DEATHBED WILLS: TIPS AND TRAPS

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TOPICS

I. DEATHBED OR TERMINALLY ILL?

II. ASSISTED SUICIDE AND THE FORFEITURE RULE

III. THE RISKS OF DEATHBED WILLS

Objectives

After completing this session you will be able to identify and avoid problems in relation to Deathbed Wills.

I. DEATHBED OR TERMINALLY ILL?

1. IMPORTANT DIFFERENCES

A deathbed will by definition is an urgent matter giving limited scope for consideration or planning.

A will for a terminally ill client may be much easier to manage. Clearly there is a time constraint but often there will be time for some considered estate planning.

Note: Time frame

In *X v Woollcombe Yonge (a firm)* [2001] WTLR 301; [2001] Lloyd's Rep PN 274 Neuberger J accepted that where a client was elderly or ill but not in immediate danger of death preparing a will within seven days would be reasonable. However, the facts of the particular case may well require the will to be prepared much more quickly. He said:

> *"Where there is a plain and substantial risk of the client's imminent death, anything other than a handwritten rough codicil prepared on the spot for signature may be negligent."*

The client was terminally ill and in hospital but when the solicitor visited her, she was up and dressed and suggested contacting the solicitor again the following week to provide new contact details,. The solicitor agreed to produce the will in 7 days and did so but she died unexpectedly the day before. The solicitor was held to have acted reasonably.

In both cases it is important to document everything particularly carefully in case of later challenges. The terminally ill client may be on medication which might allow a disgruntled person grounds for challenge on the basis of lack of capacity or lack of knowledge and approval. The risks are much greater in a true deathbed situation. In both cases the testator may be weak and vulnerable meaning that undue influence is a matter to consider.

2. OPTIONS FOR TAX PLANNING - DEATHBED WILLS

It is unlikely that you will do any tax planning at all but there are two things you might consider:

- Lifetime gifts to reduce the death estate below the £2m taper threshold for the RNRB.
  - The gift will be a failed PET and will attract IHT at 40% (unless the property is eligible for relief) but reducing the estate will save IHT on the RNRB.
  - Use a declaration of trust to avoid having to comply with the formalities for transferring legal title.

- The other spouse or civil partner could make lifetime gifts of assets pregnant with gain to benefit from the CGT-free uplift on death. Disposals between spouses/civil partners are no gain/no loss.

3. OPTIONS FOR TAX PLANNING – TERMINALLY ILL CLIENTS

The same two options exist and should be proceeded with briskly in case the client's condition worsens unexpectedly and/or they lose capacity.

It may be possible to take advantage of the family maintenance exemption.

3.1 The family maintenance exemption

s.11 of the Inheritance Tax Act 1984 excludes four types of transfers from being transfers of value for IHT:

(1) A disposition made by one party to a marriage or civil partnership in favour of the other party or of a child of either party;

(a) for the maintenance of the other party, or

(b) for the maintenance, education or training of the child for a period ending not later than the year in which he attains the age of eighteen or, after attaining that age, ceases to undergo full-time education or training.

(2) A disposition made in favour of a child who is not in the care of a parent of his and is for his maintenance, education or training for a period ending not later than the year in which:

(a) he attains the age of eighteen, or

(b) after attaining that age he ceases to undergo full-time education or training;

but paragraph (b) above applies only if before attaining that age the child has for substantial periods been in the care of the person making the disposition.

(3) A disposition made in favour of a dependent relative of the person making the disposition and is a reasonable provision for his care or maintenance.

(4) A disposition made in favour of an illegitimate child of the person making the disposition and is for the maintenance, education or training of the child for a period ending not later than the year in which he attains the age of eighteen or, after attaining that age, ceases to undergo full-time education or training.

Section 11(6) contains definitions:

"child" includes a step-child and an adopted child and "parent" shall be construed accordingly;

"dependent relative" means, a relative of a person, or their spouse or civil partner, who is incapacitated by old age or infirmity from maintaining himself, or a person's mother or father or their spouse's or civil partner's mother or father.

Terminally ill parents can use this section to make lifetime provision for their children in a tax efficient manner. Bizarrely transfers must be to the children of a party to an existing marriage or to illegitimate children. Transfers to a party's child after a divorce or following the death of one party to the marriage are not covered.

Transfers to minor children, or those in full-time education who are not the children of the donor can fall within the section BUT NOTE that the child must:

- not be in the care of their parents, and
- if they are over 18, have spent 'substantial periods' with the donor before reaching 18.

Where the conditions are satisfied, the parent can create a lifetime settlement for the benefit of the children giving trustees power to spend capital as well as income. It is important that the settlement is not capable of continuing beyond the completion of education and training. HMRC says at IHTM04175:

> *"A gift by way of settlement is not within IHTA84/S.11 (1)(b) if the child can receive benefits under the settlement after reaching eighteen and ceasing to undergo full-time education or training."*

The terms of the trust must therefore be such that all funds will be used on the provision of maintenance, education or training by the time the child ceases to undergo full-time education or training. The Vesting Date should be defined as the date on which the child reaches 18 or full-time education or training ceases. Any balance should be paid to the child, not revert to the settlor.

This amount to be transferred requires careful calculation at the time the disposition is made. If the house is transferred, a full market rent must be paid to prevent there being a reservation of benefit.

The legislation does not expressly require amounts paid to children to be reasonable but an excessive payment is likely be challenged by HMRC on the ground that it was not for maintenance, education or training. In ***AC v DC and Others (No.2)*** [2012] EWHC 2420 (Fam) a wife had asked the divorce court to order payments of £2m to trusts established for the maintenance, education and training of their three children aged 14, 13 and four. The court refused on the basis that periodic payments could be ordered from the husband's substantial resources. Bearing in mind their different ages and their needs, there was a real risk that the capital payments applied for would not be regarded by HMRC as falling within IHTA 1984, s11.

3.2 Consider pension nominations

If the client is likely to die under 75, consider nominating the children rather than the spouse/civil partner for some or all of the funds. IHT will be payable if transfers to non-exempt beneficiaries exceed the available NRB but the children can access the funds in the future without an income tax liability.

3.3 Consider property eligible for 100% relief

- If the spouses/civil partner each own property in excess of £1m, the terminally ill client should consider giving some to the children or to a relevant property trust as unused allowance cannot be transferred.

- If the terminally ill client owns all the property eligible for relief and it exceeds £1m, consider leaving some to the spouse/civil partner (absolutely or on IPDI trusts so they can use their allowance.

- If the other partner owns all the property eligible for relief consider giving some to the terminally ill partner. Relief for successive transfers under IHTA, 1984, s109 and s116 removes the ownership requirement for the transferee where one transfer is on death.

II. ASSISTED SUICIDE, MERCY KILLING AND THE FORFEITURE RULE

1. ASSISTED SUICIDE AND '*MERCY KILLING'*

The act of suicide requires the victim to take his or her own life.

1.1 Encouraging or assisting suicide

A person commits an offence under section 2 of the Suicide Act 1961 if they do an act capable of encouraging or assisting the suicide or attempted suicide of another person, and that act was intended to encourage or assist suicide or an attempt at suicide. The consent of the Director of Public Prosecutions (DPP) is required before an individual may be prosecuted. The offence carries a maximum penalty of 14 years' imprisonment.

Committing or attempting to commit suicide is not, however, of itself, a criminal offence.

The DPP issued guidance for prosecutors following the House of Lords judgment in *R (on the application of Purdy) v Director of Public Prosecutions* [2009] UKHL45. It says at [35]

> *Explaining the law*
>
> *For the avoidance of doubt, a person who does not do anything other than provide information to another which sets out or explains the legal position in respect of the offence of encouraging or assisting suicide under section 2 of the Suicide Act 1961 does not commit an offence.*

A prosecution is less likely to be required if:

(1) the victim had reached a voluntary, clear, settled and informed decision to commit suicide;
(2) the suspect was wholly motivated by compassion;
(3) the actions of the suspect, although sufficient to come within the definition of the offence, were of only minor encouragement or assistance;
(4) the suspect had sought to dissuade the victim from taking the course of action which resulted in his or her suicide;
(5) the actions of the suspect may be characterised as reluctant encouragement or assistance in the face of a determined wish on the part of the victim to commit suicide;
(6) the suspect reported the victim's suicide to the police and fully assisted them in their enquiries into the circumstances of the suicide or the attempt and his or her part in providing encouragement or assistance.

1.2 *Mercy killing*

It is murder or manslaughter for a person to do an act that ends the life of another, even if he or she does so on the basis that he or she is simply

complying with the wishes of the other person concerned. So, for example, if a victim attempts to commit suicide but succeeds only in making him or herself unconscious, a person commits murder or manslaughter if he or she then does an act that causes the death of the victim, even if he or she believes that he or she is simply carrying out the victim's express wish.

The CPS has issued guidance *'Homicide: Murder, manslaughter, infanticide and causing or allowing the death or serious injury of a child or vulnerable adult'* (updated on 5 October 2023). In the section on *'mercy killings*' and suicide pacts there is a list of public interest factors similar to the DPP's list tending in favour of or against prosecution.

2. FORFEITURE RULE AND RELIEF FROM FORFEITURE

There is a long-established rule under common law that a person cannot profit from their crime. It is not limited to property passing under a will and/or intestacy. It also extends to property passing by nomination or as a *donatio mortis causa*. It was accepted in ***Re K*** [1985] 1 All ER 403; affirmed [1986] Ch 180, [1985] 2 All ER 833 that the forfeiture rule applies to sever a joint tenancy by treating the beneficial interest as vesting in the deceased and the survivor as tenants in common. See ***Leeson v McPherson*** [2024] EWHC 2277 (Ch) considered below. In ***Henderson v Wilcox*** [2015] EWHC 3469 (Ch), [2015] All ER (D) 42 (Dec) the court held that the rule did not prevent a son taking under the terms of a lifetime discretionary trust created by his mother whom he had unlawfully killed as a result of gross negligence. The trustees were free to appoint property to the son if they thought it appropriate.

The forfeiture rule applies to all cases of unlawful killing, including manslaughter by reason of diminished responsibility or by reason of provocation, with a possible exception where a defendant is found to be criminally insane, leading to an acquittal (***Land v Land*** [2007] 1 All ER 324, [2006] WTLR 1447).

What about causing death by dangerous or careless driving?

There had been no cases on the point but in ***Amos v Mancini*** [2020] EWHC 1063 (Ch), HH Judge Jarman QC had to decide the point in a case of careless driving. He said that he could see no logical distinction in applying the rule to all cases of manslaughter (including those which involve little more than inadvertence) but not to a case of causing death by careless driving. Accordingly, he concluded that the rule does apply to causing death by careless driving (although he granted relief from forfeiture under the Forfeiture Act 1982, as to which see below).

'*Unlawful killing*' includes aiding, abetting, counselling or procuring the death of another person, for instance by assisting with their suicide, a crime under s 2 of the Suicide Act 1961. In ***Dunbar v Plant*** [1997] 4 All ER 289, the rule was applied to the survivor of a suicide pact.

A criminal conviction is not necessary. In ***Leeson v McPherson*** [2024] EWHC 2277 (Ch) a husband was prosecuted for the murder of his wife but was acquitted by the jury upon the direction of the trial judge following the husband's successful submission of no case to answer. Her father and son brought a successful application that he

should be found liable for her unlawful killing on the balance of probabilities. The husband was ordered to repay 50% of the money he had moved from their joint accounts to his sole account (starting 18 hours after her death), 50% of the sale proceeds of various co-owned properties, any sums received from her pensions and the proceeds of life assurance policies taken out by him (£2.5m).

In ***Ninian v Findlay*** [2019] EWHC 297 (Ch), Chief Master Marsh held that by travelling with her terminally ill husband to the Dignitas Centre in Zurich, Mrs Ninian had provided assistance and involvement which did amount to acts which were capable of assisting her husband's suicide. She was, therefore, subject to the forfeiture rule.

The Forfeiture Act 1982 enables the court to modify the forfeiture rule, and its application to the Inheritance (Provision for Family and Dependants) Act 1975 in cases other than murder and applies to every kind of succession on death. The blanket ban under the forfeiture rule in respect of persons convicted of the manslaughter of the deceased has thus been modified. In both ***Ninian v Findlay*** and ***Dunbar v Plant***, the court agreed to grant relief from the effects of the forfeiture rule under the Act in relation to assisting with another's suicide.

Ninian v Findlay contains an interesting practical point. The husband and wife had consulted solicitors while making the arrangements with Dignitas with a view to minimising the risks to Mrs Ninian. Mr Ninian's existing will, left everything to his wife but if the gift failed for any reason to named charities. The solicitors recommended a new will naming Mrs Ninian's brothers as the substitute beneficiaries. The reasoning was that charities might have felt obliged to challenge an application for relief from the forfeiture rule in order to maximise funds for their charitable purposes. The application for relief was not opposed by the brothers and was successful.

In ***Withers Trust Corp Ltd v Estate of Hannah Goodman*** [2023] EWHC 2780 (Ch) a devoted husband helped his wife (in the last stages of cancer) to die and subsequently killed himself, describing himself as dying of a broken heart. His wife left her estate to him with a substitutional gift to a discretionary charitable trust. In her letter of wishes she referred to her own wish to establish a charitable foundation with a charitable status so that IHT would not be paid on her estate. She also explained that her wish was to benefit those with an interest in the classic car industry, in particular providing apprenticeships for 16 to 25 year olds. Unfortunately the gift could have been used to benefit non-UK charities and so would not attract the IHT exemption. The husband's gift over was to a UK charity with virtually the same objects. The Master went through the factors set out in the CPS guidance and decided that there were ample grounds for granting relief.

Had the forfeiture rule not been modified to allow the husband to inherit the wife's estate, a large amount of IHT would have been payable on the gift to charity.

In ***Morris v Morris*** [2024] EWHC 2554 (Ch),Myra Morris suffered from an incurable, degenerative neurological disorder and decided she wanted an assisted death in Switzerland. Her husband made the travel arrangements for Myra to travel to Switzerland, accompanied by their children Jamie and Katie and Myra's sister Susan. At the clinic, Myra committed suicide with the assistance of staff, in the presence of Philip, Jamie, Katie and Susan.

Philip reported Myra's death to police but was told there was nothing to investigate. He later discovered the forfeiture rule could preclude him from inheriting under Myra's will.

The court held that the public interest factors against prosecuting Philip for assisting suicide were clearly satisfied, indicating strong grounds to relieve him of the forfeiture rule. Philip's actions were motivated solely by compassion for Myra's wishes and did not indicate higher moral culpability.

Importantly, the court held that Jamie, Katie and Susan did not take any steps to actively assist or encourage Myra's suicide, merely being present to comfort her, so their interests were not forfeit.

Subject to relief under the Forfeiture Act, the PRs will have to decide how property which has been forfeited is to pass. There may be a gift to a replacement beneficiary in which case they will have to decide whether or not the wording used is apt to fit the circumstances which have occurred. For example, if the substitutional gift is worded to take effect if the primary beneficiary '*predeceases or fails to survive by a stated period*', it cannot take effect (subject to the provisions of the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011. If the gift is non-residuary, it will fall into residue and if it is residuary, it will pass under the intestacy rules. If the gift to the replacement beneficiary is expressed to take effect 'if this gift fails for any reason', it will cover forfeiture and the property will pass under the terms of the gift.

The Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011 has changed the position in relation to deaths occurring after the Act comes into force but there is uncertainty as to its extent. It provides that forfeiture is to be treated as death but only for the purpose of the Wills Act 1837. That limitation probably means that it only applies when a child forfeits entitlement to a parent's estate.

Note: Recent High Court decision on waiving the Forfeiture Rule

On 16 June 2025 in *Grant v Murphy and Others* Master Bowles (sitting in retirement) made an order declaring that an executor could at the request of the beneficiaries lawfully distribute the estate on the footing that the Forfeiture Rule did not apply.

Alexander Learmonth KC of New Square Chambers represented Mr Muphy. Mr Murphy had accompanied the deceased to Dignitas and was, therefore, at risk of forfeiting his entitlement. New Square Chambers issued the following summary:

> *"Although no judgment exists, in making the order sought the Court confirmed that where all potential beneficiaries who might be entitled if the forfeiture rule applied were adult and had capacity, they could make an agreement between themselves for the estate to be distributed according to the will, without regard to the forfeiture rule, and the executor could safely comply. Although the forfeiture rule is a creature of public policy, no reasons of public policy arose to make such agreements unenforceable."*

This confirmation is very welcome and will allow families to avoid applications to court.

Note however what Jan Atkinson of Osbornes wrote in the *Law Society Gazette* on 18 July 2025 about the cost and complexity:

"Under English law, assisting or encouraging suicide remains a criminal offence. Even where no prosecution is brought, civil consequences may still arise. Chief among them is the forfeiture rule, a principle that prevents individuals who have unlawfully killed another from inheriting from their victim's estate. The rule has traditionally applied to murder and manslaughter. But where does that leave those who assist a terminally ill person with their death?

This was the dilemma at the heart of Re Peace, Grant v Murphy (2025, unreported), where I acted for the executor of an estate and instructed Justin Holmes of Radcliffe Chambers. It raised difficult questions about intent and the uncertain interface between the criminal and civil consequences of helping someone to die as they wished. Ultimately, the case was resolved by agreement, but not without considerable effort and expense.

The law on forfeiture is governed by both common law and statute, principally the Forfeiture Act 1982. While section 2 of the act gives courts the discretion to grant relief from forfeiture in appropriate cases, there is no definitive guidance on how that discretion should be exercised where the conduct in question involves helping a person end their life voluntarily.

Assisting a suicide abroad, even if it is upon the express wish of a dying person, is still technically a crime under the Suicide Act 1961. However, the director of public prosecutions (DPP) has indicated that prosecutions are unlikely where: the person who assisted acted wholly out of compassion; the deceased had a clear and settled intention to die; and there was no evidence of coercion or financial motivation.

That stance offers some reassurance on the criminal front, but not in relation to matters of succession and inheritance. The forfeiture rule may still apply regardless of whether criminal charges are brought. And unlike in criminal law, the threshold for 'unlawful killing' in civil proceedings is lower.

In Re Peace et al, the deceased had left a will naming several people as beneficiaries. At least one of them had helped arrange the journey abroad for the assisted death. Though no one disputed that these actions had been motivated by care and respect for the deceased's wishes, concerns arose that they could be seen, at least technically, as having assisted a suicide.

If that beneficiary was deemed to have forfeited his interest under the will, his share would fall into residue or pass to others in substitution, depending on the terms of the will. Those substitute beneficiaries would receive a significantly larger share if a main beneficiary had forfeited his interest.

To avoid that outcome and to minimise the need for intervention from the court, all the named beneficiaries in the deceased's will entered into an agreement confirming that no one who had helped the deceased achieve his desired end of life should be treated as having forfeited their entitlement. The executor then sought a court order approving the agreement and authorising him to distribute the estate on that basis.

The court was satisfied with the arrangement and made the order. The cooperative position of the beneficiaries in this case perhaps made it unusual but the process was still far from straightforward. Even with all parties largely in agreement, obtaining the order involved careful preparation of evidence, legal submissions, and formal representation for each of the relevant beneficiaries. The costs were significant, particularly relative to the value of the estate, and diminished the value of what some of the beneficiaries will receive.

Such disputes could arise in many estates, especially where some beneficiaries stand to gain if others are disqualified from inheriting. In such cases, resolution through agreement may not be possible and an application to the court for relief from forfeiture would most likely become necessary.

That brings its own risks, of course. The outcome is discretionary and the law remains undeveloped. While courts have granted relief in some assisted dying cases, such decisions tend to be fact-specific and unpredictable. Evidence about the extent and nature of the assistance, the deceased's mental capacity, and the motives of the helper will all be scrutinised.

Even where relief is granted, the process can be emotionally draining, time-consuming and expensive. The costs of litigation could consume a large portion of the estate. These issues pose a real challenge for private client practitioners, especially those advising testators or executors.

Where a client is contemplating assisted dying abroad, solicitors should flag the inheritance risks to any proposed helpers, ideally before any assistance is provided. Forward planning might include a letter of wishes explaining the circumstances and the deceased's wish that forfeiture should not apply, or a clause in the will directing the executors to seek court approval in the event of any forfeiture concerns.

For executors administering an estate after an assisted death, early investigation into the facts is essential. If assistance was given by a beneficiary, legal advice should be sought promptly. Depending on the circumstances, options may include:

- *Negotiating an agreement to avoid forfeiture;*
- *Applying to court for approval of such an agreement; or*
- *Seeking relief from forfeiture under the 1982 act.*

In all cases, practitioners must manage expectations around cost and delay. Even unopposed applications can result in substantial legal fees and delay distributions for many months.

As assisted dying becomes a more prominent issue in society, the lack of clarity is something lawyers are increasingly likely to have to grapple with. But this case provides a road map and may pave the way for avoiding distressing and costly forfeiture applications in the right circumstances."

III. THE RISKS OF DEATHBED WILLS

1. SHOULD YOU DO THEM?

A deathbed will is only likely to be required when a client is not happy with their existing provisions and wants to change them. This inevitably means that someone will receive less than they otherwise would have done, and will look for a reason to challenge the will you prepare. Likely challenges could be based on:

- a lack of testamentary capacity
- a lack of knowledge and approval
- mistakes due to misunderstanding the instructions
- undue influence
- faulty execution

If you are going to make a deathbed will, it is important to try to reduce the likelihood of these risks.

But should you agree to make such wills? And if you do, what steps can you take to minimise the risks associated with them?

1.1 Your firm needs a policy

Because of the increased risks associated with deathbed wills, you need to consider whether your firm is willing to prepare such wills at all.

Many firms do and will therefore, for example, have close links with local care homes and hospices.

Other firms will only make deathbed wills for existing clients on the basis that this reduces the risks. The firm will have some knowledge of their previous wills, the family circumstances and the extent of their property.

If your firm is going to do deathbed wills, have a policy on who does them. Only experienced fee earners should draft such wills. Their experience means they are less likely to make mistakes and, if the will is challenged, their evidence will carry more weight. In two recent cases***, Waite v Skilton*** [2024] EWHC 3153 (Ch) and ***Crew v Oakley*** [2024] EWHC 2847 (Ch) judges referred to the fact that the solicitors involved were experienced.

1.2 Charging

If your firm does act in emergency cases, it is legitimate to make an increased charge to reflect the urgency and increased risks. Ensure that your pricing structure is clear and transparent on this point. Get agreement upfront. The family may not want to pay you after the death.

1.3 Record everything!

Your attendance note needs to cover everything. In the event of a challenge, counsel will put it under the microscope..

2. WHAT PREPARATIONS TO MAKE?

It is helpful to have a means of photographing or recording the client. In ***Crew v Oakley*** there was an argument as to the client's capacity. Deputy Master Linwood said at [204]

> "*it may be appropriate for solicitors in such circumstances to record their attendance by video on a telephone or other electronic device, subject to permission and the privacy of others who may be there."*

You are unlikely to be able to find suitable witnesses. Many hospitals and care homes do not allow staff to witness wills. If the client is at home, family members are likely to be beneficiaries. So take a witness with you (if possible take someone relatively experienced who can make a separate note of the process)

2.1 If possible, check earlier wills

If your firm has acted for the client in the past, get copies of previous wills and, if there is time, look at previous will files for any useful information. If the instructions for the new will are very different from earlier wills, this can be a warning of a capacity or undue influence issue. You should therefore check the client's circumstances. Have they altered? If not, what is the reason for the change to the will?

Earlier wills may reveal vital information such as a recital of a mutual wills agreement. The revocation clause may be limited because there is a separate will dealing with foreign property. You don't want to inadvertently revoke it.

The will file may indicate that the client has only a life interest in an asset such as the former matrimonial home. They may be a beneficial joint tenant in which case their instructions may require you to prepare a notice of severance.

Remember that this will have to be served.

Note: Service of notice of severance

A notice does not have to be given to the other joint tenant in person. Law of Property Act 1925, s196 provides that a notice is properly served on a person if it is left at their last-known place of abode or business. Alternatively, it is properly served if sent by registered post (which is extended to recorded delivery by Recorded Delivery Service Act 1962, s.1(1), and Schedule, para 1) and not returned by the postal service.

Serving a notice is a unilateral act so it can be served on a person who lacks capacity or on their attorney or deputy (see ***Quigley v Masterson*** [20111] EWHC 2529(Ch)). It does not depend in any way on the agreement of the recipient. Co-owners can also sever by mutual agreement.

2.2 Make sure you are familiar with options for signing

Section 9 of the Wills Act 1837 provides that a will must be signed

"*by the testator,* or by some other person in his presence and by his direction".

In *Barrett v Bem* [2012] EWCA Civ 52 the Court of Appeal held that a '*direction*' requires more than mere acquiescence or passivity; some sort of instruction was required. The testator had to make a positive communication, either verbal or non-verbal.

The Court also confirmed that a beneficiary who signs on the testator's behalf does not forfeit entitlement although it will be necessary to prove knowledge and approval.

However, Lewison LJ commented at [39] that "*it is plainly undesirable that beneficiaries should be permitted to execute a will in their own favour in any capacity; and that Parliament should consider changing the law to ensure that this cannot happen in the future*".

Any mark made by the testator is a valid signature provided the testator intended it to be their signature.

The following have been held to be signatures:

- an inky thumb print: (*Re Finn* (1935) 52 TLR 153)
- initials: (*In the Goods of Savoy* [1851] 15 Jur 1042)
- a mark made by a rubber stamp with a facsimile signature: (Perrins v Holland [2009] EWHC 1945 (Ch))
- the words '*your loving mother*': (*In the Estate of Cook* [1960] 1 WLR 353)
- part of the testator's name: (*In the Goods of Chalcraft* [1948] 1 All ER 700)

Whatever is relied on as a signature must be complete in the sense that the testator completed as much as they intended to be their signature (*In the Goods of Chalcraft*).

Note 1: Guided signatures

In ***Fulton v Kee*** [1961] NILR 1 Lord MacDermott said

> "*A testator wishing to execute his will himself need not depend solely on his own efforts; he may be helped to make his signature by name or mark. The extent to which a testator so aided must participate brings us to a difficult borderline which can hardly, in the nature of things, be described in detail or exhaustively. On the cases, however, I think this may be said. The testator must do some physical act in connection with the signing*". Passive physical contact with the wielder of the pen is not enough. The section requires ". . . *something of the testator which is positive and discernible and not just a matter of abstention*".

Because of the uncertainty it is preferable for the testator to sign with a mark or direct that someone else sign.

Note 2: Amendment of attestation clause

No presumption of knowledge and approval arises when someone signs on behalf of a testator (or where a person is unable to read and makes a mark) . You should therefore amend the attestation clause to show that the will was signed by another person signing his own or the testator's name, by the direction and in the presence of the testator, and that it was read over to the testator who seemed thoroughly to understand and approve the contents.

Note 3: Testamentary capacity

Normally a testator must have testamentary capacity when the will is executed and must know and approve the contents at that time.

However, in ***Parker v Felgate*** 8 PD 171 the court accepted that, exceptionally, a will can be valid despite lack of full capacity at execution. In ***Perrins v Holland*** [2010] EWCA Civ 840 the Court of Appeal reviewed the authorities and confirmed that the principle remains good law.

The effect of ***Parker v Felgate*** is that a will prepared in accordance with the testator's instructions is valid, though at the time of execution the testator could not understand each individual clause provided the testator:

- remembers giving instructions, and
- believes the will to be effecting those instructions.

In ***Perrins v Holland*** the Court of Appeal also approved at [32] the statement of Lewison J at first instance that ". . . *in a case in which the principle in Parker v Felgate is applied it is not necessary to prove knowledge and approval of the will, provided that (a) the testator believes that it gives effect to his instructions and (b) it does in fact do so."*

2.3 Precedents and preparation of will

You are probably going to have to prepare the will away from the office. If so, unless you have a portable printer, be prepared to write the will in manuscript. You may find a printer is available but you may have difficulty getting it to work with your laptop, though a memory stick will help. If you are going to handwrite the will, consider creating a template that you can fill in.

Ensure you take a laptop with suitable precedents on and client care documentation.

Make sure you are familiar with the precedents you take. In ***Reading v Reading*** [2015] EWHC 946 (Ch) (not a deathbed will case), the attendance note recorded that the client wanted a nil rate band discretionary trust for his children and step-children. The solicitor used the firm's standard precedent, forgetting that it did not include step-children.

In ***Waite v Skilton*** [2024] EWHC 3153 (Ch), Mrs Skilton wanted to leave her second husband a life interest in the matrimonial home (inherited from her parents), remainder to her son from first marriage. The solicitor used her firm's standard precedent which included a power for the life tenant to require a sale. The son objected that this was not what his mother wanted. The court agreed that the inclusion was a clerical error caused by cutting and pasting the firm's precedent, without instructions from the deceased.

2.4 Other documents you may need

Make sure you have necessary documents prepared in advance ready for immediate use, such as:

- a short-form retainer letter and terms of business
- an adapted checklist for taking instructions to be followed in such circumstances
- paperwork to meet the requirements of the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134).

  You will be making an off-premises contract and must provide on paper the information required by Sch 2 to the Regulations before starting work. The client does not have to read it but you should explain the following key points:

  (a) your charges;

  (b) the right to complain;

  (c) the right to cancel within 14 days, which can be waived by a request to start work immediately.

  The Law Society has a helpful Practice Note dealing with the information required (currently withdrawn for updating).

2.5 Practical points

When visiting your client, make sure you take:

- business cards and photographic ID to make sure that you are allowed in
- chargers for your phone and laptop
- paper and a range of pens in case the client has dexterity issues

Wear removable layers as hospitals and care homes are usually hot.

2.5 Two recent cases

Waite v Skilton [2024] EWHC 3153 (Ch)

The facts

On 17th December 2018 Eileen Skilton, who came from a well-established farming family, was gravely ill. She was not expected to live to Christmas. Her second husband, Peter Skilton, telephoned their solicitors. A senior associate solicitor went to see Mrs Skilton the following day. She drafted a codicil to Mrs Skilton's existing will made in 1985 in expectation of her marriage to her marriage to Mr Skilton. Mrs Skilton executed the codicil and died on 21st December 2018.

It was common ground that Mrs Skilton had testamentary capacity at the time she executed the codicil.

The codicil appointed as her executors and trustees: Peter Skilton; Jason Waite, her only child; Judith, her best friend; and the directors of the firm of solicitors. It was common ground that Mr Skilton and Jason Waite had never got on with each other.

Mrs Skilton owned a number of properties and pieces of land, including an area known as Manor Farm Yard which had a number of farm outhouses on it and was the means of access to the fields beyond. These were used for the farming activities she carried on with Jason.

Her Will had left Jason her jewellery and all freehold property situate in Waddingham, her remaining personal chattels to Mr Skilton and residue to Mr Skilton and Jason equally. The codicil significantly reduced Mr Skilton's share. Mrs Skilton had decided that it was fair to pass on the bulk of her estate to her son who was responsible for managing the farming and letting businesses.

The codicil added a number of clauses to the will. The "*House*" and contents was left to Mr Skilton for life and stated that "*During the Trust Period my Trustees shall not …. sell my House or the Contents except with the Beneficiary's written consent <u>but they shall sell my House or the Contents at the Beneficiary's written request</u>*". Mr Skilton was also left two other properties to provide him with an income. All other land was left to Jason. Her jewellery was left equally to her friend, Judith, her goddaughter and her two step-daughters. (It was subsequently agreed that this was a drafting error and they should have been given one item of jewellery of their choice). In other respects the will was confirmed.

"House'" was defined as "*my house known as Manor House School Lane Snitterby together with its grounds including <u>Manor Yard</u> or other the Dwelling which I may own as my principal residence at my death*" and "*Contents*" was defined as "all my furniture furnishings and household effects".

The solicitor had prepared a draft codicil in the office based on the information given to her by Mr Skilton which she amended by hand following Mrs Skilton's instructions. Mrs Skilton was in bed and her son and friend, Judith, were in the bedroom. The solicitor asked the son to leave which he did. Mrs Skilton said that she wanted Judith to remain which she did.

The solicitor prepared an attendance note when she returned to the office and Judith made a note of the events.

A number of issues arose as to the meaning of the codicil.

(1) Did the deceased intend her husband to have a full life interest or a mere right to occupy Manor House?
(2) Was the inclusion of power for the husband to compel a sale of Manor House an error?
(3) Did the reference in the codicil to Manor Yard include Manor House Yard?

In addition, the firm which had drafted the will and were appointed as co-executors with Judith, Jason and Mr Skilton applied to be removed and replaced by a professional firm. There was a potential conflict of interest, because Jason was considering whether a claim in negligence might lie against the firm arising out of the drafting of the codicil. The administration of the estate had been much delayed. Nearly six years after the deceased's death, apart from obtaining some valuations, little had been done. All the parties were agreed that this part of the claim should be allowed.

Mr Skilton was happy to resign as an executor and trustee, on condition that Jason also resigned. He was in favour of the appointment of a professional firm as sole personal representative.

Judith wished to remain as an executrix. She was the deceased's best friend, and felt that she was an appropriate person to reflect her wishes. She was neutral as to the appointment of professionals.

Jason wished to remain as executor. He opposed the appointment of professionals and considered that he and Judith should be allowed to remain as executors alone for the following reasons:

(a) although the value of Mrs Skilton's estate was over £4m, it had no ready cash to pay the remuneration of a professional administrator.
(b) as the main beneficiary of the estate and person running the farming business, he ought to be involved in decisions which affect his inheritance.
(c) Mrs Skilton had wanted her friend to act and there was no suggestion that she had done anything wrong.
(d) if any claims need to be brought on behalf of the estate, he would need to finance them as the main beneficiary, so it was more sensible for him to remain an executor and pursue them directly.

(e) He could work together with Judith well and they understood and respected the deceased's wishes."

Finally, there were allegations that Mr Skilton had taken cars which were business assets and other assets of his wife's which he had sold. He admitted having taken money from his wife's bank account in order to install a stair lift. There was little supporting evidence.

The decision

1. Life interest or occupation right?

Mrs Skilton had used the expression "*life interest*" when giving instructions to the solicitor. This was stated in the attendance note prepared immediately after the meeting. On a balance of probabilities the judge found that she did intend to give her husband a life interest.

The solicitor was a witness of truth. She had no reason in her attendance note to misstate what Mrs Skilton had told her about wanting to give a life interest. It was common ground that Mrs Skilton had during her professional life a close attention to detail. If she used an expression like a "life interest trust", the judge considered that he could properly infer that she knew at least in broad terms what that was.

Accordingly the rectification claim in respect of the life interest failed.

2. Mr Skilton's right to require a sale

The judge accepted Jason's evidence that his mother discussed Mr Skilton residing at the Manor House after her death but did not say that he would have a power of sale. If she had mentioned a power of sale, that would have been something to which he would have been strongly opposed. He would have raised the matter with his mother. Similarly, Mrs Skilton's friend, Judith, gave evidence that she would have noticed if a power of sale had been mentioned during the discussions between the deceased and her solicitor and picked up on it. Further, Mrs Skilton was clear that her reason for making the codicil was in order to ensure that the property which she inherited from her parents went to her son. She appreciated that this meant cutting her husband out of much of the financial benefit of her estate. Giving an unrestricted power of sale to her husband potentially allowed the Manor House to pass outside the family.

The power of sale was likely to have been part of the firm's standard life interest precedent and therefore included in the draft codicil prepared before the solicitor met Mrs Skilton.

The judge concluded that the insertion of a power of sale into the codicil was a clerical error caused by cutting and pasting the firm's precedent without instructions from the deceased. Accordingly, the will should be rectified to remove the reference to the power to sell.

3. The meaning of "Manor Yard"

Applying the principles of interpretation two facts were of particular importance. (1) the definition in the will was of "*the House*", not the farm. (2) Manor Yard was part of the grounds of Manor House. The judge found as a fact that Manor Farm Yard was not part of the grounds of the Manor House: it was part of the farming and equine business. That was sufficient to determine that Manor Yard meant Manor House Yard.

This conclusion was reinforced by the need to access the fields by way of Manor House Yard. Mrs Skilton would have been unlikely to want her son to be beholden to her husband for access to the fields, given their mutual animosity.

Where there is an ambiguity in a Will, Administration of Justice Act 1982, s21 allows extrinsic evidence, including evidence of the testator's intention, to be admitted to assist in its interpretation. The judge did not consider that the expression Manor Yard was ambiguous but, in case he was wrong, he considered what extrinsic evidence, including evidence of the testator's intention might show. Here, he said, the evidence was all one way. Mrs Skilton wanted to give the farming assets to her son. The Manor Farm Yard was part of the farm. Access over Manor Farm Yard was the existing means of access to the fields beyond. This reinforced his conclusion that Manor Yard referred only to the Manor House Yard.

4. Should the executors be removed?

Yes. It was appropriate to order the removal of all executors and replace them with a professional firm.

If Jason continued as an executor and trustee, there would be a real conflict of interests. Under the terms of the codicil, as rectified, Mr Skilton no longer had a power of sale of the Manor House. Instead, the trustees had a discretion to order a sale. Mr Skilton was in his late 80's and might well need to move into a smaller property or go into a nursing home. The financing of such a change might ultimately involve either the sale of the Manor House or Jason, for example, buying an annuity for Mr Skilton in exchange for the latter's agreeing to the reversion falling in early. The conflict of interest between him and Mr Skilton was such that he could not be expected to deal in a fair manner with any issue of a sale of the Manor House.

It was true that appointing professionals would involve a cost. However, the deceased's view was that it was appropriate to have at least one professional executor. She knew of the animosity between her son and her husband and it was likely that she wanted a professional executor precisely because of this problem. Even if that was not right, there was little alternative to the appointment of a professional if Jason was removed as an executor. It would be inappropriate for Judith to remain as a sole executrix.

Professional executors would certainly consult Jason, as the main beneficiary, on issues of importance.

5. The alleged misappropriation of estate assets

There was too little evidence for the judge to make any decision as to what may or may not have constituted personal chattels of the deceased as opposed to business assets .
There was no dispute that Mr Skilton had taken some assets which had belonged to his wife and had disposed of them. Similarly, there was no dispute that he had taken some money from her bank account. The judge could not determine whether that was wrongful or not. There was no pleaded issue. The precise nature of the assets of which he had disposed was not in evidence.

However, by his actions Mr Skilton had acted as an *executor de son tort* and became subject to a duty to account for all estate assets taken or disposed of. He was ordered to give an account of his dealings with the assets of the deceased's estate.

Comment

(1) The case illustrates the difficulties involved in taking urgent instructions particularly where the estate is complicated and there is ill feeling between potential beneficiaries. One of the issues that will always be a concern is testamentary capacity. In the light of the urgency of drafting the will, it was not possible to have a doctor in attendance. The solicitor therefore sensibly set out at reasonable length in her attendance note examples of Mrs Skilton showing sufficient understanding to make a valid codicil. It was difficult for the solicitor to take detailed instructions because of the client's weakened condition. However, the case shows how easily misunderstandings can arise and how important it is, where possible, to establish exactly what is intended.

(2) Be familiar with your firm's standard precedents. The judge made the point that the important power to require a sale was buried at the back of the clause, where the risk of the provision being overlooked was greater than if it were at the front.

(3) Farming cases often involve several different parcels of land. It is impossible to be too careful in identifying exactly what is being given to each beneficiary and to record all discussions and conclusions.

(4) Even in contentious cases executors should take steps to progress the administration of the estate so far as possible. The judge described the administration of the estate lamentable. Nearly six years after the deceased's death, little had been done. However the administration was severely hampered by the animosity between the husband and son which was so great that they refused even to be in the same room with each other. This prevented the valuers from carrying out its valuation, since the executors would not agree who would be present at the valuation. When taking instructions in a less urgent situation, it is important to point out the difficulties warring executors can cause.

(5) Although the judge concluded that the fact that the deceased had used the term 'life interest' meant that he was entitled to infer that she knew,

at least in broad terms, what it meant, the solicitor confirmed that she could not recall giving any advice to the Deceased as to what this meant as opposed to a right to reside. Although the two are identical in inheritance tax terms, they can have very different outcomes for the beneficiary. It is therefore important to establish exactly what the client means.

Crew and another v Oakley and others **[2024] EWHC 2847 (Ch)**

Mrs Carry Keats made a Will in 2020, appointing the claimants, Angela and David Crew, as executors and residuary beneficiaries. She had made a number of Wills with the same solicitors over the years. She fell out with the claimants and in November 2021 gave instructions for a new will cutting them out. She did not include her sister, Josephine, as a beneficiary in any of the wills. She had a love/hate relationship with Josephine, who had received significant lifetime gifts from her over the years.

- On 26th January 2022, Mrs Keats was visited in hospital by her solicitor, to discuss making a new Will.

- Mrs Keats tore through three-quarters of the 2020 Will, but was unable to complete the task. The solicitor asked if she should complete the tearing and Mrs Keats nodded. at Mrs Keats' direction.

- The solicitor started to take instructions for a new will, but Mrs Keats lost capacity during the meeting, and no new will was made. The solicitor explained that Mrs Keats was now intestate and that Josephine would inherit everything and Mrs Keats said happy with that.

The court accepted the solicitor's evidence, finding her to be a convincing and impartial witness who was satisfied that Mrs Keats had capacity at the time of the revocation. The court relied on the solicitor's contemporaneous attendance note and her experience in dealing with testamentary capacity. The court did accept that the bulk of the attendance note related to the wishes for the new will rather than the destruction of the old one. Deputy Master Linwood said:

> *"it may be appropriate for solicitors in such circumstances to record their attendance by video on a telephone or other electronic device, subject to permission and the privacy of others who may be there".*

- The court found that Mrs Keats met the ***Banks v Goodfellow*** test for capacity, understanding the nature of making a will, the extent of her property, and the claims of potential beneficiaries. Her instructions to the solicitor regarding the disposition of her estate demonstrated that she had weighed the claims of beneficiaries.

- The court held that Mrs Keats had the intention to destroy the will, as evidenced by her actions and her positive communication to Mrs Webb through a nod to complete the tearing. This constituted the required authority. The decision in ***Barrett v Bem*** [2012] EWCA Civ 52 had accepted that a direction did not need to be verbal.

The case emphasises the importance of contemporaneous and detailed records in probate disputes. The solicitor's attendance notes were instrumental in establishing both the act of revocation and Ms. Keats' testamentary intentions and capacity at the moment she tore the will. The Judge gave weight to the solicitor's testimony. The longstanding relationship between Ms Keats and her solicitor, combined with the solicitor's experience in drafting wills, further strengthened the credibility of that evidence.

This judgment emphasises the critical role that experienced practitioners play in complex situations such as revocation of a will and assessment of testamentary capacity. If Ms Keats had not revoked her Will in the presence of the experienced practitioner who knew her well, the outcome could have been very different.