement must secure that:

- there is no interest in possession, and
- if any of the settled property is applied during the disabled person's life, it is applied for the benefit of the disabled person.

The trustees can be given power to give amounts to others within the annual limit (currently the lesser of £3,000 or 3% of the trust capital per tax year) without affecting the status of the trust.

The trustees of a discretionary trust can use their powers to modify the terms of the trust within two years of the death so that it meets the requirements of s89. The modification will be read back to the date of death under IHTA 1984, s144.

3. PERILS OF SECTION 33 OF WILLS ACT

The section provides that unless the will provides otherwise where a testator makes a gift to a lineal descendant who predeceases leaving issue of their own who survive the testator, the issue take the share their parent would have taken (subject to the same terms and contingencies). It is easy to overlook.

3.1 Example of overlooking

Naylor v Barlow **[2019] EWHC 1565 (Ch)**

The testator farmed in partnership with his wife and two of their sons, John and Philip. As sole freehold owner, he granted an agricultural holding tenancy to the partnership at an annual rent. He and his wife had two other children who were not actively involved in the farm. He left his interest in the family farm to his wife, and John and Philip, as tenants in common as to one third each, but subject to the proviso that the gift to the sons was conditional on:

> *"… each of them paying within a period of nine months from the date of my death to each of my daughter Beryl Eunice Clowes and my son Basil Hine the sum of £15,000 so that each son shall pay a total of £30,000 and in the event of either of my said sons failing to satisfy the condition imposed upon such gift to that son then I devise the interest in Brown Edge Farm aforesaid which such son would have taken had he satisfied the condition subject to any agricultural tenancy to which the said farm may be subject at my death equally between my said daughter Beryl Eunice Clowes and my said son Basil Hine as tenants in common"*

John did not satisfy the condition so his interest passed to Beryl and to Basil. Philip had predeceased his father and so was unable to satisfy the condition. The will had no express substitution clause for issue of a predeceased child but Wills Act 1837, s33 was not excluded. Hence, Philip's two children were

entitled to the property left to their father. However, no one realised this until long after the nine month period had expired. Philip's widow had asked her solicitor's to check with the firm acting for the grandfather whether her daughters had been left everything. They replied that they had not and sent a copy of the will to the widow's solicitors.

Were Philip's children subject to the condition? They would not be if compliance with the condition was impossible.

Judge Hodge QC held that they were. There is a distinction in law between the situation where a beneficiary fails to fulfil a condition (otherwise capable of fulfilment) simply because he does not know about it in sufficient time to do so and the different situation where it is physically impossible for him to fulfil the condition, as where the College of Heralds will not award him the stipulated arms or an animal charity cannot look after the testator's dog because he was no longer in possession of any dog at the time of his death.

The distinction is justified because in the latter situation, neither the testator nor the beneficiary has any control over whether or not the condition can be fulfilled whilst in the former situation it was within the testator's power to make fulfilment of the condition contingent upon it having been notified to the beneficiary in sufficient time to enable him to fulfil the condition (as by requiring it to be performed only within a specified period of time after it has been notified to the beneficiary). His final comment is salutary:

> *"If any lessons are to be learned from the present case, it is that the draftsman of a will incorporating a condition along the lines of clause 3 should consider expressly making the time for compliance run only from the time of notification of the condition to the relevant beneficiary."*

3.2 What is contrary intention?

***Hives v Machin* [2017]EWHC 1414 (Ch)**

Marjorie, left the residue of her estate:

> *"UPON TRUST for such of my son PETER DAVID MACHIN my said son ERIC WILHELM MACHIN and my said son CHRISTOPHER BASTUBBE who shall be living at the date of my death and if more than one in equal shares absolutely".*

Eric and Christopher both predeceased the testatrix. Christopher died without issue. Eric had a daughter, Joanne.

Timothey Fancourt QC sitting as a deputy judge held that the section applies unless expressly excluded. The wording was not an exclusion. It said that the residue should be divided between all the children who were alive at Marjorie's death. It did not say expressly what was to happen to the share of a deceased child who died with issue. The decision makes clear that the default

setting is that the section applies, unless there is good evidence of an intention that it should not.

The letter sent to Marjorie with the will was no help. It simply repeated what the clause said, it did not explain how it would apply in various scenarios.

> *"What Marjorie actually thought about the effect of clause 5, if anything, is unknown. Had she focussed on it closely she would probably have understood that if one or other of [the sons] predeceased her the other[s]* would take".

3.3 A Will I was sent

"*I GIVE my Residuary Estate to and equally between my son Fred and my daughter Annie and my daughter Bessie or the whole to the survivor of them*"

Fred predeceased leaving a son. The firm's view was: "*because of the wording of the residuary clause, the residue passes to the two daughters in equal shares*".

Do you agree that is the correct interpretation of the Will?

3.4 Implications for will drafting

Don't allow any scope for mistake.

Establish client's wishes when taking instructions.

Clients usually want grandchildren to replace a predeceased child, in which case include a substitutional clause.

If, unusually, they do not want the grandchildren to take, spell it out. State expressly that the share of a predeceased child is to be divided between the surviving siblings to the exclusion of any issue of the predeceased child.

4. QUESTION THE FAMILY DETAILS

Try to get a clear picture of the family tree. The word 'child' is fraught with difficulties. Clients may have children they have brought up as their own but never formally adopted. One party to a marriage may have a non-marital child unknown to the family. They may even have a whole 'other' family.

4.1 When is a child not a child?

***Marcus v Marcus* [2025] EWHC 1695**

Stuart Marcus established a discretionary trust for the benefit of his "children". Stuart and his wife, Patricia, had raised two boys, Jonathan and Edward, both of whom Stuart believed to be his biological sons. Unknown to Stuart, however, Edward was the result of an affair Patricia had during their

marriage. Stuart died without learning the truth about Edward's parentage. Edward discovered the facts before Stuart's death, while Jonathan only learned of them several years after Stuart had died.

Following a breakdown in their relationship, Jonathan brought proceedings disputing Edward's entitlement to benefit from the trust, arguing that as a non-biological child, Edward did not fall within the meaning of "children" as used in the trust deed.

At first instance, the court acknowledged that the expression “children” does not usually include stepchildren but that the ordinary meaning could be displaced based on context. The Master noted that:

> "*the test for the court is to take the natural meaning of children and to consider what a reasonable person in possession of the facts and circumstances known or assumed by the parties at the time that the document was executed…would understand Stuart to have meant by the word. Put another way, are the facts and circumstances sufficient to lead the court to move away from the natural meaning of children?".*

On the facts, the Master found that the surrounding circumstances overwhelmingly supported a wider interpretation, such that Edward was included within the meaning of “children”.

Jonathan appealed, but the High Court upheld the original decision. The court noted that Stuart had chosen to use the word "children" in a context where, in the real world, both Jonathan and Edward were treated as his sons. The judgment stated:

> *"[Stuart] chose to use a word ("children") which, in the real world, described both Edward and Jonathan perfectly…Edward was treated for practical, familial and all other purposes as a biological child notwithstanding the true fact that he was not…[Stuart] intended the word to include Edward…with the result that Edward is one of the settlor's "children" on the true construction of the settlement."*

It should be noted that a key tenet of Jonathan’s argument throughout this case was that the expression “children” should be viewed as a “*term of art*” which had acquired a strong presumptive meaning of biological children through successive rulings by the court. However, the court was not convinced that this was right.

In any event, it was noted that a “*term of art*” (as with the “*natural”* meaning of a word) is capable of being displaced by context, so it was not necessary for the court to make an express ruling on this point. Going forwards, however, the court may well be increasingly reluctant to designate these types of expressions as “*terms of art*”, particularly in light of modern family structures. Furthermore, if the Law Commission’s recent proposal to introduce electronic wills is implemented by the Government, it is possible that this will result in an increase in the number of wills prepared without the involvement of a lawyer,

and it may be unrealistic for the courts to expect testators to be aware of the definition of a so-called "*term of art*".

4.2 'Child' does not include step-child

But it may be clear from the context that this was intended.

See ***Reading v Reading*** [2015] EWHC 946 where in the particular circumstances of the case the word 'child' was interpreted to include 'step-children. The testator had instructed that his will include a NRB discretionary trust for the benefit of his wife, children and step-children. The solicitor drafting used the firm's standard precedent which did not include 'step-children. He admitted that he had not thought about it.

Other parts of the will referred too 'children and step-children'.

4.3 Who is a 'spouse' or 'civil partner'?

A party to a voidable marriage is a spouse unless and until the marriage is avoided and it is too late to avoid it once one party has died.

The recent High Court case involving accountant James Dinsdale captured headlines. Dinsdale, who died in 2020, left behind a £1.8 million estate, a legal wife (whom he married in 2012), and a second partner whom he had married without divorcing the first (in 2017). He died intestate.

Obviously the second 'wife' was not eligible to inherit under the intestacy rules. However, she was eligible to apply as a spouse under the Inheritance (Provision for Family and Dependants) Act 1975.

Section 25(4) provides that:

> *"a spouse, wife or husband shall be treated as including a reference to a person who in good faith entered into a void marriage with the deceased unless either:*
>
> *(a) the marriage of the deceased and that person was dissolved or annulled during the lifetime of the deceased and the dissolution or annulment is recognised by the law of England and Wales, or*
>
> *(b) that person has during the lifetime of the deceased formed a subsequent marriage or civil partnership."*

Section 25(4A) makes corresponding provisions for civil partners.

4.4 Cohabiting couples

It is sensible to provide (and document) advice on:

- The IHT advantages of the spouse exemption, and

- The fact that marriage revokes an existing will unless (it appears from a will that at the time it was made the testator was expecting to be married to a particular person and that he intended that the will should not be revoked by the marriage, the will shall not be revoked by his marriage to that person. Corresponding provision is made for the formation of a civil partnership.

There is no time limit on the formation of the marriage or civil partnership[2] so some practitioners advocate that wills made by cohabiting couples should include such a statement in case they decide to marry or form a civil partnership at a later stage. Often the driver for such a decision is the terminal illness of one party and it can be helpful not to have to remake wills. A suitable statement is:

> *"I am expecting to marry/form a civil partnership with X and do not want this will to be revoked by that marriage/civil partnership."*

If the statement is included, it is unnecessary to state that the will is not conditional on the marriage taking place but it is sensible to say so to avoid any doubt.

> *"This will is not conditional on [my marriage to X] [the formation of my civil partnership with X] taking place."*

5. FOREIGN ELEMENT

An increasing number of clients have foreign assets. This needs to be addressed when preparing their wills. It is common to prepare separate wills. Care must be taken with revocation clauses.

Should the English will be drafted to deal with '*all assets except…*' or be limited to assets '*in England and Wales*' or '*in the United Kingdom'*.

If the will is limited to UK assets, there is the danger of assets falling between the two wills. See, for example ***The Royal Society v Robinson*** [2015] EWHC 3442 (Ch) where a will was limited to assets situate in *'the United Kingdom*'. The testator had made a will dealing separately with his Swiss assets. Unfortunately, apart from his Swiss assets, his major assets were bank accounts in the Channel Islands and the Isle of Man.

The technical meaning of '*United Kingdom'* does not include the Channel Islands or the Isle of Man. Stroud's Judicial Dictionary says under the entry of 'United Kingdom':

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[2] Some people suggest that the decision in *Re Gray's Estate* (1963) 107 Sol Jo 156 introduces a time limit. The deceased married 25 years after the will was made and the will was held to be revoked. However, the decision was on the basis of the earlier provision (LPA 1925, s177) which was worded differently: *"A will expressed to be made in contemplation of a marriage shall, …., not be revoked by the solemnisation of the marriage contemplated*". The will gave everything to *'my wife'* X, whom the testator had previously 'married' bigamously. There was no express statement of an intention to marry. Subsequently the true wife died and the testator married X. The judge held that s177 did not save the will since the expression *'my wife'* could not be said to indicate an intention to legally marry X, in view of the testator's existing marriage.

> *"The United Kingdom is a union of England and Wales with Scotland forming Great Britain (Union with Scotland Act 1706) and Northern Ireland (Union with Ireland Act 1800, Government of Ireland Act 1920). So apart from interpretation clauses the use of "United Kingdom" in statutes shows that only Great Britain and Northern Ireland, but not the Channel Islands or Isle of Man are included therein."*

That is confirmed by the Interpretation Act 1978, schedule 1 of which provides:

> "*The United Kingdom means Great Britain and Northern Ireland*" whereas *"British Islands means the United Kingdom, the Channel Islands and the Isle of Man*."

Mr Robinson would have died intestate as to his major assets had the judge not agreed to interpret the words '*United Kingdom'* in an extended way in order to give effect to his clear intention. Exactly the same issue arose in ***Partington v Rossiter*** [2021] EWCA Civ 1564, although again the Court determined that where an English will was expressed as only having "*effect in relation to my UK assets*" it was possible for such reference to the UK to include Jersey.

Note however, that further applications will be necessary to establish that the local court is willing to accept that interpretation.

'Situate in' **problems**

A recent will that was sent to me was limited to "*my assets situate in England and Wales*". The deceased owned a valuable classic car which had been sent abroad for repair and was still there at the date of death. (Who was entitled???)

In circumstances where the client has valuable moveable assets (cars are probably the most likely), consider whether it is worth including a definition of 'situate'.

You could state that an item is to be regarded as *'situate'* here if it is normally kept here but is temporarily out of the country at the date of death. But give PRs a final discretion in case of dispute.

Note: Long term residence replaces domicile by for IHT purposes

> Before 6 April 2025 a person domiciled in UK was liable to IHT on their worldwide assets while a non-domiciled person was only liable to IHT on their UK assets. From 6 April 2025, long term residence becomes the test. A person is long term resident if they have been UK resident for 10 of the previous 20 tax years. Residence is determined using the statutory residence test.
>
> A person who has been resident in the UK for 20 years will cease to be long term resident once they have been non-resident for 10 full tax years. Hence a UK national who has been non-resident for 10 tax years will cease to be liable for IHT on their non-UK assets.

V. THE IMPACT OF IHT

1. RULES ON BURDEN

Under IHTA 1984, s211 the burden of tax on non-residuary gifts of UK property falls on residue unless the will provides otherwise. The burden of tax on foreign property and property passing by survivorship falls on the individual taking the property. Consider this recent will:

EXAMPLE

T had cohabited with C for many years. They owned a house in England and T had property in Spain in his sole name. His will made various gifts to C.

(1) His share of the English house to C.

It turned out that T and C owned the house as beneficial joint tenants

(2) Villa and apartment in Spain to C

Both had been sold just before T died and the proceeds remitted to a joint bank account.

(3) Substantial pecuniary legacy to C.

(4) Residue to charity

T had assumed that all the tax would come out of residue and was happy for whatever was left to go to charity. In fact, the tax on the joint property was borne by C. Only the tax on the pecuniary legacy was paid from residue

2. REMEMBER GROSSING UP

Where tax is coming out of residue, testators who are trying to divide assets between residuary and non-residuary beneficiaries in what they regard as a fair way need to be aware that the amount ultimately received by the residuary beneficiaries can be significantly reduced by the tax burden – particularly if grossing up is involved.

3. TAX ON LIFETIME GIFTS?

Where the deceased made lifetime gifts in excess of their NRB, the tax is borne by the transferees. Earlier transferees will take a greater benefit as the NRB is allocated to the earlier transfers.

For example, Mum gives £325,000 to her son and one year later gives £325,000 to her daughter. She dies two years later with a single NRB. The son pays no tax but the daughter pays 40% on £325,000.

The will can direct that IHT be paid out of residue but this will be treated as a pecuniary legacy. If residue is going to an exempt beneficiary, grossing up will be necessary.

4. PARTLY EXEMPT ESTATES: BE CAREFUL NOT TO WASTE BPR

IHTA 1984, s39A governs the allocation of relief where part of the estate is exempt and part is chargeable.

- It provides that where there is a specific gift of property eligible for BPR or APR, the value of the specific gift is reduced by the relief. So it is a waste to give property attracting relief to an exempt beneficiary.

  Example

  if T has shares in a family company value £300,000 and qualifying for 100% relief, it makes sense for T to give the shares to non-exempt beneficiaries and residue to spouse/civil partner or charity.

- If property attracting relief passes as part of residue, it does not reduce just the IHT value of the residue. Instead, the benefit of the relief is spread proportionately over all the assets of the estate.

  Example

  T dies with an estate of £2m which includes property attracting BPR of £800,000. He leaves pecuniary legacies to charity, residue to his son. Some of the BPR must be allocated to the charitable legacies.

  It is preferable to make a specific gift of the property eligible for relief to a non-exempt beneficiary.

VI. WHEN IT ALL GOES WRONG

1. *LARKE v NUGUS* LETTERS

When someone wants to challenge a will you have drafted, the first step is normally to write you a letter asking for details of the will making process.

You have a duty of confidentiality to your client which passes to their personal representatives on death. Hence you should not divulge any information unless you are the sole executor or have the consent of the personal representatives.

The problem arises of course where there are two possible sets of personal representatives depending on whether or not the latest will is valid.

The Law Society's Practice Note on Disputed Wills (updated several times and most recently September 2023) says:

> *"In those circumstances, you may be better to have the consent of all the rival claimants (in the example, A and B). However, it is considered that rival claimants to a grant of representation cannot assert a right to confidentiality or Privilege against each other. In those circumstances it may be possible to make disclosure to those rival claimants (i.e. to both A and to B).*
>
> *A further alternative would be to obtain the consent of all the persons who might be entitled to the estate, whatever the outcome of the dispute, i.e. the beneficiaries."*

The danger in not providing the information is that while the will may be declared valid, the other side may not be ordered to pay costs, as happened in Larke v Nugus. The leading judgment said:

> *"when there is litigation about a will, every effort should be made by the executors to avoid costly litigation if that can be avoided and, when there are circumstances of suspicion attending the execution and making of a will, one of the measures which can be taken is to give full and frank information to those who might have an interest in attacking the will as to how the will came to be made."*

The Court of Appeal made it clear that the information required related to both:

- the circumstances in which the testator gave instructions for the will, and
- the circumstances in which the will was executed

You are allowed to make a reasonable charge for the time spent replying.

What if a claim in negligence is threatened? The Practice Note says:

“Where there is an explicit or implicit threat of a claim for negligence or other breach of duty related to the preparation of the will, then your obligations to respond to the request(s) are the same.

However, in addition you should:

1. *insofar as they might be affected by the breach of duty, inform any lay executors and beneficiaries of the will that they should take independent advice, and*
2. *immediately inform your practice's insurers of the existence of a potential claim.”*

It continues:

“Acting in litigation concerning a disputed will which you prepared can give rise to conflicts of interests, such as between the duties you owe to your client and the duties will owe to the court when giving evidence.

You should consider carefully whether you, or your firm, can properly act in those circumstances, with reference to SRA RELs and RFLs paragraphs 6.1 and 6.2.”

APPENDIX 1

NRB DISCRETIONARY TRUST (WITH LOAN/CHARGE PROVISIONS)

Based on a precedent in *Trust Taxation and Private Client Tax Planning* 5th Ed. Emma Chamberlain

7.

(1) This clause shall not take effect unless the gift made to my [husband/wife] by Clause [ ] of my Will takes effect (or but for this clause would do so).

(2) In this clause the Nil Rate Sum shall mean whichever is the lesser of:

(a) twice the upper limit of the nil rate per cent band in the table of rates of tax applicable on my death in Schedule 1 to the Inheritance Tax Act 1984; and

(b) the maximum amount which will not give rise to a charge to inheritance tax by reason of my death

PROVIDED THAT I require my Executors to claim the benefit of any unused inheritance tax nil rate band or downsizing allowance to which my estate may be entitled and that the value of those amounts shall be taken into account in arriving at the Nil Rate Sum.

(3) I give the Nil-Rate Sum to my Legacy Fund Trustees on trust to invest it in exercise of the powers of investment given them by my will and by law and to hold it and the property which currently represents it ("the Legacy Fund") on the trusts and with and subject to the powers and provisions set out in this clause.

(4) During the Trust Period my Legacy Fund Trustees (being at least two in number or a trust corporation) may at any time or times:

(a) by deed or deeds revocable (during the Trust Period) or irrevocable appoint that all or any part or parts of the income or capital of the Legacy Fund shall be held on such trusts (including discretionary and protective ones) in favour or for the benefit of all or any one or more of the Discretionary Beneficiaries and with and subject to such powers (including dispositive and administrative ones exercisable by my Legacy Fund Trustees or any other person) and other provisions as my Legacy Fund Trustees think fit;

(b) transfer all or any part or parts of the income or capital of the Legacy Fund to the trustees of any Settlement wherever established (whose receipt shall be good discharge to them) to be held free from the trusts of my Will and on the trusts and with and subject to the powers and provisions of that Settlement but only if those trusts powers and provisions are such that (at the time of the transfer) they could themselves have created them under (i); and

(c) pay transfer or apply any part of the Legacy Fund to or for the advancement or benefit of any Discretionary Beneficiary.

(5) In default of and subject to any exercise of the powers given them by the preceding provisions:

(a) during the Trust Period my Legacy Fund Trustees shall pay or apply the income of the Legacy Fund to or for the maintenance education support or

otherwise for the benefit of such one or more of the Discretionary Beneficiaries as my Legacy Fund Trustees may in their absolute discretion think fit but with power to accumulate such income or any part or parts of it (with power to apply the accumulations of past years as if they were income of the current year) and with power (during the Trust Period) to resolve to hold the whole or any part or parts of such income as income on trust for any of the Beneficiaries absolutely; and

(b) on the expiry of the Trust Period my Legacy Fund Trustees shall hold the Legacy Fund as to both capital and income on trust absolutely for such of my issue as are then living and if more than one in equal shares through all degrees according to their stocks and so that no issue shall take whose parent is alive and so capable of taking.

(6) My Legacy Fund Trustees (being at least two in number) may by deed or deeds (and so as to bind their successors) wholly or partially release or restrict the powers given them by this clause.

(7) Any other non-residuary gifts made by my Will or any Codicil to it shall have priority to this one.

(8) Instead of satisfying the legacy wholly by the payment of cash (or by the appropriation of property) to the Legacy Fund Trustees my Trustees may:

(a) require the Legacy Fund Trustees to accept in place of all or any part of the Nil-Rate Sum a binding promise of payment made by

[my Trustees as trustees of any residuary property given by this Will or any Codicil hereto on trusts under which my husband/wife] has an interest in possession for the purposes of Inheritance Tax which debt shall be repayable on demand;] OR

[my husband/wife]

(b) charge all or any part of the Nil Rate Sum on any property which is (or but for this clause would be) given by this Will or any Codicil

[on trusts under which my [husband/wife] has an interest in possession for the purposes of Inheritance Tax]

[to my husband/wife is absolutely].

(9) The Legacy Fund Trustees may lend money currently held by them to my [wife/husband].

(10) In amplification of the foregoing provisions

(a) if my Trustees exercise their powers under cl.7(8)(a) they shall be under no further liability to see that the Legacy Fund Trustees receive the sum promised and if they exercise their powers under cl.7(8)(b) they shall be under no further liability to see that the Legacy Fund Trustees receive the sum secured;

(b) if my Trustees exercise their powers under cl.7(8)(ii) they may give an assent of the property subject to the charge and no one in whose favour the assent is made shall become personally liable for the sum secured;

(c) the Legacy Fund Trustees may require security to be given for any debt to be created by a promise within cl.7(8)(a) or by a loan within cl.7(9) and in relation both to such debts (whether or not secured) and to any debt to be secured by a charge within cl.7(8)(b) (all of which shall be debts payable on demand) they:

(i) may (subject to the above provisions) impose such terms (if any) as they think fit including terms as to interest and the personal liability of the borrower and terms linking the debt to the Index of Retail Prices or otherwise providing for its amount to vary with the passage of time according to a formula; and

(ii) may subsequently leave the debt outstanding for as long as they think fit and refrain from exercising their rights in relation to it and waive the payment of all or any part of it or of any interest due in respect of it and they shall not be liable if my Trustees are or become unable to pay the debt or a security is or becomes inadequate or for any other loss which may occur through their exercising or choosing not to exercise any power given by this sub-clause;

(d) the powers given by this clause are without prejudice to any other powers given by this Will or any Codicil to it or by the general law and are exercisable even though my Trustees and the Legacy Fund Trustees may be the same persons and my [wife/husband] may be among them (but they are not exercisable while [she/he] is the sole Legacy Fund Trustee) and any of the Legacy Fund Trustees may exercise or concur in existing all powers and discretions given to him by this clause or by law notwithstanding that he has a direct or other personal interest in the mode or result of any such exercise.