Introduction to Will Drafting for Accountants

MONDAY, 28 OCTOBER 2019

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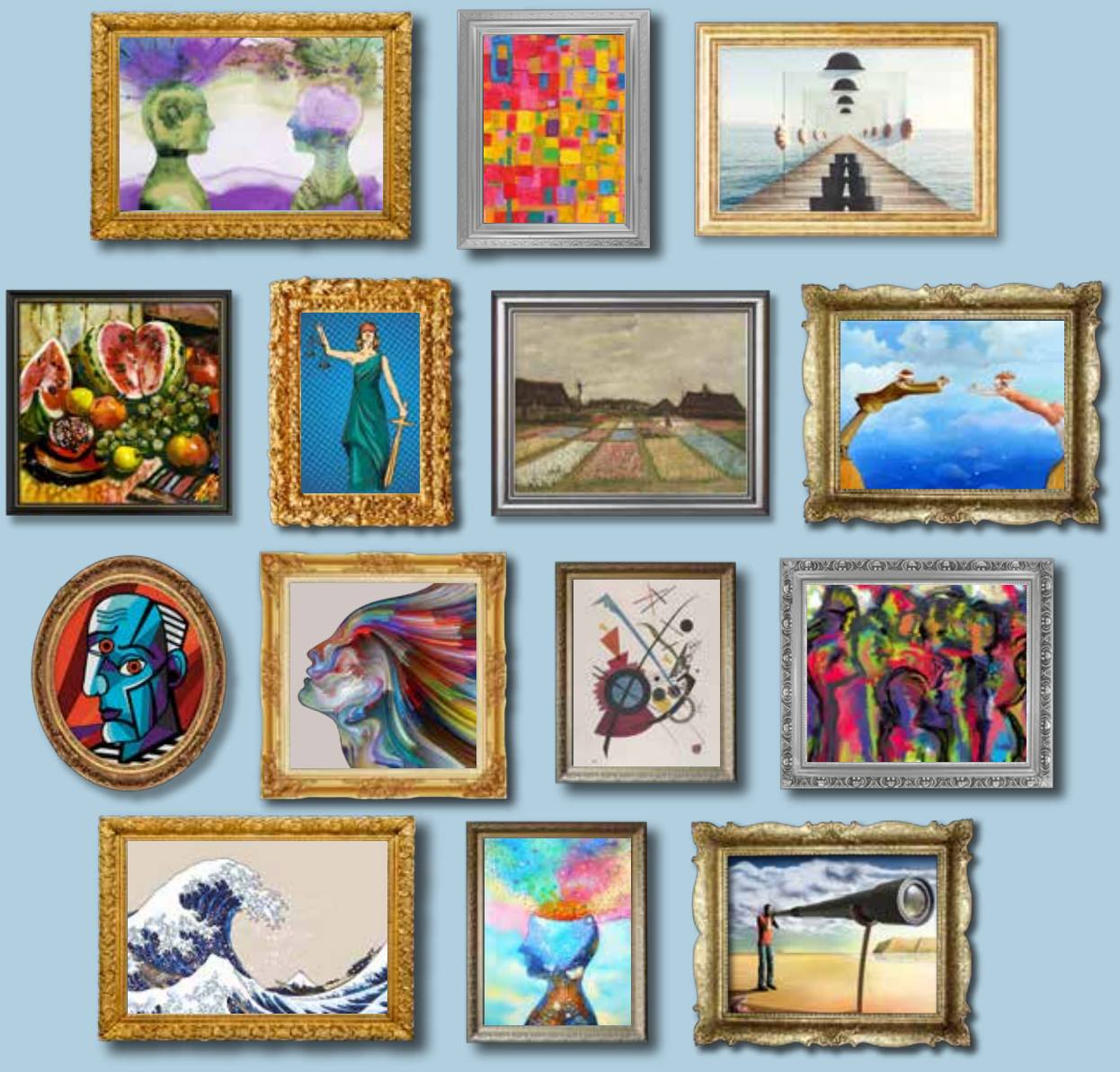

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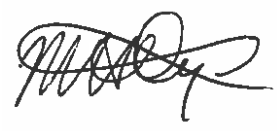

Marcia Dyce
Communities Manager, ICAEW

Agenda

Time	Session
09:00	Registration
09:30	Formal requirement for wills; When to use life interest trusts; When to use discretionary trusts; Taking instructions for a will – who is the client?, family, size of estate, who does the client wish to benefit; Capacity to make a will and knowledge and approval of the contents; Undue influence: Conflict of interest – couples may have different wishes; Does client have an equitable interest in a house vested in the name of someone else? Does someone else have an equitable interest in a house vested in the name of the client? The difference between joint tenants and tenants in common; The imposition of a trust in case of co-ownership of a house of land; Possibility of a claim under the Inheritance (Provisions for Family and Dependants) Act 1975 - duty to warn clients, statements about why testator is cutting out a relative
11:00	Refreshment Break
11:15	The basic structure of a will; Wills in contemplation of marriage/civil partnership, conditional on the marriage/partnership taking place; Revocation clauses; The choice of executors/trustees, advantages and disadvantages of the possible appointees; Appointment of the partners in the firm as executors; Charging clauses; Funeral wishes; Appointment of guardians; Drafting points with regard to specific gifts – ademption, difference between specific gifts and general legacies, generic gifts, who bears the cost of transfer; Gifts of personal chattels; Incorporation of documents; Precatory trusts;
12:45	Lunch

13:45	Drafting points with regard to gifts to minors – vested or contingent, named or class gifts, express substitution clauses and s 33 Wills Act 1837, who is included in a gift to children, adopted children, bereaved minors trusts; Gifts of residue – why is it given to executors/trustees on power to retain and sell it? Survivorship clauses – are they necessary? Can they cause problems? Conditional gifts/determinable interests; Residence nil rate band and its effect on drafting wills; Powers of personal representatives/trustees, and reasons for amending the implied powers; the STEP standard provisions; Use of punctuation in wills; Is it in order to draft a will benefitting yourself?
15:15	Refreshment Break
15:30	Demonstration of ICAEW accredited will drafting software – Arken.legal
17:00	Event Close

Speaker Biography

John Thurston, LL.B., TEP, Solicitor

John is particularly interested in the law relating to wills, trusts, taxation, powers of attorney and elderly clients. He is the author of "*A Practitioner's Guide to Powers of Attorney*", "*A Practitioner's Guide to Trusts*", "*A Practitioner's Guide to Inheritance Claims*" , *"A Practitioner's Guide to Executorship and Administration"* and *"Estate Planning for the Middle Income Client"* all published by Bloomsbury Professional. He is also a contributor to *"Tolley's Administration of Trusts" "Tolley's Administration of Estates"* and '*Tolley's Accountants Legal Service",* and contributed a section to *"Tax Efficient Will Drafting"* published by LexisNexis Butterworths. He is also a frequent presenter of training courses for solicitors and other professionals.

Introduction to will drafting.

Delegates' notes.
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Terminology.

Will – a document intended to take effect on death.

Codicil – a supplemental will.

Executors – persons appointed by will to get in the assets of the testator, to pay the debts of the testator, and then distribute the assets to those entitled under the will.

Bequest or legacy – a gift of personal property or money in a will.

Devise – a gift of land.

Pecuniary legacy – a gift of money.

Specific gift – a gift of assets distinguished from other property.

Residue or residuary estate – a gift of anything left.

Attestation clause – clause at the end of the will reciting the requirements for execution of a will.

Intestacy – no valid will.

Partial intestacy – will, but it does not dispose of all of the property of the deceased.

Administrators – where will does not appoint executors, or there is no will, the court will appoint administrators to deal with the estate.

Grant of probate – confirmation by the court that a will is valid, and the appointment of the executors.

Grant of letters of administration – grant by the court when there are no executors. Grant confers authority on administrators.

Trust – this is where persons are appointed as trustees to hold assets for the benefit of others or possibly themselves.

Formalities.

Section 9 of the Wills Act 1837 provides that no will shall be valid unless

(a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and

(b) it appears and that the testator intended by his signature to give effect to the will; and

(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(d) each witness either -

(i) attests and signs the will; or

(ii) acknowledges his signature in the presence of the testator (but not necessarily in the presence of any other witness) but no form of attestation shall be necessary.

The word signature has been given a very wide meaning by the courts.

The testator can authorise someone else to sign the will on his behalf.

The other person must sign the will in the presence of the testator and by his direction.

The other person can sign the will using the name of the testator or his or her own name.

Section 9 requires and that the testator must intend by his signature to give effect to the will. This means that the signature can appear anywhere in the will, and the will will be valid provided that the testator intended to to give effect to the will by his signature.

It is not necessary for the witnesses to know that the testator is signing a will.

A testator can also acknowledge his signature.

The acknowledgement can be made orally, or by conduct.

Section 9 requires that each witness must attest and sign the will in the presence of the testator.

There are no rules laid him down in the Wills Act as to who can act as a witness.

The only requirement is that they should understand what is going on.

Note that a beneficiary or the spouse/civil partner of a beneficiary under the will should not witness it. If they do, they will not be able to take any benefit under the will.

It is usual to include an attestation clause in a will.

A will without an attestation clause will still be valid, but if the executors seek to prove the will, they will probably have to produce an affidavit of due execution setting out the circumstances in which the will was executed.

The best practice is for the client to attend at the office of whoever drafted the will in order to sign it.

Where this is not possible, there will should be sent to the testator with very clear instructions as to how it should be executed.

These instructions should include a warning that the will should not be witnessed by a beneficiary under the will or the spouse/civil partner of such a beneficiary.

Uses/advantages/disadvantages of different gifts.

Spouse—absolute or life interest? (spouse includes civil partner).

Uses.

Life interest - second or subsequent marriages with children from previous marriages.

Advantages.

Absolute gift - simple. Usually double NRB available on death of survivor.

Life interest - control of ultimate destination of assets. Usually double NRB available on death of survivor.

Disadvantages.

Absolute gift - loss of control

Life interest - inflexible, but this can be mitigated by extending powers of trustees.

IHT.

It makes no difference, as far as IHT is concerned, whether the spouse has an absolute interest or only a life interest. The spouse exemption applies in both circumstances.

If the spouse has an absolute interest, the spouse can make use of the *inter vivos* exceptions from IHT and, in addition, can make PETs. A spouse with a life interest can also do so if the trustees' powers are wide enough.

Capital gains tax.

Where a spouse has an absolute interest, any gain belongs to the spouse.

Where a spouse has a life interest, any gain belongs to the trustees. The trustees will be entitled to half the annual exemption, but the rate of tax on the gains will be 20/28 per cent.

The spouse will also be entitled to the annual exemption in his or her own right.

Income tax.

It makes no difference, as far as income tax is concerned, whether the spouse has an absolute interest or only a life interest.

Nil rate band gift.

A very effective method of saving IHT is for the will to contain a legacy up to the nil rate band to the children, or trustees, with the residue to the spouse.

Uses.

Wealthy clients who can afford to give such a legacy, and provide adequately for survivor.

Advantages.

Tax efficient assuming NRB does not increase.

Gives assets to next generation at a time when needed.

Disadvantages.

If NRB increases, it is not a good idea to make use of NRB of first spouse to die.

NRB discretionary trust.

This is where an amount not exceeding the nil rate band is settled on a discretionary trust for the benefit of the spouse and children with the residue going to the spouse.

Uses.

NRB discretionary trusts once very common with power for trustees to take an IOU or impose a charge. Not so common now because of the transferable nil rate band.

Advantages.

Preserves NRB of first spouse to die.

Flexibility - if beneficiaries have financial or matrimonial difficulties, trustees can wait until these issues have been resolved before distributing the assets.

Disadvantages.

Loss of control.

Inheritance tax.

No inheritance tax falls due on creation, but there is a possibility of a charge on distributions and on each tenth anniversary. However, the amount of IHT payable should be small.

When a beneficiary dies, the trust property will not form part of the beneficiary's estate for IHT purposes.

Capital gains tax.

The trustees will be entitled to half of the annual exemption available to an individual.

If the trustees dispose of any assets, and become liable to CGT, the rate of tax is 20/28 per cent.

Death normally wipes out any capital gain, so that a beneficiary acquires the assets at market value as at the date of death. This will not happen with discretionary trusts.

Income tax.

The trustees will pay income tax at 45/38.1 per cent, but if the income is paid to a beneficiary who is not a basic rate taxpayer, the beneficiary will be able to recover the tax paid.

Uses.

NRB discretionary trusts once very common with power for trustees to take an IOU or impose a charge. Not so common now because of the transferable nil rate band.

Discretionary trust.

Uses.

To provide for beneficiaries where it is desirable not to give them absolute interests, eg a beneficiary with severe learning disabilities.

Advantages.

Flexibility - if beneficiaries have financial or matrimonial difficulties, trustees can wait until these issues have been resolved before distributing the assets.

Disadvantages.

Loss of control.

IHT.

Two-year discretionary trust.

Inheritance tax.

Section 144 of the Inheritance Tax Act 1984 provides that any termination of a discretionary trust within two years of death is not a transfer of value for IHT purposes. Any termination is read back into the will.

IHT may have to be paid on the death of the testator. If there is an appointment in favour of the spouse, the spouse exemption will apply.

Uses.

Flexibility.

Capital gains tax.

There is no special treatment for CGT purposes.

Absolute gifts to children and grandchildren.

HMRC will treat any income and gains as belonging to the children/grandchildren.

Uses.

Gifts to adult children/grandchildren.

Advantages.

Simple.

No taxation implications for trustees.

Disadvantages.

As soon as beneficiaries attain 18, they can call for the assets to be transferred to themselves.

Inheritance tax.

If the beneficiary dies under the age of 18, the property will still form part of the beneficiary's estate for IHT purposes. However, there will be no charge when the beneficiary attains 18, or if the trustees exercise their power of advancement.

Capital gains tax.

Any gain made by the trustees will belong to the beneficiary. There will not be a deemed disposal when the beneficiary attains 18.

Income tax.

Trustees pay income tax at basic rate; depending on his or her income, the beneficiary will be able to recover the tax paid, or may be liable to higher rate tax.

Contingent gifts to children and grandchildren (e.g., 'to my grandson A if he attains 21').

If to children of testator or testatrix, may be bereaved minor's trusts. Could be subject to relevant property regime.

Uses/advantages.

Many clients do not want children/grandchildren to become absolutely entitled to the trust assets on attaining 18.

Disadvantages.

Tax.

Vulnerable beneficiaries.

There is special tax treatment for trust for vulnerable beneficiaries, but various conditions have to be satisfied.

Taking instructions.

Points to consider:

- Who is the client?
- Conflict of interest?
- Capacity
- Undue influence
- Family
- Assets
- Joint tenants or tenants in common
- Equitable interests
- IHT
- Possibility of claims under the 1975 Act

What does client want?

Capacity/undue influence.

Banks v. Goodfellow (1870) LR 5 QB at 565.

Cockburn CJ:

“It is essential … that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties -- that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it, which if the mind had been sound, would not have been made.”

D’eye v Avery [2001] WTLR 227 CHD

Mr Burley was a keen dancer and one of his regular partners was the Plaintiff. He was a bachelor. He suffered a massive stroke in December 1986, and a cousin, Mrs Harvey, was appointed his receiver.

Mr Burley’s doctor had certified that he was incapable of managing and administering his property and affairs, but had struck out the words “by reason of mental disorder as defined in the Mental Health Act”. He was of the opinion that there was no mental disorder, but that because of the stroke Mr Burley was incapable of making himself understood.

The Plaintiff took Mr Burley to a bank, where he gave instructions for a will under which the Plaintiff was the sole beneficiary, with a gift over to charity should she predecease Mr Burley. Mr Burley merely confirmed what he wanted by pointing at the Plaintiff. He later returned to the bank to execute the will with the Plaintiff, but it was not read to him. After Mr Burley's death, the original will could not be found, but the Plaintiff sought to prove a copy.

It was held that there was no room for the presumption of revocation, because there was no evidence that Mr Burley had ever had the will in his possession.

It was also held that whilst he had capacity to make a will, he did not have the necessary knowledge and approval.

Sharp v. Adam [2006] WTLR 1059.

T suffered from secondary progressive multiple sclerosis. He was divorced, but had two daughters. He owned a successful stud farm. Although one of the daughters lived in America, he was in contact with both of them.

In 2001 he executed a will disinheriting his two daughters, and giving the bulk of his estate to two employees, S and B, who had run the stud farm under his direction for some years. When he executed the will, he could not speak and communicated through his carer by means of nods. A solicitor drafted the will, and arranged for T's general practitioner to be present when the will was executed. The general practitioner considered that he had capacity to make the will.

The validity of the will was challenged. There was conflicting expert evidence as to

whether T had capacity. It was held that he did not have capacity.

Mental Capacity Act 2005.

Section 2(1) provides that a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. It is immaterial whether the impairment or disturbance is permanent or temporary [section 2(2)].
Section 2(3) provides that a lack of capacity cannot be established merely by reference to–

(a) a person´s age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.

If there are any proceedings to determine if a person has capacity, then it must be decided on a balance of probabilities [section 2(4)].

Section 3 defines what is meant by the inability to make decisions. Section 3(1) provides that a person is unable to make a decision for himself if he is unable-

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

Section 3(3) provides that the fact that a person is unable to retain the information relevant to a decision does not prevent him from being regarded as able to make the decision.

Section 3(4) provides that the information relevant to a decision includes information about the reasonably foreseeable consequences of –

(a) deciding one way or another, or

(b) failing to make the decision.

Section 1 prescribes various principles, which apply for the purposes of the Act. They are:

A person must be assumed to have capacity unless it is established that he lacks capacity;

A person is not to be treated as unable to make a decision unless all practicable steps help him do so have been taken without success.

A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

> Before the act is done, or the decision made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Scammell v. Farmer [2008] EWHC 1100 (Ch).

The testatrix made a will in 1995 substantially benefiting the claimants. In 2003, she executed another will substantially benefiting the defendant. The validity of this will was challenged by the claimants. There was evidence that the testatrix had the early stages of dementia. There was also evidence that the defendant had been instrumental in securing the execution of the 2003 will. The defendant had also destroyed the 1995 will and any copy.

It was argued that the test of capacity under the Mental Capacity Act 2005 should be applied in order to decide if the testatrix had capacity to make a will. This was rejected by a judge as he did not feel that that this test was appropriate when considering wills, and in addition as the will was executed in 2003, it would be retrospective legislation.

On the facts, it was held that the testatrix did have capacity to make the will.

It was also held that the circumstances surrounding the execution of the will were suspicious, but that the defendant had discharged the burden of proving that the testatrix knew and approved of the contents of the will.

It was also held that the testatrix was not coerced into making the will.

A solicitor had prepared the 2003 will. The judge referred to the "Golden Rule" as laid down by Templeman J in ***Kenward v. Adams:***

> "When a solicitor is drawing up a will for an aged testator or one who has been seriously ill it should be witnessed or approved by a medical practitioner, who ought to record his examination of the testator and his findings. That was the golden if tactless rule ... Other precautions were that if there was an earlier will it should be examined, and any proposed alterations should be discussed with the testator."

The judge also referred to ***Cattermole v. Prisk*** where Judge Norris observed:

> "This 'golden rule' provides clear guidance as to how, in relevant cases, disputes can be avoided, or minimised (with the material relevant to the determination of the dispute contemporaneously recorded and preserved). The 'golden rule' is not itself a touchstone of validity and is not a substitute for the established tests of capacity and of knowledge and approval that I have summarised in the two preceding paragraphs."

It was held that there had been no breach of the "Golden Rule".

In the estate of Robert Perrins deceased [2009] EWHC 1920 (Ch)

The testator suffered from multiple sclerosis, and executed a will in favour of his carer/cohabitee cutting out the son of his marriage. It was alleged that the testator did not have capacity when he signed his will.

It was held that he did have capacity when he gave instructions for his will, and that he

knew the will was in accordance with his instructions when he signed it.

It was also stated obiter that the test for capacity to make a will should be the test of ability to make a decision in MCA.

Perrins v. Holland [2010] EWCA Civ 840.

On appeal, it was argued that Parker v. Felgate was wrongly decided, and that a testator must have mental capacity both at the time when instructions were given for a will, and when it was executed.

This was rejected by the Court of Appeal It was held that it was sufficient for a testator to know and approve of the contents of a will at the time of execution. The testator did not have to have full capacity then.

Key v. Key [2010] EWHC 408 (Ch).

K's wife died after 65 years of marriage. There were four children of the marriage, two sons and two daughters. K was a farmer and had given land to the sons. He had made wills substantially benefiting his sons. There was evidence that he was confused, and devastated by the death of his wife.

A few days after the death of his wife he executed a will substantially benefitting his daughters. C, the solicitor who prepared the will, did not obtain a medical report about the capacity of K.

On the face of it, the will in favour of the daughters ensured equal treatment between the children.

It was held that K did not have capacity to make the will, or the necessary knowledge and approval.

Briggs J was very critical of C for not doing more to check that K had capacity.

He also stated that it was for the court to decide if a testator had capacity, not expert witnesses.

ABC v. XZ [2013] WTLR 187.

X, who had substantial wealth, was diagnosed with dementia shortly after the death of his wife of 56 years. He granted a lasting power of attorney in favour of his three children, A, B and C. Z was employed as his full time carer from July 2010. and three months later X said that he wanted to marry Z. This caused a rapid deterioration in family relationships, and resulted in an application to the court for a determination of whether X had capacity to marry, to make a will, to make or revoke a power of attorney, to manage his property and affairs and to litigate.

Hedley J quoted the decision of Mumby J in Sheffield City Council v. E [2005] 2 WLR 953 with approval. He also agreed with Mumby J that the test for capacity to marry must not be set too high as it would deprive people of limited or borderline capacity the benefits of marriage. On the facts, it was held that X did have the capacity to marry.

With regard to the question of whether X had capacity to make a will, Hedley J refused to make a general declaration. He was of the view that many times X would not have the capacity to do so, but other times might. He stated that any will made by X would be open to challenge unless accompanied by contemporary medical evidence asserting capacity.

Hedley J also stated that he was not satisfied that X did not have capacity to revoke the power of attorney in favour of the applicants (the registration had been cancelled). As with testamentary capacity, he refused to make a general declaration that X lacked capacity, but qualified that by stating that the grant or revocation of a power of attorney could be challenged unless accompanied by contemporary medical evidence asserting capacity.

With regard to managing his affairs, Hedley J said that whilst most of his financial affairs were delegated to advisers, they were only advisers. Managing financial affairs was an ongoing business, unlike the specific act of making a will or granting a power of attorney. It was held that X did not have capacity to manage his affairs.

In Masterman-Lister v. Brutton & ors [2003] 1 WLR 1511 Chadwick LJ said at para 75:

> "The test to be applied, as it seems to me, is whether the party to the legal proceedings is capable of understanding, with the assistance of proper explanation form legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of the proceedings."

It was held that X did not have capacity to litigate.

<u>In the matter of Louisa Ann Ashkettle [2013] WTLR 1331.</u>

A left two wills, one made in 1986 dividing her estate between her three children, and one in 1999 giving her whole estate to her daughter Rosalind. Her sons, Robert and Dennis challenged the validity of the 1999 will on the grounds that the will had not been properly executed, that A lacked mental capacity, that A did not know and approve of the contents of the will and that there had been undue influence.

A solicitor, S, had taken instructions for the will, but his will file had been destroyed. He could not remember in detail what had happened. He had signed the will on behalf of A. Rosalind maintained that A did have capacity to make the will, but Robert and Dennis provided evidence that A's mental state deteriorated from 1995, probably because of Alzheimer's disease. There was also medical evidence that people suffering from that disease were good at maintaining a facade to hide the disease.
It was held:

1. On hearing the evidence, A had directed S to sign the will on her behalf.
2. A did not have capacity to make the will.
3. A did not know and approve of the contents of the will.

Because of the findings by the judge, she did not give any ruling on the allegation of undue influence.

<u>Fischer v. Diffley and anor [2014] WTLR 757.</u>

The deceased executed two wills, one in March 2009 and the other in 2010 under which

the defendants had a life interest in the whole estate. Under the 2009 will, the remainder passed to the Battersea Dogs Home, but under the 2010 will the remainder went to the deceased's family in Germany. The deceased had substantial assets in England and Germany. A longstanding friend had prepared both wills; he had since died. There was conflicting evidence as to whether the deceased had mental capacity at the time, but three medical experts were of the opinion that she did not.

It was held that both wills were invalid. HHJ Dight said the he had to apply both Banks v. Goodfellow and the test for capacity under the Mental Capacity Act 2005. The burden of proof was on the defendants to prove the deceased had capacity and knew and approved of the contents. He was not satisfied that the deceased had capacity to make both wills or know and approved of the contents.

Walker and anr v. Badmin and ors [2015] WTLR 493.

The testatrix was diagnosed with a terminal malignant brain tumour. She had left her husband to live with Michael Badmin (MB) who was 23 years her junior. There were two daughters of the marriage. She made a will under which MB was a major beneficiary. The will was made by Cooperative Will Writing Services who initially asked three superficial questions to determine if she had capacity, and did not suggest obtaining a medical report, although they were aware of her condition. It was held that she did have capacity to make the will.

Nicholas Strauss QC discussed whether the test for capacity under the MHA should become the test for capacity to make wills, and decided that it should not. He said:

> Under the MCA there is is a presumption that everyone has capacity. With wills the established law is that if a will appears to be rational on the face of it, there is a presumption that the testator had capacity to make the will. However, if a doubt is raised about the capacity of the testator, then the burden of proof is then on those who want to obtain a grant of probate.
>
> The MCA requires that a person should be able to understand all the information relevant to making a decision. This is perhaps more than the common law test requires.
>
> The MCA requires that a person should be able to understand the reasonably foreseeable consequences of the choices open to him. Again, perhaps this is more than the common law requires.
>
> 4. The MCA is designed to deal with whether a living person can make decisions.

Kostic v. Chaplin and others [2007] EWHC 2298 (C).

The testator believed that there was an international conspiracy of dark forces against him in which his wife, mother and sister were implicated. He left a will giving his entire estate to the Conservative Party.

It was held that these delusions meant that he did not have the capacity to make a will.

Walters v. Smee [2008] EWHC 2029 (Ch).

The deceased had no close relatives, but Mr and Mrs Walters looked after her. She had a will benefiting them, but shortly before her death she executed the will in favour of old friends, Mr and Mrs Smee.

There was evidence that the deceased had concerns about the behaviour of Mr Walters, but it was held that these concerns were to a large extent without foundation. However, it was these concerns which had prompted the deceased to change her will.

It was held that delusions had affected the capacity of the deceased to make a will, and her last will was held to be invalid.

It was also held that promises had been made to Mr and Mrs Walters, and that they had acted to their detriment relying upon that promise, and accordingly were entitled to the estate of the deceased.

Undue influence.

In re Good deceased, Carapeto v.Good and others [2002] WTLR 801, [2002] WTLR 1305.

A challenge to a will failed. It was held that the losing parties should pay one half of the costs of the claimant. “An alternative costs order might be made where the testator or those interested in the residue had been the cause of the litigation or if the circumstances led reasonably to an investigation.”

G had made a will under which she gave her residuary estate to C and her husband, with some specific legacies for her family. C had been the housekeeper for G for twenty years, and there was close bond between them. It was conceded that G had testamentary capacity, but it was alleged that G did not know and approve of the contents of the will, and that she had been unduly influenced by G. These allegations were rejected.

With regard to undue influence, the judge said that it meant coercion. Legitimate persuasion is permissible. “The defendants have to show that, one way or another, the Carapetos so manipulated Miss Good that she felt that she had no choice but to make the May will”.

IN THE MATTER OF THE ESTATE OF WINIFRED VICTORIA EDWARDS (DECEASED)
JOHN EDWARDS
Claimant
- and -

TERENCE JAMES EDWARDS
ELIZABETH MAUD COOMBES
THE PARTNERS OF KTP SOLICITORS
Defendants [2007] EWHC B4 (Ch)

This was a dispute between the two sons of the testatrix about the validity of a will benefiting one of her sons, Terry. There was some evidence that Terry might have turned his mother against his brother, and the will was held to be invalid.

Mr Justice Lewison said:

i) In a case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;

ii) Whether undue influence has procured the execution of a will is therefore a question of fact;

iii) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition;

iv) In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud.

v) Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense;

vi) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A "drip drip" approach may be highly effective in sapping the will;

vii) There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is "fraudulent calumny". The basic idea is that if A poisons the testator's mind against B, who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the will is liable to be set aside;

viii) The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. In my judgment if a person believes that he is telling the truth about a potential beneficiary then even if what he tells the testator is objectively untrue, the will is not liable to be set aside on that ground alone;

ix) The question is not whether the court considers that the testator's testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent.

Knowledge and Approval of Will.

Gill v. Woodall, Lonsdale and RSPCA [2009] EWHC B34(Ch).

H and W made mirror image wills under which each gave his or her estate to the other with a default gift to the RSPCA. H died first. G, a daughter, challenged the will of W.

It was held the W know and approved of the contents of the will, but that there had been coercion. It was held that the will was invalid.

G also alleged that her parents had promised her that the farm would one day be hers, and that she had acted to her detriment relying on that promise. This claim also succeeded.

Gill v. Woodall and Lonsdale [2010] EWCA Civ 1430.

On appeal, it was held that the will was invalid.

The judge at first instance had held that the testatrix did know and approve of the contents of the will, but had been unduly influenced into making the will. The Court of Appeal held that the testatrix did not have the necessary knowledge and approval of the contents of the will. This was because there was no evidence that the testatrix had ever read the will when it had been sent to them, and in addition, when she signed the Will, her mental state was such that she would not have understood it.

In the estate of Abbie Hinch deceased [2013] EWHC 13 (Ch).

The testatrix had four children, Stephen, Victoria, Francis (Frank) and Anthony who predeceased her. Frank lived with the testatrix and cared for her. She did make a will through a solicitor in 1996 under which she appointed Victoria as sole executrix, and after some legacies, divided her residuary estate equally between her three surviving children.

In 2004 she made a will through a firm of will writers under which Frank was appointed as sole executor, and the residue went to Frank with a gift over in default to Stephen and Victoria.

Stephen and Victoria challenge the validity of the 2004 will on the ground that the testatrix did not know and approve of the contents of the will.

The firm of Will writers who had prepared this will had gone out of business, and the employee who had dealt with the will could not be contacted.

Stephen and Victoria alleged that Frank drank to excess and was tyrannical.

A retired professor of geriatric medicine and the general practitioner of the testatrix were of the view that the testatrix had mental capacity. There was also other evidence that the testatrix had capacity at the time she executed the 2004 will.

It was held that where a will appears to be rational on the face of it, there is a presumption that the testatrix knew and approved of the contents, unless there are circumstances which excite the suspicion of the court. It was also held that it is possible to find knowledge and approval with regard to part of a will, but not with regard to other parts.

On the facts, it was held that there was nothing to excite the suspicion of the court with regard to the 2004 will.

There was also some evidence that she might have wanted to include a gift of her jewellery in the will. However, the judge was not satisfied that she believed her intentions with regard to the jewellery were included will.

It was also held that it was difficult to see how the doctrine of partial knowledge and approval could apply where the relevant clause has been omitted from a will.

Practice points.

1. Usually there will be no doubt client has capacity.

2. If in doubt, spend time with them to see if they have capacity.

3. If still doubtful, suggest that it would be desirable to obtain medical report, but client will have to agree.

4. If will is likely to be challenged, again suggest a medical report.

5. A terminally ill person can still make a valid will, but if in doubt, get a medical report. However, what should you do if there is not time to get a medical report?

Conflict of interests.

Couples often want mirror image wills, particularly if it is a long marriage and there are children and grandchildren of the relationship. However, if if is a second or third marriage one or both with children from previous marriages, and children from the current marriage, they may have very different ideas about the content of wills.

Try to get them to agree. If not possible, may have to instruct different firms.

Transfer into the name of one party.

If a house is transferred into the name of one party financial contributions will give the other party an equitable interest in the property in the absence of any agreement.

Promises may also give the non-owning party an equitable interest.

It may be that the home has been transferred into the name of one party, whilst the other party has contributed towards the purchase price. If it is the wife who has contributed, then the effect is that the husband will hold the property on trust for both of them in equity. If it is the husband who has contributed to the purchase price, there is a rebuttable presumption that he intended to advance the money to the wife. Is this still good law?

Financial contributions towards the cost of a house will probably give rise to an equitable interest in the property. However, anything less than that will probably not give a spouse or civil partner or cohabitee an equitable interest in the property in the absence of any agreement.

Lloyds Bank v Rosset [1991] 1 AC 107.

The House of Lords stated that the first aspect to be considered was whether there has been any agreement as to the shares in the matrimonial home.

If there was no agreement, then only financial contributions would give a non owning party an equitable interest.

Mollo v. Mollo [2000] WTLR 227.

AM and CM married in 1966, and had two children. They divorced in 1987, and met for the first time after the divorce in 1992. CM then visited her sons, and was horrified by their living conditions. She decided to purchase a house to be divided into three flats, one for each son, and one for the use of AM and CM when they came to this country. The house was purchased in her name, and she made it clear that she expected AM to contribute one half of the price. AM could not afford to do so, but he did contribute towards the costs, and paid the cost of improvements, most of which he carried out himself.

CM then locked AM and the sons out of the property. It was agreed that it should be sold.

AM and the sons claimed an equitable interest in the property.

It was held that the sons did not have any equitable interest in the property as there was no evidence that there was any intention that the boys should have any such interest, and they had not contributed to the purchase price.

AM had contributed money and worked on the property. On a broad brush approach, he was entitled to 25% of the proceeds.

Jones v, Kernott [2009] EWHC 1713 (Ch)

This was a dispute between two cohabitees as to the shares in which they owned a house which had been their home until the relationship broke down in 1993.

It was held that the parties owned the house in the proportions 90:10.

Kernott v. Jones [2010] EWCA Civ 578.

K appealed to the Court of Appeal. It was held that the parties owned the property in the proportions 50:50.

J accepted that when the parties separated they owned the property in equal shares. The question was whether there was any evidence of any intention to vary this. It was held that there was not.

Jones v. Kernott [2011] UKSC 53.

The Supreme Court has overturned the decision of the Court of Appeal, and restored the decision of the judge at first instance.

Lord Walker and Lady Hale said at para 51:

"1. In summary, therefore, the following are the principles applicable in a case such as this, where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests.

(1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.

(2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.

(3) Their common intention is to be deduced objectively from their conduct:

"the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party" (Lord Diplock in *Gissing v Gissing* [1971] AC 886, 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v Dowden*, at para 69.

(4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, "the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property": Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, para 69. In our judgment, "the whole course of dealing … in relation to the property" should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties' actual intentions.

(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4))."

Lord Walker and Lady Hale also made the point that there was a difference between the

situation where property was vested in the joint names of the parties, and where it was in the name of one party to a relationship. If it was in joint names, there is a presumption of a joint tenancy in equity. If it is in the name of one party to a relationship, the other party has to prove that they have an equitable interest in the property.

Their other Lordships to a large extent agreed, although Lord Wilson thought that Lady Hale's emphasis on a fair result was going too far. The court should try to infer the intention.

Estoppel.

In Wayling v. Jones [1995] 2 DLR 1029 a claim based on proprietary estoppel succeeded. Balcombe LJ said at page 1031-1032:

> "(1) there must be a sufficient link between the promises relied upon and the conduct which constitutes the detriment...
>
> (2) the promises relied upon do not have to be the sole inducement for the conduct: it is sufficient if they are an inducement.
>
> (3) once it has been established that promises were made, and that there has been conduct by the plaintiff of such a nature that inducement may be inferred then the burden of proof shifts to the defendant to establish that he did not rely on the promise."

Gillett v. Holt [2000] 2 All ER 289.

G worked as farm labourer for H relying upon promises that he would be left the farm. G and H fell out.

G successfully sued to enforce the promises.

Robert Walker LJ said at page 301:

"Moreover, the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round."

Jennings v. Rice [2001] WTLR 871.

J worked for R as a gardener and handyman. Originally, he was paid by the hour, but this stopped in the late eighties. J did ask for money, but R told him that he would be alright, and that she would leave him her house. In the last few years of R's life, J helped to feed and dress her, and stayed the night in her house.

R died intestate a widow without any children. She had lost contact with her other relatives.

J applied under the 1975 Act, but this claim was unsuccessful.

However, a claim based on proprietary estoppel succeeded. He was awarded a lump sum of £200,000, which was calculated in the basis that it would have cost about £25,000 per annum to provide her with nursing care.

The Court of Appeal has dismissed an appeal by J.

Campbell v. Griffin [2001] WTLR 981.

C, who had spent part of his childhood in a children' home, became Mr. and Mrs. A's lodger. Initially, this was a commercial arrangement, but gradually Mr. and Mrs. A came to regard C as their son. He helped with domestic chores, and towards the end of Mr. and Mrs. A's life became their carer. Both Mr. and Mrs. A made promises to him that he would have a home for life.

It was held that the doctrine of proprietary estoppel applied, and C was awarded £35.000 from the proceeds of sale of the house [about £160,000].

The court held that once it was proved that promises had been made, and that there had been conduct by the applicant of such a nature that inducement may be inferred, then there is a presumption of reliance.

Grundy v. Ottey [2003] WTLR 1253.

A was an alcoholic, who had a quasi matrimonial relationship with O. This lasted from 1996 to 1999. In 1997/1998 the deceased made promises to O that on his death she would have a life interest in his houseboat, and a flat in Jamaica. The deceased died in 2000.

It was argued that O had merely behaved in a manner which could be expected of someone living in a quasi matrimonial situation, but the judge at first instance found that the applicant had done more than could be expected of a person in this situation in view of the deceased's serious alcohol problem. The applicant had also given up a career as a model and actress to look after the deceased.

The judge at first instance had assessed her expectation as worth about £250,000, but had awarded her £50,000 and the Jamaica flat or £50,000 in default of the flat. Her application under the Inheritance (Provision for Family and Dependants) Act 1975 was dismissed.

The Court of Appeal upheld the award of the judge at first instance as the fact that the parties had separated before the death of A meant that O could not expect the promises to be enforced to the letter.

Hyett v. Stanley and others [2003] WTLR 1269.

F was the sole legal owner of a farm. He separated from his wife in 1988, and in subsequent divorce proceedings she did not pursue a claim in respect of the farm because she understood that it would be given to the two sons of the marriage.

F commenced a relationship with H, and in 1992 at the instance of H, F restructured his finances. F and H executed a legal charge to Barclays Bank which contained a joint and several covenant by F and H to repay the money outstanding. The reason why H had to give the covenant was that her income was required to support the charge. H was concerned about what would happen if the relationship broke down, and F told her that as her name was on the charge she had a right to the farm. H admitted that she was not concerned with what would happen if F died.

An insurance policy on the joint lives of both parties was also taken out.

On appeal, it was held that H was entitled to one half of the farm.

It was also held that the policy had been taken out with the clear intention of repaying the mortgage, and H's claim to be reimbursed for the amount paid to redeem the mortgage was rejected. She was also ordered to pay to the executors an amount they had expended in part redemption of the mortgage.

Thorner v. Curtis [2007] EWHC 2422 (Ch).

The claimant worked for a farmer for many years for no pay. Whilst the farmer may not have made an express promise to leave the farm to the claimant, there was an understanding between them that that would happen. The deceased died intestate.

It was held that the doctrine of promissory estoppel applied, and that the claimant was entitled to the farm.

Mr John Randall QC sitting as a deputy judge of the High Court said:

> "The Court must not allow itself to be tied down with semantics - an assurance is an assurance whether made expressly by words spoken or written, or made by implication from words spoken or written or from conduct. The 'broad inquiry' (as to the ultimate question of unconscionability) which the court must make in any such case will include consideration of whether assurances given (or expectations encouraged) by whatever means were indeed 'tantamount to' promises."

Thorner v, Major [2008] EWCA Civ 732.

The decision of the judge at first instance was overturned by the court of appeal on the basis that there needed to be clear evidence of a promise before the doctrine of promissory estoppel could be applied.

Thorner v. Major [2009] UKHL 18.

The House of Lords overturned the decision of the Court of Appeal.

It was enough that there was a clear understanding the farm would be left to the promise.

It was also held that the promisee was entitled to the whole of the farm even though the deceased had purchased other land. There was no evidence of any intention that the promisee should not have the whole farm.

Bradbury and others v. Roger Taylor and another [2013] WTLR 29.

The deceased lived in a large property in Cornwall. He suggested to the defendants, who were his nephew and niece, that they should move from Sheffield and live in the property. The first defendant favoured the idea, but the second defendant had reservations. The judge at first instance held that the deceased had made representations to the effect that if the defendants moved to Cornwall, he would leave the property to them in his will. Unfortunately, the parties fell out, and the deceased had begun proceedings against them, but died the day before the case was due to be heard.

It had been held by the judge at first instance that the doctrine of proprietary estoppel applied, and that the defendants had acted to their detriment by moving from Sheffield to Cornwall, and were entitled to the whole of the property.

There was a challenge to the findings of fact by the judge at first instance, but the Court of Appeal has confirmed the decision.

Davies v. Davies [2014] EWCA Civ 568.

The appellants were farmers, and the respondent was a daughter. The respondent had worked on the family farm, and had become a very good stockwoman. She fell out with her parents partly because they disapproved of her choice of husbands, which ultimately resulted in a fight between her father and herself in the dairy.

She alleged that promises had been made to her that she would get the farm, and that she had acted to her detriment relying on those promises.

The case depends on its facts, but it was held that this was correct.

A very sad case.

Davies v. Davies [2016] EWCA Civ 463.

In previous proceedings, it had been held that respondent was entitled to some equitable relief under the principles of proprietary estoppel. This case was concerned with how that equity was satisfied. At first instance, the judge has awarded the respondent £1.3. On appeal, this was reduced to £500,000. Lewison LJ said:

> "Inevitably any case based on proprietary estoppel is fact sensitive; but before I come to a discussion of the facts, let me set out a few legal propositions:
>
> i) Deciding whether an equity has been raised and, if so, how to satisfy it is a retrospective exercise looking backwards from the moment when the promise falls due to be performed and asking whether, in the circumstances which have actually happened, it would be unconscionable for a promise not to be kept either wholly or in part: *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 at [57] and [101].
>
> ii) The ingredients necessary to raise an equity are (a) an assurance of sufficient clarity (b) reliance by the claimant on that assurance and (c) detriment to the claimant in consequence of his reasonable reliance: *Thorner v Major* at [29].
>
> iii) However, no claim based on proprietary estoppel can be divided into watertight compartments. The quality of the relevant assurances may influence the issue of reliance; reliance and detriment are often intertwined, and whether there is a distinct need for a "mutual understanding" may depend on how the other elements are formulated and understood: *Gillett v Holt* [2001] Ch 210 at 225; *Henry v Henry* [2010] UKPC 3; [2010] 1 All ER 988 at [37].
>
> iv) Detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances: *Gillett v Holt* at 232; *Henry v Henry* at [38].
>
> v) There must be a sufficient causal link between the assurance relied on and the

detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. The question is whether (and if so to what extent) it would be unjust or inequitable to allow the person who has given the assurance to go back on it. The essential test is that of unconscionability: *Gillett v Holt* at 232.

vi) Thus the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result: *Jennings v Rice* [2002] EWCA Civ 159; [2003] 1 P & CR 8 at [56].

vii) In deciding how to satisfy any equity the court must weigh the detriment suffered by the claimant in reliance on the defendant's assurances against any countervailing benefits he enjoyed in consequence of that reliance: *Henry v Henry* at [51] and [53].

viii) Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application: *Henry v Henry* at [65]. In particular there must be a proportionality between the remedy and the detriment which is its purpose to avoid: *Jennings v Rice* at [28] (citing from earlier cases) and [56]. This does not mean that the court should abandon expectations and seek only to compensate detrimental reliance, but if the expectation is disproportionate to the detriment, the court should satisfy the equity in a more limited way: *Jennings v Rice* at [50] and [51].

ix) In deciding how to satisfy the equity the court has to exercise a broad judgmental discretion: *Jennings v Rice* at [51]. However the discretion is not unfettered. It must be exercised on a principled basis, and does not entail what HH Judge Weekes QC memorably called a "portable palm tree": *Taylor v Dickens* [1998] 1 FLR 806 (a decision criticised for other reasons in *Gillett v Holt*).

There is a lively controversy about the essential aim of the exercise of this broad judgmental discretion. One line of authority takes the view that the essential aim of the discretion is to give effect to the claimant's expectation unless it would be disproportionate to do so. The other takes the view that essential aim of the discretion is to ensure that the claimant's reliance interest is protected, so that she is compensated for such detriment as she has suffered. The two approaches, in their starkest form, are fundamentally different: see *Cobbe v Yeoman's Row Management Ltd* [2006] EWCA Civ 1139, [2006] 1 WLR 2964 at [120] (reversed on a different point [2008] UKHL 55; [2008] 1 WLR 1752). Much scholarly opinion favours the second approach: see Snell's Equity (33rd ed) para 12-048; Wilken and Ghaly Waiver Variation and Estoppel (3rd ed) para 11.94; McFarlane The Law of Proprietary Estoppel para 7.37; McFarlane and Sales: *Promises, detriment, and liability: lessons from proprietary estoppel* (2015) LQR 610. Others argue that the outcome will reflect both the expectation and the reliance interest and that it will normally be somewhere between the two: Gardner: *The remedial discretion in proprietary estoppel – again* [2006] LQR 492. Logically, there is much to be said for the second approach. Since the essence of proprietary estoppel is the combination of expectation and detriment, if either is absent the claim must fail. If, therefore, the detriment can be fairly quantified and a claimant receives full compensation for that detriment, that compensation ought, in principle, to remove the foundation of the

claim: Robertson: *The reliance basis of proprietary estoppel remedies* [2008] Conv 295. Fortunately, I do not think that we are required to resolve this controversy on this appeal.

In *Jennings v Rice* at [45] Robert Walker LJ referred to a class of case in which the assurances and reliance had a consensual character not far short of a contract. In such a case "both the claimant's expectations and the element of detriment will have been defined with reasonable clarity." In that kind of case the court is likely to vindicate the claimant's expectations. Although Robert Walker LJ does not say so in terms, it is implicit that in such a case the claimant will have performed his part of the quasi-bargain. At [47] he referred to another class of case in which:

"… the claimant's expectations are uncertain (as will be the case with many honest claimants) then their specific vindication cannot be the appropriate test. A similar problem arises if the court, although satisfied that the claimant has a genuine claim, is not satisfied that the high level of the claimant's expectations is fairly derived from his deceased patron's assurances, which may have justified only a lower level of expectation. In such cases the court may still take the claimant's expectations (or the upper end of any range of expectations) as a starting point, but unless constrained by authority I would regard it as no more than a starting point."

What is not entirely clear from this passage is what the court is to do with the expectation even if it is only a starting point. Mr Blohm suggested that there might be a sliding scale by which the clearer the expectation, the greater the detriment and the longer the passage of time during which the expectation was reasonably held, the greater would be the weight that should be given to the expectation. I agree that this is a useful working hypothesis."

<u>Davies v. Davies and ors [2015] EWHC 1384 (Ch).</u>

Mr and Mrs Davies owned a farm in Wales, and had five children. One of those children, James, alleged that promises had been made at various times that farm would be left to him, and that he acted to his detriment by working on the farm for low wages, had ploughed profits into the farm by carrying out improvements costing in the region of £177,000 over the years and had given up the idea of a career in the police force. The parents fell out with Cindi, the wife of James, and in 1999 they made wills giving the farm to James until he reached the age of 60 or predeceased, and subject to that to sell farm and divide the proceeds equally between the other children and the children of James. There were independent witnesses who supported James's version of events.

It was held that the doctrine of proprietary estoppel applied, and that James was entitled to the farm but not to a bungalow occupied by his mother. James was making monthly payments to his mother and it was held that he should continue to make those payments.

<u>Moore v. Moore and Till Valley Contracting Ltd [2016] EWHC 2202 (Ch).</u>

Manor Farm Stapleford is a 650 acre arable farm. It had been run by the Moore family for four generations, and since 2008 the farm had been run by Stephen Moore, his father Roger and Till Valley Contracting Limited as a partnership. Stephen already owned 1/2 interest in the farm.

Roger was married to Pamela, and in addition to Stephen, there was also a daughter of the marriage, Julie.

Stephen alleged that Roger had told him that the farm and the farming assets of the partnership would be his one day. The judge, Mr S Monty, stated that he had to determine five questions:

> 14.1. Were promises made by Roger to Stephen to the effect that Stephen would one day have Roger's share of the Farm and the Assets? 14.2. Did S
> on those promises? 14.3. If so, did he rely o
> promises were made, and there was detrimental reliance, would it now be unconscionable for Roger to resile from that position? 14.5. If so, how
> Stephen's interest be satisfied?

Pamela was unhappy that the daughter, Julie, was not getting anything from the farm.

It was held that the promises had been made to Stephen, and for various reasons that he had acted to his detriment relying on these promises, for example by not getting better paid job, and working long hours.

With regard to unconscionability, there was an allegation of bad behaviour by Stephen, but it was held that this was so trivial as to be irrelevant.

It was held that Stephen was entitled to an equitable interest in Roger's share in the farm and farm assets, which included Roger's current and capital accounts, Roger's share of the company cash and profits, and Rogers director's loan account. however, it was also held that Roger and Pamela should remain at Manor Farmhouse as long as that met their needs, with Stephen responsible for maintaining and repairing it. Roger and Pamela should continue to receive a weekly sum of £200, and Stephen should be required to pay from partnership funds for all reasonable health and care cost for Roger and Pamela should the need arise.

Moore & anr v. Moore & anr [2018] EWCA Civ 2669.

The findings of fact by the judge were challenged, but the challenge failed. Henderson LJ quoted Lord Reed in Henderson v Foxworth Investments Limited [2014] UKSC 41, [2014] 1 WLR 260 when he said:

The case was remitted for a further hearing as to how the equity should be satisfied.

Guest v. Guest [2019] EWHC 869 (Ch).

Yet another sad case where a child works on parents' farm for many years relying on promises that they would ultimately inherit the farm. They then fall out.

In this case it was held that such a promise had been made to a child, that he had acted to his detriment relying on the promise and that it would be unconscionable for the parents not be bound by the promise.

It was ordered:

i.50% after tax (see paragraph (iii) below) of the market value of the dairy farming business identified in the Supplementary Report of Ms Dooley dated 25 October 2018 or 50% (after tax) of any actual value realised by, or apportioned to, the sale of that business in consequence of this judgment;

ii) 40% after tax (see paragraph (iii) below) of the market value of the freehold land and buildings at Tump Farm identified in the Reports of Mr McLaughlin dated 8 August and 8 October 2018 or 40% (after tax) of any actual value realised by the sale of that property in consequence of this judgment. If the percentage share is determined by reference to the valuation then the tenure is as stated at paragraph 22 of the first Report save that Tump Farmhouse shall be treated as being subject to a "life interest" in favour of the parents and the survivor of them (on terms that they are responsible for its upkeep for so long as they live there) and Granary Cottage is to be valued on the basis of MR1 and not MV1 or MV2. In the event of the percentage being determined by reference to actual proceeds of sale, the parents shall first be credited with the notional value of the life interest. In the absence of agreement between the parties, that life interest shall be the subject of further independent valuation; and

iii.the percentage share payable to Andrew shall be net of any taxes that either are payable by the parents in respect of their realisation of sale proceeds or would properly have been payable on a sale of the dairy business (per (i) above) and/or Tump Farm (per (ii) above).

Habberfield v. Habberfield [2017] EWHC 317 (Ch).

The claimant was one of the four children of the defendant and her husband who owned a farm in Somerset, Woodrow. She claimed that her father had promised her that she would have the farm. and that she acted to her detriment relying on that promise. The defendant denied that any such promise had been made. The claimant left the farm after a fight with her sister

The judge carefully reviewed the evidence, and decided that the promise had been made, and that the defendant was fully aware that the promises had been made. He also held that the claimant had acted to her detriment relying on these promises - she had worked for low pay and had few holidays. The parents had made an offer to the claimant in 2008. but it was held that she was justified in rejecting it.

The judge also considered what type of award should be made to the claimant. He stated that there was a difference between giving effect to the expectation of compensating for the detriment suffered.

On the evidence, the judge calculated that the claimant's quantifiable reliance amounted to £220,000. However, the judge held that the claimant ought to receive compensation based on what she had been promised. What she had been promised was a viable dairy farm at Woodrow. Woodrow was still occupied by the defendant, her son Andrew, her daughter Sarah, Sarah's husband William and William's son, James.

The value of Woodrow alone including the farmhouse was £1.6 million. Without the farmhouse, the value of the land together with the farm buildings was estimated at one £1,170,000. The judge considered that it would be wrong to separate the farmhouse from the rest of the farm, and force the defendant to move out. He ordered that the claimant should have a cash payment of £1,170,000.

Habberfield v. Habberfield [2019] EWCA Civ 890.

The decision of the judge at first instance was upheld, even though it meant that the farm would have to be sold.

Joint tenants in common.

“I give the residue of my estate to my grandchildren.”

“I give the residue of my estate to my grandchildren as tenants in common.”

Be wary of the class closing rules.

“I give the residue of my estate to such of my grandchildren as shall be living at the date of my death.”

In all cases of co-ownership, the law imposes s trust.

H and W are joint tenants/tenants in common of the house. They will hold the legal estate as joint tenants; in equity they can be joint tenants or tenants in common.

Inheritance (Provision for Family and Dependants) Act 1975.

English law is unusual in permitting testators to dispose of their property in whatever way they think fit. In many jurisdictions, this is not possible.

Persons entitled to claim.

S 1(1) of the 1975 Act prescribes the persons entitled to claim. They are:

> the wife or husband or civil partner of the deceased;
> a former wife or former husband of the deceased who has not remarried
> if the deceased died on or after 1 January 1996, a person, who during the whole of the period of two years ending immediately before the date when the deceased died, was living in the same house hold as the deceased, and as the husband or wife of the deceased; this category now includes same sex couples.
> a child of the deceased
> any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated as a child of the family in relation to that marriage;
> any person (not being a person included in the foregoing paragraphs of the sub-section) who immediately before the death of the deceased was being maintained either wholly or partly by the deceased.

The spouse.

Frequently there will be no doubt that an applicant is the spouse of the deceased.

If there is any doubt, it may be necessary for the court to decide if the marriage is valid.

> For example, if the applicant has been married before, and there was doubt about the validity of the divorce so that the marriage to the deceased might be void, the court may have to decide if the marriage was valid.

A spouse who is not living with the deceased at the date of his death is still entitled to claim. Similarly a spouse who is separated from the other spouse under a decree of judicial separation can also claim.

Former spouses.

A divorced spouse is entitled to claim under the 1975 Act. However, once the spouse has remarried, there is no right to claim. It is immaterial that the remarriage is void or voidable (section 25(5)).

Frequently spouses are barred from claiming against the estate of the other in the divorce.

Similar rules apply to civil partners.

Cohabitees.

This category of applicant is a new one which was added by the Law Reform(Succession) Act 1995.

In order for an applicant to succeed under this head, the applicant would have to prove:

(a) the deceased died after 1 January 1996 and

(b) the applicant must have lived in the same household as the deceased, and
(c) as the husband or wife of the deceased during the whole of the period of two years ending immediately before the date when the deceased died.

Same sex cohabitees are now included.

Re Watson (deceased) [1999] 1 FLR 878.

The parties lived together for some time, but did not have any sexual relationship.

Neuberger J recognised the "multifarious nature of the marital relationship", and said that the court should ask itself whether in the opinion of all persons with normal perceptions, it could be said that that the two people in question were living together as husband and wife. In this case, it was held that they were.

Churchill v. Roach [2003] WTLR 779.

D married in 1954, and had two children. The family home was in Scotland.

D and his wife separated in 1987, and subsequently moved to the Midlands. He purchased a house in Warwick.

He first met the claimant, who was a professional colleague in 1989. She had purchase a house, 7 Ferry Lane, Alveston in 1991.

The deceased and the claimant became lovers in 1992, but they did not cohabit for long. They spent the week in their respective properties, but spent weekends together, usually at the deceased's house.

D entered into a separation agreement with his wife in 1998.

D and the claimant discussed purchasing a property together, and both put their properties on the market. D's house sold first.

The property adjoining 7 Ferry Lane, 5 and 6 Ferry Lane, then came on the market, and was purchased by the deceased in December 1998. Ultimately, a door was made between the two properties in March 1999. Steps were taken to put the properties into joint names, but D died in April 2000 before these could be completed.

D left a will made in 1979 giving his residuary estate to his children.

The claimant alleged that she and D were joint tenants of the property. She also applied under the 1975 Act.

In support of the claim that she was a joint tenant, the claimant alleged a constructive trust or that the doctrine of proprietary estoppel applied. Both these claims were rejected. It was held that there was no evidence that there had been any agreement that D and the

claimant would hold the property as joint tenants. In addition, it was held that there was no evidence that the deceased had given the claimant any assurances which she had relied on to her detriment.

The claim that D and the claimant were cohabiting was also rejected. There was no doubt they had been cohabiting from December 1998, but the 1975 Act required it to start in April 1998. Judge Norris QC said at page 797:

“In the instant case I have no doubt that Arnold and Muriel did enjoy sexual relations. The question in this case, it seems to me, is whether they were living in the same household and living as husband and wife, whatever the state of their sexual relations. It is, of course, dangerous to try and define what “living in the same household” means. It seems to me to have elements of permanence, to involve a consideration of the frequency and intimacy of contact, to contain an element of mutual support, to require some consideration of the degree of voluntary restraint upon personal freedom which each party undertakes, and to involve an element of community of resources. None of these factors of itself is sufficient, but each may provide an indicator.”

It was held that prior to December 1998 D and the claimant had been living in separate households, albeit they had met at weekends.

However, it was held that D had been maintaining the claimant.

It was held that the claimant did not need any income, but it was also held that her income was insufficient to meet her housing needs.

It was held that 5 and 6 Ferry Lane should be transferred to the claimant subject to the payment of £65,000.

The £65,000 was the actuarial value of the family’s interest in the house if the claimant had been given a life interest terminable on marriage or cohabitation.

Gully v. Dix [2004] EWCA Civ 139 21/01/04.

G left her husband to live with D in 1974. They never married. D was an alcoholic, and the parties separated several times only to be reconciled.

On 7 August 2001 D threatened to kill himself in front of G, and brandished a knife. D left G for her own safety, but she would have gone back if she considered it possible.

Ward LJ said the legislation required the parties to be living in the same household, not house. The crucial question was whether either had demonstrated a settled acceptance that the relationship is at an end. The evidence was that neither party accepted that the relationship was at an end.

If there is any doubt about whether there is cohabitation, an applicant may be able to apply as a person maintained by the deceased [see Malone v. Harrison [1979] 1 WLR 1353].

Baynes v. Hedger [2008] EWHC 1587 (Ch).

The deceased was a sculptress of some repute. She never married, and did not have any children.

She became very friendly with the applicant, and very close to the children of the applicant. It was accepted that the deceased and the applicant had had an intimate relationship, but this had not been publicly acknowledged. However, in later years the deceased had lived in the country, whereas the applicant lived in London in a house provided by the deceased. The deceased had her own room in this house.

The deceased had helped one of the daughters of the applicant financially, although the daughter had stressed that these were business transactions, and were to be treated as loans.

On the death of the deceased, the applicant applied under the Inheritance (Provision for Family and Dependants) Act 1975 on the basis that she had been living with the deceased in the same household as civil partners for two years up to the date of death of the deceased, and also that she was a person maintained that the deceased.

The daughter also applied against the estate of the deceased on the basis that she was a person maintained by her.

It was held that in order to succeed as a cohabitee, there had to be a public acknowledgement of the relationship. This had not happened here, and so the applicant could not succeed as a cohabitee. In addition, it was also held that she was not being maintained by the deceased.

With regard to the daughter, although the deceased had made loans to her, it was held that they were ' soft loans ' in that the deceased knew that they were not likely to be repaid. It was held that the deceased was partly maintaining the daughter. However, on facts, it was held that the world did make a reasonable financial provision for her, and so her claim failed.

Baynes v. Hedger [2009] EWCA Civ 374.

The Court of Appeal held that Hetty Baynes was not maintained by the deceased because the deceased had not assumed responsibility for her maintenance.

In addition, the Court upheld the decision of the judge at first instance that the deceased had made reasonable financial provision for the applicant.

Swetenham v. Walkley and another [2014] WTLR 845.

The claimant applied against the estate of the deceased under the Inheritance (Provision for Family and Dependents) Act 1975 on the basis that his estate had not made reasonable financial provision for her. She was claiming on the basis that she had lived with the deceased as husband-and-wife in the same household for two years up to the date of death of the deceased.

It was held that as a matter of fact the claimant and the deceased had had a sexual relationship at one stage, but in more recent years they had spent most of days together. It was clear that in the eyes of third parties they were a couple. However, the deceased had a separate bedroom in the house, and he had his own home. The deceased took the claimant out in his own car, and also paid when they were out together. The claimant did the deceased's washing and cooked for him as well.

Walden-Smith J said:

> 'What is clear to me is that in order to find that two people live together as husband-and-wife it is necessary for there to be a certain type of tie between them, both privately between themselves and publicly for others to witness–a tie which is of a mutual society or consortium whereby they each give the other mutual protection and support which binds them together.... Of course, marital relationships are multifarious in their nature. Sharing ongoing sexual relations, or even the same bed or bedroom is not a prerequisite to a finding to people living as husband and wife. Mere friendship, however close, would not be enough."

There was expert evidence that the claimant needed an immediate care plan. The premium would be £257,382. The claimant had capital of £128,000, so there was a shortfall of £129,000. The judge added a capital cushion and an additional sum to cover contingencies, and ordered that the claimant should be paid £201,210 form the estate of the deceased.

Kaur v. Dhaliwal [2014] EWHC 1991 (Ch).

This case is concerned with whether the claimant had lived with the deceased for two years up to the date of his death so that she could claim as a cohabitee under the Inheritance (Provision for Family and Dependants) Act 1975.

D's wife of 25 years committed suicide. He was prosecuted for manslaughter on the ground that it was his conduct which had caused his wife to take her own life, but acquitted.

The claimant started a relationship with the deceased shortly after the death of his wife, in June 2005 they became engaged. They decided to keep it secret from the two sons of the marriage, but they found out about it and strongly disapproved. After the engagement the deceased frequently stayed at the claimant's flat, and the claimant stated that from that time they had sexual relations. She also gave up her job as a carer, and worked seven days a week in the deceased's cafe on Hounslow station.

In July 2006 a flat owned by the deceased became vacant, and the claimant moved into it. It had been found that the claimant and the deceased lived there until September 2006. What happened thereafter was not clear, but there was no challenge to the findings of the judge at first instance that:

> (1) For about a month, in around January 2007, the Deceased made a family visit to India with his younger son.
>
> (2) For about 2 weeks prior to July 2007, in May or June 2007, both the Claimant and the Deceased stayed with the Claimant's friend Gagan at 84 Waye Avenue.
>
> (3) At the beginning of July 2007 another of the Deceased's flats, 42 Solway Close, became vacant and the Claimant and the Deceased entered into occupation and lived there together until about April 2009 when they moved to another flat at 26 Solway Close which they had purchased together, and where they lived until the Deceased's death on 7 June 2009.

(4) For the period from the time they moved into 42 Solway Close in July 2007 until the Deceased's death, the statutory criteria in sub-section 1(1A) were satisfied i.e. for that period the Claimant was living in the same household as the Deceased and as his wife.

There was no doubt that the parties had lived together for 1 year 49 weeks.

Had they been living together as husband and wife prior to that?

Applying Gullly v. Dix, it was held that they had been, so the claimant could claim as a cohabitee.

Children of the deceased.

"Child" includes a child en ventre sa mere at the death of the deceased.

An adopted child can claim against the estate of the adoptive parent, but such a child has no claim against the estate of his or her natural parent [Re Collins (deceased) [1990] 2 All ER].

An illegitimate or legitimated child can claim under this category.

A stepchild does not come within this category, but might come within the next category – child of the family.

Note that an adult child can claim.

Child of the family.

A child of the family is any person not being a child of the deceased who in relation to any marriage or civil partnership to which the deceased was at any time a party, or otherwise in relation to any family in which the deceased at any time stood in the role of parent, was treated by the deceased as a child of the family.

This applies where the deceased had married someone with children from a previous relationship, and treated those children as his or her own.

What test is applied to decide if the applicant is a child of the family? In Re Leach (deceased) [1985] 2 All ER 754 at page 762 Slade LJ said:

> “I can see no reason why even an adult applicant who has at all material times been an adult person may not be capable of qualifying under that subsection, provided that the deceased has, as wife or husband (or widow or widower) under the relevant marriage, expressly or impliedly, assumed the position of parent towards the applicant, with the attendant responsibilities and privileges of that relationship”

What conduct will lead a court to say that an adult child has become a child of the family?

Maintained person.

S1(3) provides that a person is to be treated as being maintained by the deceased (either wholly or partly, as the case may be) only if the deceased was making a substantial contribution in money or money's worth towards the reasonable needs of that person, other than a contribution made for full valuable consideration pursuant to an arrangement of a commercial nature.

S1(1)(e) requires that the applicant should have been maintained immediately before the date of death.

What is meant by maintenance?

H v. Mitson and others [2009] EWHC 3114 (Fam).

The the father of the applicant had been killed in an industrial accident when his wife was expecting the applicant. The wife did live with someone else, but they never married and did not have any more children.

The applicant left home to live with a young man, of whom the mother disapproved. They subsequently married, and there were five children of the marriage. There were three attempts at reconciliation, but these were all unsuccessful.

The mother of the applicant died leaving a will benefiting charities, and the daughter applied under the Inheritance (Provision for Family and Dependents) Act 1975.

The judge at first instance stated that the question was whether the deceased had acted unreasonably, but on appeal it was held that this was not the correct test. The correct question was whether on an objective basis the, having considered all the factors in section 3, the resulting provision, or lack of it, was unreasonable. Applying this test, King J was of the opinion that the provision was not unreasonable. If it was unreasonable, the judge had erred in balancing the various factors mentioned in section 3.

Ilott v. Mitson [2011] EWCA Civ 346.

The Court of Appeal has restored the decision of the judge at first instance It was held that the judge at first instance had asked himself the right question, and that his decision not plainly wrong.

Ilott v. Mitson [2014] WTLR 575.SG

This an appeal against the amount of the award.

It was argued that £50,000 would be of little use to the claimant as it would affect her entitlement to benefits, and would be gradually reduced to nil. She should be given enough to enable her to purchase a house.

It was also argued that lack of expectancy did not preclude a finding that the deceased had not made reasonable financial provision for the claimant. However, when a judge was deciding what order should be made, it was a factor to be considered.

It was held that the decision of the judge at first instance was not manifestly wrong.

Ilott v. Mitson [2015] EWCA Civ 797.

Arden LJ considered that the judge at first instance had made two errors:

1. He stated that he would limit the award because of the appellant's lack of expectancy and her ability to live within her means. He had not explained what effect that had on the award.

2. He did not calculate what effect the award would have on the entitlement of the applicant to state benefits.

She said:

> "The court is entitled to look at future as well as present needs. The appellant is now in her 50s and has no pension.
>
> I consider that the appellant's resources, even with state benefits, are at such a basic level that they outweigh the importance that would normally be attached to the fact that the appellant is an adult child who had been living independently for so many years.
>
> The first question which I have to decide is whether the current living standard is sufficient. This is the correct test, and the court's assessment should not be motivated by a desire to provide an improved standard of living as opposed to a desire to meet appropriate living needs. Nor on the other hand is the court bound to limit maintenance to mere subsistence level. In my judgment, the appellant's present income is not reasonable financial provision for her maintenance in the context of this application given the restrictions which, as exemplified by Parker J's findings, she has to impose on her own expenditure and the lack of any provision to meet her future needs, for example when she grows older or if she suffers any ill-health.
>
> How in those circumstances should the court set about determining the amount of an award if the effect of an award is to remove the state benefit?
>
> In my judgment, what the court has to do is to balance the claims on the estate fairly. There is no doubt that, if the claimant for whom reasonable financial provision needs to be made is elderly or disabled and has extra living costs, consideration would have to be given to meeting those. In my judgment, the same applies to the case where a party has extra financial needs because she relies on state benefits, which must be preserved. Ms Reed submits that the provision of housing would not do this. I disagree. The provision of housing would enable her both to receive a capitalised sum and to keep her tax credits. If those benefits are not preserved then the result is that achieved by DJ Million's order in this case: there is little or no financial provision for maintenance at all.
>
> The claim of the appellant has to be balanced against that of the Charities but since they do not rely on any competing need they are not prejudiced by what may be a

higher award than the court would otherwise need to make.

In my judgment, the right course is to make an award of the sum of £143,000, the cost of acquiring the Property, plus the reasonable expenses of acquiring it. That would remove the need to pay rent though some of that money may be required for meeting the expenses that she will have as owner. As Ms Stevens-Hoare submits, having the Property will enable her to raise capital (by equity release) when she needs further income in the future.

In addition, I would add to the award a further sum to provide for a very small additional income to supplement her state benefits without the necessity of an equity release. If my Lords agree, I would provide that she has an option, exercisable by notice in writing to the first and second respondents within two months of the date of this order (or within such longer period as the appellant and first and second respondents may agree) to receive a capital sum not exceeding of £20,000 out of the estate for this purpose. According to the current Duxbury tables in At a Glance for 2015/6, the sum £20,000 would if invested give her £331 net income per year for the rest of her life. This is not a large amount because of the factors which weigh against her claim, particularly the fact that she is an adult child living independently, Mrs Jackson's testamentary wishes and to a small extent the appellant's estrangement from Mrs Jackson.

The option may be exercised in part more than once provided that the total sum of £20,000 is not thereby exceeded. I have expressed the provision of a capital sum as an option so that, if the award of a capital sum would result in the loss of benefits, she can if she wishes take a lesser sum, or (as she may prefer to do if she is advised that her benefits will not be prejudiced) she may take the lesser sum and spend it, and then exercise the option for an amount or amounts not exceeding the balance."

<u>Ilott v. The Blue Cross & ors [2017] UKSC 17.</u>

The Supreme Court has overruled the decision of the Court of Appeal, and restored the decision of the judge at first instance.

Lord Hughes gave the leading judgement (with whom all the other judges agreed), and made the following points:

1. Maintenance under the 1975 Act is not limited to subsistence level.

2. If an award is going to be made under the Act, it could be of income or capital. Maintenance could include giving capital to an applicant to enable the applicant to purchase a car so that he or she can travel to and from work.

3. The test under the Act is not did the deceased act unreasonably, but whether the deceased had made reasonable financial provision for the applicant.

4.The convention was to treat the consideration of a claim under the 1975 Act as a two-stage process, (1) was there a failure to make reasonable financial provision for the applicant and if so (2) what order ought to be made. Lord Hughes said that the two questions will usually become: (1) did the will/intestacy make reasonable financial provision for the claimant and (2) if not, what reasonable financial provision ought now to be made for him.

5. A claimant does not need to show a moral claim.

6. It may not be possible to meet all the needs of a claimant because of competing claims on the deceased's estate.

7. The Court of Appeal had criticised the judgement of the judge at first instance on the grounds that whilst the judge had stated that because of the claimant's lack of expectancy and her ability to live within her means, an award should be limited. However, he had not explained how he had limited the award.

8. The judge at first instance had also been criticised for not taking into account the effect of any award on the entitlement of the claimant to state benefits.

9. The Supreme Court rejected both these grounds of criticism.

10.Lord Hughes said:

> "The District Judge did not make the suggested or any error in taking into account the nature of the relationship between the deceased and the claimant. In many cases this will be of considerable importance. If, by contrast with the present case, the claimant were a child of the deceased who had remained exceptionally and confidentially close to her mother throughout, had supported and nurtured her in her old age at some cost in time and money to herself, and if she had been promised many times that she would be looked after in the will, it could not be said that the judge was required first to assess reasonable financial provision on the basis of some supposed norm of filial relationship, neither particularly close nor particularly distant, and then to lift the provision by an identified amount to recognise the special closeness between the two ladies. But without going through any such exercise, and yet adhering to the concept of maintenance, a judge ought in such circumstances to attach importance to the closeness of the relationship in arriving at his assessment of what reasonable financial provision requires. In the paragraphs leading up to the one criticised by the Court of Appeal, this Judge had dutifully worked his way through each of the section 3 factors. The long estrangement was the reason the testator made the will she did. It meant that Mrs Ilott was not only a non-dependent adult child but had made her life entirely separately from her mother, and lacked any expectation of benefit from her estate. Because of these consequences, the estrangement was one of the two dominant factors in this case; the other was Mrs Ilott's very straitened financial position. Some judges might legitimately have concluded that the very long and deep estrangement had meant that the deceased had no remaining obligation to make any provision for her independent adult daughter - as indeed did Eleanor King J when it appeared that she had scope to re-make the decision. As it was, the judge was perfectly entitled to reach the conclusion which he did, namely that there was a failure of reasonable financial provision, but that what reasonable provision would be was coloured by the nature of the relationship between mother and daughter."

Reasonable financial provision.

In order to succeed in a claim under the Act, spouses or civil partners must prove that reasonable financial provision has not been made for them

Al other applicants must prove that reasonable financial provision has not been made for their maintenance.

Duties of anyone drafting wills.

A person drafting a will is under a duty to warn clients about the possibility of a claim under the 1975 Act.

What should a will draftsman do if asked to draft a will for a client leaving everything to charity when he knows that the client has a spouse, civil partner, young children, or is living with someone else, or is maintaining an elderly relative, or has been treating the children of his spouse or civil partner as children of the family?

Another possible scenario is that the client wants to make some provision for a spouse, but does not realise that it may not adequately provide for the spouse.

Is the will draftsman under any duty to enquire about whether there is anyone who might claim under the Act, and who is not a beneficiary under the will?

Statements by the deceased.

The court may attach little weight to any statement by the deceased as to why he has not made any provision for the applicant, although it is admissible in evidence.

Practice points.

1. Ascertain if there is anyone who might make a claim under the 1975 Act.

2. Include list of who can claim in letter to client - some clients may not tell you about possible claimants.

3. If client wants to cut out a possible claimant, warn client about the possibility of a claim.

4. Consult family members.

5. Give possible claimant something in will.

6. Statement or note as to why someone has been cut out of will.

Typical structure of a will.

Name of testator.

Address of testator.

Revocation clause.

Appointment of executors/trustees.

Charging clause?

Funeral directions.

Appointment of guardians.

Pecuniary legacy.

Specific gifts.

Gift of residue.

Extension of powers.

Testimonium.

Attestation.

Date.

The effect of marriage/civil partnership on wills

Section 18(1) Wills Act 1837 provides that a will is revoked by the marriage of the testator or testatrix, but s 18(3) provides that where it appears from the will that at the time it was made the testator or testatrix was expecting to be married to a particular person and that he or she intended that the will should not be revoked by his or her marriage to that particular person, the will shall not be revoked by marriage to that particular person.

Section 18(4) provides that where 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 a disposition in the will should not be revoked by his marriage to that particular person -

> (a) that disposition shall take effect notwithstanding the marriage; and
>
> (b) any other disposition in the will shall take effect also, unless it appears from the will that the testator intended the disposition to be revoked by the marriage.

There are similar provisions in s18B re civil partnerships.

Gifts to a future spouse can be conditional on the marriage taking place.

Revocation clause.

It is normal to include an express revocation clause in wills.

Be careful if the testator has made an earlier will dealing with foreign assets.

Appointment of executors/trustees.

The testator can appoint anyone he or she likes as executor, but a grant will not be made to more than four, or to an infant or a person who is mentally incapable.

If spouses are appointing each other, and then giving all the assets to the other, it may not be desirable to include a survivorship clause as far as the appointment of the surviving spouse as executor is concerned.

It may be that an express provision should be included giving executors power to exercise trustee powers.

Possible appointees:

> friends and relatives;
> solicitors and accountants;
> banks or other trust corporations;
> the Public Trustee.

Friends and relatives.

Advantages.

Personal knowledge.

Cheap.

T can appoint whoever he likes.

Disadvantages.

May not have skill or knowledge.

May have to employ solicitor or accountant to do work.

May predecease.

May refuse to act.

Could be embarrassed if there is dispute.

A beneficiary can be appointed an executor, although there is a possibility of a conflict of interest.

Solicitors and accountants.

Advantages.

May have acted for T for long time.

Skilled at administering estates.

Insurance.

Independent.

Trustworthy.

Disadvantages.

Banks or other trust corporations.

Advantages.

Never dies.

Security.

Rigidity in administration of assets.

Disadvantages.

Will charge.

May instruct solicitors - element of double charging.

May refuse to act, particularly if they anticipate difficulties.

Rigidity in administration.

The Public Trustee.

Office created by the Public Trustee Act 1906.

Advantages.

Never dies - corporation sole.

If there is any breach of trust or other wrongdoing, the State is liable.

Disadvantages.

No personal knowledge.

Will charge.

Legacy to executor.

A legacy to an executor in the will may be construed as conditional on the executor proving the will.

It should be made clear in the will whether the legacy is conditional on the executor proving the will.

Avoid “if the executor proves the will and acts in its trusts” – if no trust is created, the executor will not be able to take.

Appointment of partners in the firm as executors.

Points to watch:

1. Appoint the partners at the date of death.

2. Express the wish that only two shall act, or nominate the senior partner to nominate who is to take out the grant.

3. Provide for the amalgamation etc of the firm.

Charging clauses.

Section 29(1) provides that a trustee who–

(a) is a trust corporation, but

(b) is not a trustee of a charitable trust,

is entitled to receive reasonable remuneration out of the trust funds for any services that the trust corporation provides on behalf of the trust.

A professional trustee is similarly entitled. Section 29(2) provides that a trustee who–

(a) acts in a professional capacity, but

(b) is not a trust corporation, a trustee of a charitable trust or a sole trustee,

is entitled to receive reasonable remuneration out of the trust funds for any services that he provides on behalf of the trust. All the other trustees must agree in writing that he may be remunerated for the services. Note that a sole trustee cannot charge.

Section 28(5) defines what is meant by acting in a professional capacity. A trustee acts in a professional capacity if he acts in the course of a profession or business which consists of or includes the provision of services in connection with–

(a) the management or administration of trusts generally or a particular kind of trust, or

(b) any particular aspect of the management or administration of trusts generally or a particular kind of trust,

and the services he provides to or on behalf of the trust fall within that description.

Section 29(3) defines reasonable remuneration. In relation to the provision of services by a trustee, it means such remuneration as is reasonable in the circumstances for the provision of those services on behalf of that trust by that trustee.

A trustee who has been appointed as an agent of the trustees, or nominee or custodian under the powers conferred by Part IV (see 2.19 below) or the trust instrument is also entitled to remuneration under s 29 (s 29(6)).

Section 29(5) provides that a trustee is not entitled to remuneration under s 29 if any provision about his entitlement to remuneration has been made–

(a) by the trust instrument, or

(b) by any enactment or any provision of subordinate legislation.

Section 31(1) confirms this position by providing that a trustee is entitled to be reimbursed out of the trust funds or may pay out of the trust fund expenses properly incurred when acting on behalf of the trust. Section 31(2) provides that the section applies to a trustee who has been authorised under a power conferred by Part IV or the trust instrument–

(a) to exercise functions as an agent of the trustees, or

(b) to act as a nominee or custodian,

as it applies to any other trustee.

Section 28(1) provides that subsections (2) to (4) apply to a trustee if–

(a) there is a provision in the trust instrument entitling him to receive payment out of trust funds in respect of services provided by him on behalf of the trust, and

(b) the trustee is a trust corporation or is acting in a professional capacity.

Section 28(2) provides that the trustee is to be treated as entitled under the trust instrument to
receive payment in respect of services even if they are services which are capable of being provided by a lay trustee. Section 28(6) provides that a person acts as a lay trustee if he–

(a) is not a trust corporation, and

(b) does not act in a professional capacity.

Section 15 of the Wills Act 1837 provides that a gift to an attesting witness or the spouse of an attesting witness is void. Section 28(4) provides that any payments to which the trustee is entitled in respect of services are to be treated as remuneration for services and not as a gift for the purposes of s 15 of the 1837 Act.

Disposal of the body.

Anyone can express wishes as to the disposal of his or her body, but the personal representatives do not have to comply with that request.

The personal representatives are under a duty to dispose of the body.

Medical research - contact the nearest medical school.

“Spare parts” – contact the nearest hospital.

Guardians

A parent with parental responsibility for a child can appoint another person or persons to be the guardian or guardians of that child.

The appointment must be in writing, and signed by the person making it or in a will.

The appointment has immediate effect on the death of the person making the appointment if there is no other person with parental responsibility for the child, or there was a residence order in favour of the person making the appointment.

The court can appoint a guardian.

The appointment of a guardian can be revoked.

A person who is appointed guardian can disclaim the appointment.

Appointment

Section 5(3) Children Act 1989 authorises a parent with parental responsibility for a child to appoint another individual to be the child's guardian in the event of his death.

Section 2(1) provides that where a child's father and mother were married to each other at the time of his birth, they each have parental responsibility for the child.

Under s 2(2) a father does not have parental responsibility for a child if he was not married to the mother at the time of the birth; in this situation the mother has parental responsibility for the child unless the father is named on the birth certificate.

Section 2(3) provides in effect that both the father and mother are to have parental responsibility for legitimated and adopted children.

Under s 105(1) "child" means a person under the age of eighteen.

Section 10 provides that two or more persons can be appointed joint guardians.

Section 5(4) empowers a guardian to appoint another individual to take his place in the event of his death.

Formalities

Section 5(5) provides that an appointment under subs (3) or (4) shall not have effect unless it is made in writing, is dated and is signed by the person making the appointment or -

> (a) in the case of an appointment made by a will which is not signed by the testator, is signed at the direction of the testator in accordance with the requirements of s 9 Wills Act 1837; or
>
> (b) in any other case, is signed at the direction of the person making the appointment, in his presence and in the presence of two witnesses who each attest the signature.

Effect of appointment

Section 5(7) provides that where –

> (a) on the death of any person making an appointment under subs (3) or (4)
> the child concerned has no parent with parental responsibility for him; or
>
> (b) immediately before the death of any person making such an appointment,
> a residence order in his favour was in force with respect to that child,
>
> the appointment shall take effect on the death of that person.

Section 8(1) defines a residence order as an order settling the arrangements to be made as to the person with whom a child is to live.

Subsection (7) does not apply if the residence order referred to in paragraph (b) was also made in favour of a surviving parent of the child.

Section 5(8) deals with the situation where the appointment does not come into immediate effect on the death of the person making the appointment. It provides that where, on the death of any person making an appointment under subs (3) or (4) -

(a) the child concerned has a parent with parental responsibility for him; and

(b) subs (7)(b) does not apply, the appointment shall take effect when the child no longer has a parent who has parental responsibility for him.

Under s *5*(6) a person appointed guardian has parental responsibility for the child, but on the death of the child a guardian has no right to benefit under the intestacy rules merely because he or she has been appointed guardian.

A guardian is not a liable relative under the Social Security Act *1986.*

Appointment by the court

Under s *5*(1)*,* where an application with respect to a child is made, to the court by any individual, the court may by order appoint that individual to be the child's guardian if -

(a) the child has no parent with parental responsibility for him; or

(b) a residence order has been made with respect to the child in favour of a
parent or guardian of his who has died while the order was in force.

The welfare of the child is paramount (s 1(1)), and a welfare report can be obtained (s 7).

Revocation and disclaimer

Under s *6*(1) a new appointment revokes an earlier appointment, unless it is clear that the purpose of the later appointment is to appoint an additional guardian.

Section *6*(2) provides that an appointment under s 5(3) or s 5(4) (including one made in an unrevoked will or codicil) is revoked if the person who made the appointment revokes it by a written and dated instrument which is signed -

(a) by him; or

(b) at his direction~ in his presence and in the presence of two witnesses who each attest the signature.

Section *6*(4) provides that an appointment under s 5(3) or (4) (other than one made in a will or codicil) is revoked if, with the intention of revoking the appointment, the person who made it -

(a) destroys the instrument by which it was made; or

(b) has some other person destroy that instrument in his presence.

Under s 6(5) a person appointed guardian may disclaim his appointment by an instrument in writing signed by him and made within a reasonable time of his first knowing that the appointment has taken effect. The Lord Chancellor can make regulations prescribing the manner in which such disclaimer must be recorded. No such regulations have been made yet.

The court has power to terminate the appointment of a guardian in the following circumstances:

(a) on the application of any person who has parental responsibility for the
child;

(b) on the application of the child concerned, with leave of the court; or

(c) in any family proceedings, if the court considers that it should be brought
to an end even though no application has been made (s 7).

Is it possible to prevent a surviving parent obtaining a residence order?

Under s 10 a parent is entitled to apply for a residence order even though the appointment of a guardian may have come into effect.

<u>Practice points.</u>

1. Families will often sort out who is to look after children if the worst happens.

2. Is it fair to ask friends to take on responsibility for your children?

Specific gifts.

Ademption.

Section 24 of the Wills Act 1837 provides that every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears.

A gift of a named property will be adeemed if the property is not owned by the deceased at the date of death. However, if the gift had been generic, then section 24 will apply.

Distinguish between a specific gift and a general gift.

If it is a general gift, and no such assets are included in the estate of the testator, then the PRs must purchase the assets required to satisfy the legacy.

Secured debts – mortgages.

Section 35(1) of the Administration of Estates Act 1925 provides that where the deceased by his will disposes of an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise, and the deceased has not by will or other document signified a contrary intention, the interest so charged is primarily liable for the payment of the charge.

Section 35(2) provides that such a contrary intention shall not be deemed to be signified-

> (a) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate; or
>
> (b) by a charge of debts upon any such estate; unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.

Gifts of personal chattels.

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1. Gift of specific chattels.

“I give my diamond engagement ring to A.”

2. Gift of a class of chattels.

“I give all my books on dogs to B.”

3. Gifts of chattels to be chosen – executors to decide if a dispute?

4. Gifts by reference to a list not included in the will.

5. Gifts of contents.

This is usually done by reference to definition in s55(1)x of AEA 1925.

This definition does not include business chattels or money or securities for money.

There is no limit on the value of items included.

Incorporation of documents in a will.

It is possible for a document to be incorporated in a will if the document is in existence at the date of the will, is referred to in the will as an existing document, and can be easily identified.

Rule 14(3) of the Non Contentious Probate Rules provides that if a will contains any reference to another document in such terms as to suggest that it ought to be incorporated in the will, the district judge or registrar must require the document to be produced and may call for such evidence in regard to the incorporation of the document as he may think fit.

Precatory trusts.

These are frequently used when the client is uncertain as to the ultimate destination of some personal chattels, usually jewellery.

“I give all my jewellery to my daughter without imposing any trust on her but on the understanding that she will distribute it in accordance with a note I will prepare.”

The daughter can keep the jewellery herself if she so wishes.

Secret or half secret trusts?

Forgiveness of debts.

1. If the debt is forgiven, and the debtor predeceases the testator, then the doctrine of lapse will apply, and the debt may still be payable by the estate of the deceased debtor.

2. Does the forgiveness extend to the whole of the debt, or only part, or whatever is owing at the date of death?

Joint tenants or tenants in common.

1. “To all my nephews and nieces.”

2. “To all my nephews and nieces as tenants in common”

1 creates a joint tenancy, so that if one nephew or niece dies, the survivors take the gift.

2 creates a tenancy in common so that if a nephew or niece predecease, then the gift falls into the residuary estate if it is some other type of gift. If the gift is of the residuary estate, then there will be an intestacy.

Indicate clearly whether a joint tenancy or tenancy in common is intended.

“To such of my nephews and nieces as shall be living at the date of my death and if more than one in equal shares.”

Gifts to children or grandchildren.

Factors to be taken into account:

1. Vested or contingent? Are the children or grandchildren to take absolutely or contingently?

2. Should the children or grandchildren be named, or should there be a class gift?

3. What happens if a child or grandchild predeceases? If the child or grandchild predeceases leaving children, are those children to take their parent's share?

The children or grandchildren will take the share of a deceased parent if nothing is said in the will under s 33 of the Wills Act 1837.

Problems with s33:

1. Absolute entitlement.

2. What is meant by "children", "grandchildren"?

3. What happens if a beneficiary who is contingently entitled predeceases the testator or does not satisfy the contingency but leaves children?

4.When is it excluded impliedly?

It also applies to class gifts.

Is there to be a per capita distribution or a per stirpes distribution?

Rainbird v. Smith [2013] WTLR 1609.

T made a will giving the residue of her estate to her three daughters. The will stated:

> "I give my estate (including any property over which I may have a general power of appointment or disposition by will to my trustees on trust …
>
> subject thereto hold the residue remaining and the income thereof ("my residuary estate") UPON TRUST for such of my daughters, the said JACQUELINE ANNE RAINBIRD JANET JONES of …. and GWENDOLINE SMITH of …. as shall survive me and if more than one in equal shares absolutely."

Janet Jones predeceased her mother leaving two children. Did s 33 Wills Act 1837 apply so that the children took her share? It was held that it did not.

4. A gift to children or grandchildren will include adopted, legitimated and illegitimate children or grandchildren, but not stepchildren. Does the testator want this?

Residuary gifts.

There may be a gift of the residue to beneficiaries of full age and capacity, but frequently there will be a gift to beneficiaries who are under age.

If all the beneficiaries are of full age and capacity, there is no need to give the residue to trustees to hold on trust for the beneficiaries.

If there is a possibility that beneficiaries who are under age may become entitled, it is common to give the residuary estate to trustees to hold on trust for the residuary beneficiaries.

If beneficiaries are entitled in succession, then it will be necessary to give the residuary estate to trustees.

Is a straight trust in order, or is it necessary to create a trust for sale?

The answer is yes, but you should include an express power to sell and to postpone sale.

The essential elements of a trust.

Clear words must be used to create a trust.

It must be possible to identify the subject matter of the trust with a reasonable degree of certainty.

If it is a fixed trust, it must be possible to ascertain all the beneficiaries.

If it is a discretionary trust, all that is required is that it should be possible for the trustees to say if a beneficiary comes within the class of beneficiaries.

There must also be certainty as to the beneficial interests.

The three certainties.

The requirements for a valid trust are:

(a) certainty of words or intention;

(b) certainty of subject matter;

(c) certainty of objects.

It is also essential that the beneficial interest should be clearly defined.

Certainty of words or intention

There are no particular words which have to be used in order to create a trust. What is important is the intention of the donor.

Re Adams and the Kensington Vestry (1884) 27 Ch D 394

The testator gave all property to the absolute use of his wife in full confidence that she would do what was right as to its disposal between his children. It was held that no trust had been created. Cotton LJ said at page 409:

'The motive of the gift is, in my opinion, not a trust imposed upon her by the gift in the will.'

A trust can be created even though precatory words are used as well.

Re Steele's Will Trust [1948] Ch 603

A will included the following bequest:

'I give my diamond necklace to my son to go and be held as an heirloom by him and by his eldest son on his decease and to go and descend to the eldest son of such eldest son and so on to the eldest son of his descendants as far as the rules of law and equity will permit (and I request my said son to do all in his power by his will or otherwise to give effect to this my wish).'

It was held that a trust had been created.

Certainty of subject matter

It must be possible to identity the subject matter of the gift with a reasonable degree of certainty.

Certainty of objects

With fixed trusts, *or life interest trusts,* it must be possible to list all the beneficiaries exactly; otherwise the trust will be void.

With discretionary trusts, the test is now whether it is possible to say that a person comes within the class of beneficiaries.

Lord Wilberforce in McPhail v Doulton also referred to linguistic or semantic uncertainty and evidential uncertainty.

He said at page 457:

> 'I desire to emphasise the distinction clearly made and explained by Lord Upjohn [1970] AC 508, 524 between linguistic and semantic uncertainty which, if unresolved by the court, renders the gift void, and the difficulty of ascertaining the existence or

whereabouts of members of the class, a matter with which the court can appropriately deal on an application for directions.'

Evidential uncertainty will never defeat a trust, but administrative unworkability may render it void.

Certainty of beneficial interest

It may be that there is uncertainty as to the beneficial interest to which the beneficiary is entitled. If this is the case, then the trust will be void.

Re Golay [1965] 2 All ER 660

A will directed that a beneficiary should be entitled to receive a reasonable income from some properties.

This was held to be valid.

Anthony -v- Donges [1998] 2 FLR 775

The testator provided that his wife should receive "such minimal part of his estate as she might be entitled to under English Law for maintenance purposes".

The executors applied for a declaration that the gift was void for uncertainty; or alternatively that it was of such amount as she would have been entitled to on an application under the Inheritance (Provision for Family and Dependants) Act 1975.

It was held that the gift was void for uncertainty.

Grossing up.

Position where there are gifts in a will to exempt beneficiaries and non exempt beneficiaries.

Part residue going to exempt beneficiaries, part to non exempt.

Section 41 IHTA provides:

"Notwithstanding the terms of any disposition-

(a) none of the tax on the value transferred shall fall on any specific gift if or to the extent that the transfer is exempt with respect to the gift, and

(b) none of the tax attributable to the value of the property comprised in the residue shall fall on any gift of a share of the residue if or to the extent that the transfer is exempt with respect to the gift."

Re Ratcliffe deceased [1999] STC 262.

"Subject to the payment of my debts funeral and testamentary expenses I give one half of the residue of my estate to A and the other half to the RSPCA."

There are two ways of dealing with this gift:

(a) The son's share could be grossed up so that the son receives the same amount as the charity.

(b) All the inheritance tax is paid from the son's share so that the son receives less than the charity.

According to Re Ratcliffe it is a question of the construction of the will as to which method should be adopted, and in that particular case it was held that method (b) was the correct way of dealing with it.

Specific gift to non exempt beneficiary free of tax, residue to exempt beneficiary.

Section 42(1) of the Inheritance Tax Act 1984 defines a specific gift as any gift other than a gift of residue or of a share of residue.

It may be that the specific gift is expressed to be free of tax, or if nothing is said, then it will be treated as being free of tax. In this situation, the specific gift must be grossed up to find the amount which after deducting the tax will leave the amount of the gift.

Specific gift to non exempt beneficiary bearing its own tax, residue to exempt beneficiary.

No inheritance tax will be payable on the residue, and the value of the non exempt gift will be subject to inheritance.

Specific gift to exempt beneficiary, residue to non exempt beneficiary.

If there is a specific gift in a will to an exempt beneficiary, like the spouse or a charity, then the value of the specific gift does not bear any inheritance tax, but the residue bears tax at whatever rate is appropriate.

Survivorship clauses.

Why include a survivorship clause in a will?

Four reasons:

Control of the ultimate destination of the assets;

Commorientes;

Avoiding the expense of double administration;

IHT.

Control of the ultimate destination of the assets;

This is only relevant if the default beneficiaries are different.

Commorientes;

Under LPA 1925 if the order of deaths is uncertain, the younger is deemed to have survived the elder.

Avoiding the expense of double administration;

If there is no survivorship clause, the assets will be administered twice.

IHT.

If there is no survivorship clause, the NRB of the first spouse to die used to be lost.

S 4(2) IHTA 1984 provides that if the order of death is uncertain, the deaths are deemed to have occurred at the same moment.

LPA governs whether any exemption or relief applies on death.

Is it always a good idea to incorporate a survivorship clause in wills?

If one spouse is much poorer than the other spouse, a survivorship clause may not be desirable – at least leave a NRB legacy to the poorer spouse so that he or she can pass it on to the children utilising the nil rate band of the poorer spouse.

A survivorship clause should be included in gifts to non spouse beneficiaries if the gift is substantial.

It is quite common for wills of spouses to include identical legacies payable on the death of the second. It should be made clear that if both spouses die within the survivorship period, the beneficiaries are not to benefit under both wills.

Pets.

The possibilities are:

1. A legacy to the executors or some other beneficiary with an expression of wishes that they will care for the pet

2. A legacy to a beneficiary conditional on them looking after the pet.

3. A legacy to an animal charity with an expression of wishes that the charity will find a suitable home for the animal.

4. Possibly a trust for the benefit of a specified animal.

Options.

a. Price.

Re De Lisle's Will Trust [196811 All ER 492.

A nephew was entitled to have certain property transferred to him at valuation agreed for probate. Was this the value entered by the executors in the Inland Revenue account, or the value ultimately agreed with the District Valuer? The latter figure was held to be correct.

If there is no effective machinery for fixing the value, the court may be prepared to fill the gap.

Re Malpass [1984] 2 All ER 313.

Son had an option to purchase a farm at the agricultural value as agreed for Probate purposes with the District Valuer. No IHT was payable on death and so DV declined to value the property.

The court ordered an inquiry to determine the agricultural value.

Dutton -v- Dutton [2001] 2 WTLR 553.

T owned his house and some adjoining land. He gave his estate to his three sons in equal shares. He also gave one of his sons, A, the right to purchase the house and adjoining land at a price to be determined by a surveyor appointed by the Trustees.

Subsequently, T gave a portion of the land to A so that A and T became tenants in common of that land.

The Executors obtained Counsel's Opinion, which was to the effect that the property should be valued on the basis of an arm's length transaction between a willing vendor and a willing purchaser.

The Valuer deducted 15% because of A's interest in part of the land.

It was held that the Valuer should be asked to assess a fair and reasonable price.

Talbot v. Talbot [196212 All ER 920.

Options to purchase at reasonable valuation were held to be valid.

b. Time.

If no time is fixed for the exercise of the option, it must be exercised within a reasonable time.

In the matter of the estate of Peter Michael Bowles deceased [2003] WTLR 329.

T in his will gave an option to purchase certain property to H at the figure agreed between his executors and the CTO as its value for IHT purposes. The executors were to notify H within six months of T's death, and T had three months to exercise the option.

The executors appointed by the will renounced the right to the grant of probate, and T's widow, J, who was entitled to the residuary estate, became the administratrix.

J's solicitors gave notice to H about the option, and then claimed it could not be exercised as the time limit for doing so had expired, even thought the value for IHT purposes had not been determined.

It was held that the time limits were directory only, partly because the deceased had not directed what was to happen if they were not complied with.

H had reasonable time to decide whether or not to exercise the option after being given notice of the agreed value.

c. Mortgages.

If the property subject to the option is mortgaged, it is a question of construction as to whether the person entitled to the option takes it free from the mortgage.

Re Fison's Will Trusts [195011 Ch 394.

A will directed that certain properties should be offered to the testator's son at specified prices. The properties were subject to an equitable charge.

It was held that the son took the property free from the equitable charge.

Romer J. at page 407 said:

> "If the true position is that the son is to be regarded as a devisee, ... he can only take those properties under his option subject to the incumbrances affecting them. On the other hand, if he is a purchaser, he is entitled to a conveyance free from incumbrances."

d. Who can exercise the option?

Re Zerny's Will Trust [196811 All ER 686.

The testator and his son carried on business using a limited company. The testator owned two properties he leased to the company. The son was given an option to purchase these properties. The son carried on the business, and then died.

It was held that his executors could not exercise the option.

Gifts to unincorporated associations.

Beware if non-charitable. A gift to such an unincorporated association could be interpreted as follows:

a. A gift to the members beneficially;

b. An accretion to the funds of the association.

c. A trust for the purposes of the association.

a. Re Smith [1914] 1 Ch 937.

Gift of residue in trust for "the society or institution known as the Franciscan Friars of Clevedon in the County of Somerset absolutely".

It was held that it was an absolute gift to the individual friars in the institution.

b. Re Recher's Will Trust [19721 Ch 526.

A will contained a gift to a non-charitable association. It was held that the gift could take effect, but it failed because the association had ceased to exist before the death of the testatrix.

Brightman J said at page 539:

> “In the absence of words which purport to impose a trust, the legacy is a gift to the members beneficially, not as joint tenants or tenants in common so as to entitle each member to an immediate distributive share, but as an accretion to the funds which are the subject matter of the contract which the members have made inter se."

c. A non charitable trust may be void for uncertainty, or because there is no beneficiary to enforce it, or because it infringes the rule against inalienability.

In the matter of St Andrews (Cheam) Lawn Tennis Club Trust [2012] WTLR 1275.

In 1938 the trustees of a tennis club took a lease of a piece of land for 10 years with an option to purchase the freehold. Shortly thereafter, the trustees executed a trust deed. In 1948, the persons who were probably trustees of the trust agreed to purchase the freehold.

The trustees sought the guidance of the court as to the ownership of the land.

It was held that the 1938 trust deed had attempted to create a perpetual non-charitable trust, and was void.

It was also held that there was a resulting trust of the land in favour of the estate of the original owner who had granted the lease and sold the freehold to the trustees.

The will should provide that the receipt of the person appearing to be the treasurer or other proper officer should be a discharge for the PRs.

It should also provide for the change of name or objects or the amalgamation or dissolution of the association.

The executors could also be relieved from the duty to ensure that the legacy was applied for charitable purposes.

Charities.

Kings v. Bultitude and HMAG [2010] EWHC 1795 (Ch).

The Church of the Good Shepherd had been founded by Harold Nicholson. On the death of Mr Harrison, D's husband was elected as the Primate, and on his death D became the Minister. D left a will containing the following residuary gift:

> "to the person who at the time of the payment of the same shall be or act as the Trustee of the Ancient Catholic Church known as the Church of the Good Shepherd at present meeting at Rookwood Road London N16 in the London Borough of Hackney for the general purposes of the said Church and the receipt of such Trustee or the person acting as such shall be a sufficient discharge to my trustees"

On D's death the church had ceased to function.

Proudman J said that the issues were:

> 1. Is Mrs Schroder's residuary estate the subject of a valid charitable gift to an identifiable institution?
>
> 2. Is it the subject of a valid charitable gift which failed subsequent to its having taken effect so that it may be applied cy-près without more?
>
> 3. Is it the subject of a valid charitable gift of which the initial purpose has failed but which may be applied cy-près in accordance with a paramount charitable intention to be ascribed to Mrs Schroder?
>
> 4. Is it undisposed of so that it devolves in accordance with the laws of intestacy?

It was held:

> 1. There was no valid charitable gift in favour of an identifiable institution.
>
> 2. The church ceased to exist on the death of D.
>
> 3. D had not displayed a paramount intention.
>
> 4. The gift passed under the intestacy rules.

Practice points.

Most precedents make provision for the charity ceasing to exist or amalgamating.

Conditions precedent, conditions subsequent and determinable interests.

Condition precedent some event has to be satisfied before the gift vests e.g.

"On the admission of any child of mine as a solicitor, I direct that my trustees shall pay that child £1,000."

Condition subsequent Gift vests in the beneficiary, but the beneficiary may lose it if some event happens e.g.

“I give Blackacre to A provided he does not become an accountant."

Determinable interest an interest which automatically determines on the happening of an event e.g.

“I give Blackacre to A until he becomes an accountant."

Conditions may be held to be invalid on various grounds:

1. Repugnancy.

“I give £500,000 to A but it is not to be paid to him until he is 50.”

2. Impossible conditions.

“I give £500,000 to A on condition that he looks after all my cats and dogs”

All the cats and dogs predecease the testator.

If it is condition precedent, and is obviously impossible, the gift takes effect anyway.

If it is possible of performance at the date of the will, but then becomes impossible, the gift fails.

3. Uncertain conditions.

Conditions may be void for uncertainty, and stricter rules apply to conditions subsequent than conditions precedent.

If it is a condition subsequent, then as long as the condition is certain, evidential uncertainty will not cause the gift to lapse.

“I give my house to A subject to the condition that if she marries a person of ample fortune then to B.”

4. Conditions contrary to public policy.

“I give £500,000 to A if he assassinates B”

5. Conditions in terrorem.

These rules only apply to gifts of personalty.

If there is a gift over, then the rule will not apply if it is a condition subsequent.

If it is a condition precedent, then again there must be a gift over on non-compliance.

If a condition precedent is void, then the gift fails.

If the condition is a condition subsequent, then the donee takes the gift free from the condition.

Marriage, separation and divorce.

A determinable interest until marriage is valid.

With conditions, a total restraint is void, but a partial restraint will be valid.

A spouse may impose a condition that the surviving spouse forfeits his or her interest on remarriage.

But if it is a gift of personalty, there must be a gift over on the occurrence of the marriage for a restraint to be valid.

If the intention is to provide for a person until marriage, a condition imposing a total restraint will be valid.

Conditions inducing spouse to separate or divorce are void.

Residence/cohabitation.

Re Coxen [1948] 2 All ER 492.

> "I devise my [house] to my trustees in fee simple upon trust that my trustees shall permit my dear wife ... to reside therein rent free during her life or for so long as she shall desire to reside therein and I declare that from and after her death or if in the opinion of my trustees she shall have ceased permanently to reside therein (whichever shall first happen) my trustees shall stand possessed of the said premises on the trust of this residuary trust fund."

It was held that the clause was valid.

Re Field's Will Trust [1950] 2 All ER 186.

A will contained a gift of chattels to a beneficiary if he shall occupy a named freehold property

The condition was held to be void for uncertainty.

Religion.

Conditions requiring a beneficiary to be the member of a particular religious group, or that they forfeit the gift if they cease to be a member of a group are valid, provided that the test of certainty is satisfied.

Clayton v. Ramsden [19431 AC 320.

A will contained a gift which was to be forfeited if the beneficiary married a person "not of Jewish parentage and of Jewish faith". This was held to be void for uncertainty.

Race.

The Race Relations Act does not apply to private trusts.

Restraints on alienation.

A total restraint is void, but a partial restraint is valid.

"To A provided he does not sell it."

"To A provided he does not sell it to B."

Re Brown [19541 Ch 39.

A testator gave his land to his four sons, but it was subject to a condition which meant that a son would lose his interest if he sold or mortgaged his interest to anyone other than his brothers. This was held to be virtually a total restraint, and therefore void.

Increased nil rate band where home inherited by descendants.

"Spouse" includes civil partners.

The idea is that everyone should have a residence nil rate amount.

This will start in 2017-18 and will be £100,000 in that year.

Various conditions must be satisfied"

1. There must be a qualifying residential interest.

2. The interest in the home must go to descendants.

3. It must be closely inherited.

If when a person dies, there is no residence nil rate because the conditions are not satisfied, then it can be carried forward, but it can only be used by a spouse or civil partner of the deceased.

Qualifying residential interest.

1. An interest in a dwelling-house which has been the person's residence at a time when the person's estate included that, or any other, interest in the dwelling-house.

2. Where a person's estate immediately before the person's death includes residential property interests in just one dwelling-house, the person's interests in that dwelling-house are a qualifying residential interest in relation to the person.

3. Where—

(a) a person's estate immediately before the person's death includes residential property interests in each of two or more dwelling-houses, and

(b) the person's personal representatives nominate one (and only one) of those dwelling-houses, the person's interests in the nominated dwelling-house are a qualifying residential interest in relation to the person.

A dwelling-house—

(a) includes any land occupied and enjoyed with it as its garden or grounds, but

(b) does not include, in the case of any particular person, any trees or underwood in relation to which an election is made under section 125 as it applies in relation to that person's death.

4. If at any time when a person's estate includes an interest in a dwelling-house, the

person—

(a) resides in living accommodation which for the person is job-related, and

(b) intends in due course to occupy the dwelling-house as the person's residence, this section applies as if the dwelling-house were at that time occupied by the person as a residence.

Meaning of "inherited"

1. B inherits the property if there is a disposition of it (whether effected by will, under the law relating to intestacy or otherwise) to B.

2. B inherits the property if

(a) under the disposition B becomes beneficially entitled to an interest in possession in the property, and that interest in possession is an immediate post-death interest or a disabled person's interest, or

(b) under the disposition the property becomes settled property—

(i) to which section 71A or 71D applies, and

(ii) held on trusts for the benefit of B.

3. Where the property forms part of D's estate immediately before D's death as a result of the operation of section 102(3) of the Finance Act 1986 (gifts with reservation) in relation to a disposal of the property made by D by way of gift, B inherits the property if B is the person to whom the disposal was made.

Meaning of "closely inherited"

1. In relation to a person's death, something is "closely inherited" if it is inherited for those purposes (see section 8J) by a lineal descendant of the person.

2. A person who is at any time a step-child of another person is to be treated, at that and all subsequent times, as if the person was that other person's child.

3. An adopted person can the child of his natural parent of the person and the adoptive parents.

"adopted person" means—

(a) an adopted person within the meaning of Chapter 4 of Part 1 of the Adoption and Children Act 2002, or

(b) a person who would be an adopted person within the meaning of that Chapter if, in section 66(1)(e) of that Act and section 38(1)(e) of the Adoption Act 1976, the reference to the law of England and Wales were a reference to the law of any part of the United Kingdom.

4. A person who is at any time fostered by a foster parent is to be treated, at that and all

subsequent times, as if the person was the foster parent's child.

"foster parent" means—

(a) someone who is approved as a local authority foster parent in accordance with regulations made by virtue of paragraph 12F of Schedule 2 to the Children Act 1989,

(b) a foster parent with whom the person is placed by a voluntary organisation under section 59(1)(a) that Act,

(c) someone who looks after the person in circumstances in which the person is a privately fostered child as defined by section 66 of that Act, or

(d) someone who, under legislation having effect in Scotland or Northern Ireland or any country or territory outside the United Kingdom, is a foster parent corresponding to a foster parent within paragraph (a) or (b).

5. Where—

(a) an individual ("G") is appointed (or is treated by law as having been appointed) under section 5 of the Children Act 1989, or under corresponding law having effect in Scotland or Northern Ireland or any country or territory outside the United Kingdom, as guardian (however styled) of another person, and

(b) the appointment takes effect at a time when the other person ("C") is under age of 18 years,

C is to be treated, at all times after the appointment takes effect, as if C was G's child.

6. Where one person is treated at any time as the child of another person, that first person's lineal descendants (even if born before that time) are accordingly to be treated at that time (and all subsequent times) as lineal descendants of that other person.

Taper.

If the estate is over £2m, for every £2 over £2m, RNRB is reduced by £1.

Example 1.

C is married to D. They own the matrimonial home worth £350,000 as tenants in common.

C dies leaving all his estate to D. It does not matter when C's death occurred.

No IHT because of spouse exemption.

Brought forward allowance is 100%

When D dies and leaves the matrimonial home to children, residential enhancement

will be increased by 100%. Double standard nil rate band available.

Example 2.

A, who is married, dies in June 2017 leaving a house worth £300,000 to daughter D. Residue of £425,000 goes to son S.

The residence nil rate band is £100,000.

The remainder of the estate - £200,000 + £425,000 = £625,000 will be subject to IHT.

Deduct NRB £325,000 = £300,000 x 40% = £120,000.

Example 3.

As example 2, but house is worth £75,000.

Residence nil rate band is £75,000.

£25,000 or one quarter can be carried forward, but can only be used by a spouse of civil partner.

Remainder of estate £425,000 subject to IHT.

Deduct NRB £325,000. IHT on £100,000 x 40% = £40,000.

When survivor dies, if residence nil rate band £125,000, it will be increased by one quarter. = £31250.

Example 4.

B dies in June 2017 leaving a house worth £300,000 to niece N. Residue of £425,000 goes to nephew M.

100% residence nil rate band can be carried forward, but can only be used by B's spouse or civil partner.

Example 5.

E died in June 2014 leaving his half share in the matrimonial worth £162,500 to his children. The residue went to his wife, F.

No IHT was payable when E died because half share within the nil rate band.

On F's death standard nil rate increased by 50%. Double residence nil rate available.

Downsizing or moving into a care home.

The qualifying conditions for the additional RNRB would be:

individual dies on or after 6 April 2017

property disposed of must have been owned by the individual and it would have qualified for the RNRB had the individual retained it

less valuable property, or other assets of an equivalent value if the property has been disposed of, are in the deceased's estate (this would also include assets which are deemed to be part of a person's estate)

less valuable property, and any other assets of an equivalent value, are inherited by the individual's direct descendants on that person's death - direct descendants are the same as those in relation to the RNRB

In addition, the following conditions would also apply:

the downsizing or the disposal of the property occurs after 8 July 2015

subject to the condition above, there would be no time limit on the period in which the downsizing or the disposals took place before death

there could be any number of downsizing moves between 8 July 2015 and the date of death of the individual

downsizing would also include disposing of part of a property (including land occupied and used as a garden or grounds) or a share in it

where a property is given away, assets of an equivalent value to the value of the property when the gift was made must be left to direct descendants

the value of the property would be the net value i.e. after deducting any mortgage or other debts charged on the property

the additional RNRB would be tapered away in the same way as the RNRB if the value of the estate at death is above £2m

the additional RNRB would be applied together with the available RNRB but the total for the two would still be capped so that they would not exceed the limit of the total available RNRB for a particular year

a claim would have to be made for the additional RNRB in a similar way that a claim is made to transfer any unused RNRB to the estate of a surviving spouse or civil partner

Calculating the lost RNRB

(HMRC note.)

There are 5 steps to work out the amount of RNRB that's been lost:

Step 1. Work out the RNRB that would have been available when the disposal of the former home took place. This figure is made up of the maximum RNRB due at the date of disposal (or £100,000 if the disposal occurred before 6 April 2017) on any transferred RNRB which is available at the date of death.

Step 2. Divide the value of the former home at the date of disposal by the figure in step 1 and multiply the result by 100 to get a percentage. If the value of the former home is greater than the figure in step 1 the percentage will be limited to 100%. If the value of the home disposed of is less than the figure in step 1, the percentage will be between 0% and 100%.

Step 3. If there is a home in the estate on death, divide the value of the home on death by the RNRB that would be available at the date of death (including any transferred RNRB). Multiply the result by 100 to get a percentage (again this percentage can't exceed 100%). If there's no home in the estate at death this percentage will be 0%.

It is possible that this step is incorrect if there is home in the estate at the date of death, and that or part of it passes to an exempt beneficiary. This may change. This could arise if S1 leaves half the home to S2 and the other half to children.[See an article by Mark Benson Capital and Professional Consulting 21/11/17.]

Step 4. Deduct the percentage in step 3 from the percentage in step 2.

Step 5. Multiply the RNRB that would be available at the date of death by the figure from step 4. This gives the amount of the lost RNRB.

The effect of step 3 is that there'll be a different amount of lost RNRB depending on whether the deceased has either:

downsized to a less valuable home

disposed of a home

If the percentage in step 3 is the same as, or greater than, the percentage in step 2 there's no loss of RNRB and there'll be no downsizing addition.

Downsizing to a less valuable home

There may be some lost RNRB where the deceased downsized to a less valuable home but still has a home in their estate on death. This will only happen when the value of the home at death is below the maximum RNRB available to the estate.

The downsizing rules won't apply if either:

there's no loss of the RNRB because the value of any home at death is equal to, or more than the maximum available RNRB

the RNRB isn't available because although there is a home in the estate on death, the home isn't left to a direct descendant

To see if the downsizing addition applies, you don't just look at whether the estate qualifies

for the maximum RNRB. Instead you have to work out whether the value of any home still in the estate at death is too low to qualify for the maximum RNRB if it was left to direct descendants.

Where the deceased downsized and still had a home when they died, the RNRB for the estate will be made up of both:

the RNRB on the home included in the estate

any downsizing addition due for the former home

The downsizing addition will generally be the lower of:

the amount of RNRB that's been lost as a result of the downsizing move

the value of the other assets in the estate left to direct descendants

Where there's no home in the estate at death, the downsizing addition will generally be the lower of:

the amount of RNRB that's been lost as a result of the disposal

the value of the other assets in the estate that the direct descendants inherit

Step 1. RNRB at date of disposal + transferred RNRB at date of death if available.

Step 2. Value of home at date of disposal ÷ total step 1 x 100. Max 100%

Step 3. Value of home at date of death if in estate ÷ RNRB and transferable RNRB x 100. Max 100%

Step 4. Deduct 3 from 2.

Step 5. Multiply RNRB available at date of death + plus transferred RNRB x 4. This gives amount of lost RNRB.

Example

Katherine's a widow. She sold a home worth £195,000 in June 2018. The maximum additional threshold when she sold the home (in the tax year 2018 to 2019) is £125,000.

She died in August 2020 with no home in her estate. The maximum additional threshold in the tax year 2020 to 2021 is £175,000.

Her estate is also entitled to the transferred additional threshold of £175,000 from her late husband's estate.

To calculate the lost additional threshold:

Step 1. The maximum additional threshold when the home was sold was £125,000. Katherine's estate is also entitled to the transferred additional threshold of £175,000. So the total additional threshold that could have been available when the home was sold is £300,000 (£125,000 + £175,000).

Step 2. The home was worth £195,000 when it was sold. Divide this by the value at step 1 (£300,000) to give a percentage of 65%.

Step 3. There's no home in the estate when Katherine dies, so the percentage is 0%.

Step 4. Taking 0% from 65% gives a percentage of 65%.

Step 5. When Katherine dies, the maximum additional threshold is £175,000. Her estate is also entitled to the transferred additional threshold of £175,000, so the maximum additional threshold for her estate is £350,000. The 'lost' additional threshold is £227,500 (65% of £350,000).

Although the lost additional threshold is £227,500, the amount of the downsizing addition available to her estate depends on the value of any other assets she leaves to her direct descendants.

Why use this formula?

Provisions are designed to calculate the RNRB which has been lost.

So step 1 – you need to know RNRB available at date of sale or transfer of home.

You also need to add to this any transferable RNRB at the date of death because that may be lost.

Step 2 – you need to calculate the percentage of RNRB which may have been lost.

Put value of house at at date of sale or transfer over the total in 1 to work out the percentage – this can never exceed 100%.

If it did you would be losing more than the maximum lost RNRB.

Step 3 – you need to calculate the value of any home at the date of death, and then work that out as a percentage of the RNRB at the date of death plus any transferred RNRB.

If there is a home in the estate, it can qualify in its own right for RNRB. So the percentage of RNRB attributable to that must be deducted.

Step 4 – take 3 away from 2 because there is no lost RNRB on the value of the house at the date of death.

If there is no home in the estate at the date of death, it need not be deducted.

Step 5 – calculate maximum RNRB available at the date of death, then apply percentage at step 4 to that to determine downsizing addition.

A sells his home for £300,000 in 2017/18.

Spouse has predeceased leaving everything to A

Buys another for £200,000.

House still worth £200,000 at date of death.

If he dies in 2020/21, he would have lost part of RNRB.

RNRB when he sold house would have been £100,000.

Add transferable RNRB - £175,000. Total £275,000.

£300,000 ÷ £275,000 x 100 = 100%

House worth £200,000 at date of death – as percentage of £350,000 = 57%.

Percentage of RNRB which has been lost is 43%.

Additional RNRB is 43% of £350,000 = £150,500.

Limited to £150,000 because when added to value of house qualifying for RNRB cannot exceed RNRB plus transferred RNRB available at death.

This can be offset against other assets going to descendants.

What advice should we give clients?

"Spouse" includes civil partners.

1. Wealthier clients. The effect of taper relief may be that they do not obtain any enhanced residence nil rate band.

Such client should perhaps be advised to make use of the few lifetime schemes concerning houses which are still available.

Most lifetime schemes to do with houses have been knocked on the head by changes to the gift with reservation of benefit rules, and the introduction of the pre-owned assets charge.

Example.

S1 and S2 own the matrimonial home worth £1m. £2m of other assets.

S1 dies in September 2020 leaving everything to S2.

S2 dies in February 2021.

Double basic nil rate band available - IHT on £3m - £650,000 = £2,350,000 at 40% = £940,000.

If S1/S2 had managed to get the house out of the death estate, and still living in it without infringing the reservation of benefit rules, no residence nil rate band.

Pre-owned assets charge.

When S2 dies, IHT on £2m - £650,000 = £1,350,000 x 40% = £540,000.

2. Ensure that there estates are less than £2m by making lifetime gifts, possibly deathbed gifts.

3. Sheltering some assets in a discretionary trust may be desirable.

Example.

H and W each have assets worth £600,000. This comprises:

> **matrimonial home half share £275,000. Assume that it does not increase in value**
>
> **a portfolio of quoted shares worth £325,000.**

H dies first in 2017 leaving whole estate to W.

W dies in 2020/21 leaving whole estate to children. Quoted shares now worth £400,000.

IHT on shares £800,000 + house £550,000 = £1,350,000- £1,000,000 = £350,000. IHT at 40% = £140,000.

If H had created a discretionary trust in his will and given the trustees quoted shares worth £325,000, residue to W, when W dies IHT on shares £400,000 house £550,000 = £950,000 - £325,000 - £350,000 = £275,000. IHT at 40% = £110,000.

S144?

See article in Taxation 20 April 2017 by Stephen Haggett pages 14 – 17.

4. A charge on the property will reduce its value - move it to other assets?

Example.

A's residence, a house, is worth £400,000, but is subject to a charge for £350,000.

A dies leaving house to children. No transferable residence nil rate band.

A's PRs can only make use of £50,000 of residence nil rate band.

5. It is not a good idea first spouse to die to make use of the residence nil rate band, or the £325,000 nil rate band.

The residence nil rate band will gradually increase – far better to make use of any increased residence nil rate band. The same applies to the basic nil rate band.

6. Clients who already have wills with nil rate band discretionary trusts.

The executors or trustees could impose a charge for the nil rate band

They could then transfer the matrimonial home to the surviving spouse or civil partner within two years of death.

Assuming that section 144 of the Inheritance Tax Act is not repealed, it would be treated as if the testator or the testatrix had given the house to the spouse or civil partner in their will.

Charge could reduce value of home limiting residence nil rate band.

Example.

H dies leaving a will with a NRB discretionary trust. Home is worth £300,000.

Trustees impose a charge for £150,000.

Transfer house to W.

W dies in 2022 when house is worth £400,000.

Residence nil rate band on £250,000.

Best to take an IOU?

7. Wills should give the house to lineal descendants either absolutely or it should be an ipdi or a disabled persons' trusts or a bereaved minors' trusts where the age contingency is 18 or an 18-25 trust.

8. Be wary of flexible life interest trusts followed by discretionary trusts for children and grandchildren. Residence nil rate band will be lost. Break up the trust?

9. Be wary of large legacies in wills to persons other than direct descendants and residue to descendants – will house be included?

Example.

T leaves legacy of £500,000 to his cohabitee, residue to children. Only assets are a house worth £400,000, and investments/cash of £100,000.

Probably best to have separate gift of house to descendants or one of the permitted trusts.

10. A gift to grandchildren of the deceased's residence conditional on them attaining a certain age is not one of the permitted trusts.

However, such a gift to grandchildren in a will will create a relevant property trust. It may be that the trustees could make use of s 32 Trustee Act 1925 to appoint the house to the grandchildren, and if they do so within two years of death, it will be read back into the will under s 144 of the Inheritance Act 1984, and RNRB may be available.

11. A life interest in favour of surviving spouse must be followed by absolute gift to children or grandchildren,

12. H and W have £2m each. Both leave interest in residence to children. Can both claim residence nil rate band?

13. In determining the value of the estate, the value of assets qualifying for APR or BPR cannot be deducted. May be it would be a good idea to put such assets into a discretionary trust on the death of a first spouse.

Example.

S1 has the following assets:

Shares qualifying for BPR worth £1,000,000.

House – half share worth £250,000.

Quoted shares worth £750,000.

S2 has the following assets

House – half share worth £250,000.

Quoted shares worth £750,000.

S1 dies leaving all estate to S2. No IHT because of spouse exemption

S2 dies leaving all estate to children.

Assuming assets have not increased in value, total estate £3m – no residence NRB.

If S1 had given shares qualifying for BPR to trustees of a discretionary trust, when S2 dies estate worth £2m. Full residence nil rate band available.

Example.

S1 has the following assets:

matrimonial home half share £300,000. Assume that it does not increase or decrease in value.

a portfolio of quoted shares worth £600,000. Assume that these do not increase or decrease in value.

shares qualifying for BPR worth £2,000,000. Assume the these do not increase or decrease in value.

S2 has assets worth £1,000,000 including half share in house.

S1 dies first in 2017 leaving whole estate to S2.

S2 dies in 2020/21 leaving whole estate to children.

IHT on house £600,000 + shares £600,000 + £700,000 (after deducting half share of house) = £1,900,000 - £650,000 = £1,250,000. IHT at 40% = £500,000. No RNRB because of taper relief.

If S1 had created a discretionary trust in his will and given the trustees the shares qualifying for BPR, residue to S2, no IHT.

When S2 dies IHT £600,000 + shares £600,000 + £700,000 (after deducting half share of house) = £1,900,000 - £1,000,0000 = £900,000. IHT at 40% = £360,000.

See article in Taxation 20 April 2017 by Stephen Haggett pages 14 – 17.

14. it is immaterial that the house is sold by the PRs or beneficiaries.

15. Second/third marriages?

Example.

S1 dies first leaving everything to S2.

S3 dies first leaving everything to S4.

S2 and S4 marry.

Can S2 and S4 make use of their predeceased spouses' residence nil rate band? The answer is yes, but the RNRB cannot exceed 100% of the RNRB.

eg S2 leaves dwelling or half share to children.

16. Ideally there should be a specific gift of the house or it should be included in the residue.

Example.

C leaves a legacy of £500,000 to his children, residue to charity.

On his death, his estate comprises a house worth £400,000 and other assets worth £200,000.

No residence nil rate band if C's executors appropriate the house in satisfaction of the legacy.

17. RNRB can be claimed if the residence passes to lineal descendants under

the intestacy rules.

18. A house which is part of the deceased's estate because of the GROB rules can qualify for RNRB as long as the donee is the lineal descendant.

19. A house could be the residence of the deceased even if they have lived in it for a short time.

20. If the residence is worth less than RNRB, some of it will be lost. Buy a more expensive property?

21. S1 does not own a residence. Dies leaving everything to S2. S2's estate entitled to double RNRB.

22. If there is a contingent gift to children or grandchildren, and they have satisfied the contingency, RNRB available.

23. If s31 Trustee Act applies to a contingent gift to a minor, when each attain 18, that minor will be entitled to the income.

Example.

G's will contains the following gift:

To my grandchildren contingent in them attaining 25.

If all the grandchildren are over 18 when G dies, and s31 applies, they will have an ipdi - RNRB may be available.

24. The surviving husband, wife or civil partner doesn't have to have previously owned the home with their late partner, or inherited it from them. It can be any home as long as the surviving spouse or civil partner lived in it at some stage before they died and the home is included in their estate.

25. The downsizing addition must be claimed within two years of the end of the month in which the person dies.

26. If a client sells the home, or downsizes, it is desirable to keep the relevant details.

27. The downsizing rules also apply to houses in trusts if the house is included in the person's estate for IHT purposes.

Is it in order to draft a will benefitting yourself?

Wintle v. Nye [1959] 1 All ER 552.

The testatrix who had no experience of financial matters made a will and codicil through the family solicitor, Nye, under which Nye was the residuary beneficiary.

Col Wintle challenged the validity of the will.

It was held that a doubt have been raised about the validity of the will, and that the burden of proof then shifted to Nye to prove that there were no suspicious circumstances. Nye could not do this.

Viscount Simmonds said at page 557:

> ' It is not the law that in no circumstances can a solicitor or other person who has prepared a will for a testator take a benefit under it. But that fact creates a suspicion that must be removed by the person propounding the will. In all cases the court must be vigilant and jealous. The degree of suspicion will vary with the circumstances of the case. It may be slight and easily dispelled. It may, on the other hand, be so grave that it can hardly be removed. In the present case, the circumstances were such as to impose on the respondent as heavy a burden as can well be imagined. Here was an elderly lady who might well be called old, and unversed in business, having no one on whom to rely except the solicitor who acted for her and her family; a will made by him under which he takes the bulk of her large estate; a will made, it is true, after a number of interviews extending over a considerable time … but having a complexity which demanded for its comprehension no common understanding; on her part a wish disclosed in January 1937 to leave her residuary estate to charity which was by August superseded by a devise of it to him; and on his part and explanation of the change which was calculated as much to aggravate as to allay suspicion; the will retained by him and no copy of it given to her; no independent advice received by her and, even according to his own account, little pressure exercised by him to persuade her to get it; a codicil cutting out legacies to charities are allegedly for the benefit of annuitants, but, in fact, as was reasonably foreseeable, for the benefit of the residuary beneficiary. '

Probably not if it is a client unless it is a small legacy.

Drafting wills for relatives - yes, as long as it is the type of will you would expect the relative to make.

Interpretation.

Sprackling v. Sprackling [2008] EWHC 2696 (Ch).

A farmer's will contained the following gift:

"Provided my lovely wife Felicity survives me by 28 days to Felicity my property known as Sandilands Farm, Rogate aforesaid to include the fishing lake with access to the car park".

What was included?

Parkinson v. Fawdon [2009] EWHC 1953 (Ch)

The Deceased appointed the Defendant and "Mark Parkinson of 215 Ditching Road Brighton in the County of Sussex" to be his executors. After constituting a trust for sale and providing for the payment of debts the Deceased directed that his residuary estate be divided in half, one half being held for "the said Mark Parkinson", and the other for such of Edith Fawdon and her sisters as should have survived the Deceased. Both Joyce and Joan had died in 1997 so that Edith Fawdon alone took this share.

No person with the name of Mark Parkinson lived at 215 Ditching Road Brighton, and there was no road named Ditching Road in Brighton. However, Justin Parkinson did live at 215 Ditchling Road.

It was held that the court had to try to ascertain the intention of the testator, and that he clearly intended to benefit Justin Parkinson of 215 Ditchling Road.

RSPCA v. Sharp and others [2010] EWHC 268 (Ch)

A will contained the following clauses:

"3. I GIVE the amount which at my death equals the maximum which I can give to them by this my Will without Inheritance Tax becoming payable in respect of this gift:

(a) as to seventy-eight percent (78%) to the said NORMAN JAMES SHARP and PATRICIA DAPHNE SHARP as shall survive me and if more than one in equal shares absolutely

(b) as to twenty-two percent (22%) to JOHN EDWARD MASON of 4 Jervis Avenue Freezywater EN3 6LT absolutely

.

4. I GIVE my property situate and known as 39 Malvern Road Gosport in

Hampshire PO12 3LH to the said NORMAN JAMES SHARP and PATRICIA DAPHNE SHARP as shall survive me and if more than one jointly and equally absolutely and I direct that the Inheritance Tax (if any) payable on my death in respect of the property and all costs of the registration of the said NORMAN JAMES SHARP and PATRICIA DAPHNE SHARP as proprietors thereof shall be payable out of my residuary estate.

5. SUBJECT TO the payment of my just debts funeral and testamentary expenses and the legacies given by this my Will or any Codicil hereto I GIVE DEVISE AND BEQUEATH the residue of my estate of whatsoever nature and wheresoever situate (which said estate and property and the property for the time being representing the same and herein referred to as "my residuary estate") unto my trustees upon trust to sell the same or any part thereof or to retain the same or any part thereof in its actual state of investment or condition at the time of my death.

6. MY TRUSTEES shall stand possessed of my residuary estate upon trust for the Royal Society for the Prevention of Cruelty to Animals of Causeway Horsham West Sussex RH12 1HG for its general purposes and I direct that the receipt of the secretary treasurer or other proper officer shall be a sufficient discharge to my trustees."

The executors distributed the estate on the basis that the legacies in clause 3 were to total the nil rate band, and that 39 Malvern Road should not be deducted when calculating what was left of the nil rate band.

The RSPCA argued that it should have been taken into account.

It was held that this was not correct.

Peter Smith J said:

“It is a matter of regret in my view that this action was ever brought. It clearly caused great distress to the Defendants and I cannot believe the Deceased would have been happy to see arguments by the RSPCA designed to erode the largesse in favour of his friends and relative to their benefit in this way. It is true that IHT is payable according to the Defendants' contentions (but not out of their share) when none is payable according to the RSPCA's argument. However that fact cannot conceal that the whole purpose and thrust of the RSPCA's argument is to raise its interest under the will by nearly 75%. I know it is said that Trustees of charitable organisations are required to maximise the return for their charity but I really wonder whether the discharge of that duty required this action to be brought. In my view the RSPCA whatever the view as to the will ought really to have considered that the residuary legacy that I have determined it is entitled to was generous and ample provision out of this estate. The impact of the

arguments on the size of the bequest to the Deceased's brother was quite stark. This action has plainly caused distress to the Defendants and in my view ought not to have been brought."

The Court of Appeal has overturned the decision of the Judge at first instance [2010] EWCA Civ 1474.

Loring v. Woodland Trust [2014] WTLR 593.

T made a will in 2001 which included the following clause (5):

> "My Trustees shall set aside out of my residuary estate assets or cash of an aggregate value equal to such sum as is at the date of my death, the amount of my unused nil rate band for inheritance tax and to hold the same for such of the following as shall survive me."

The residue was left to the Woodland Trust.

T died in 2011.

Her husband had predeceased her, and her executors claimed the transferable nil rate band which substantially reduced the residue.

It was argued that clause 5 was limited to T's nil rate band, but it was held that it included T's husband's nil rate band as s8(a)(3) IHTA 1984 made it clear that it was retrospective.

Drafting points.

Drafting points common to wills and other documents.

1. How much should you break a clause down into subclauses?

The more you break a clause down, the easier it will be to follow.

A very simple example: compare these clauses:

"I give to A my grandfather clock, my piano, my camera, my binoculars, my collection of fossils, the pictures in the hall, my tools and my gardening equipment including my lawnmower and lawnraker."

"I give to A:

(a) my grandfather clock; (b) my piano; (c) my camera; (d) my binoculars; (e) my collection of fossils; (f) the pictures in the hall; (g) my tools; (h) my gardening equipment including my lawnmower and lawn raker.

But do not overcomplicate a document.

Clause 5 [a] (ii); Clause 5[a](ii)[3].

2. How long should each clause, sub clause or sentence be?

If you are aiming to draft a document which is readily understandable by laymen, the answer is as short as possible.

It is quite in order to have a clause or sub clause consisting of one short sentence.

3. Construction of documents.

The court will look at the whole of a document in order to construe it. When it comes to interpreting single words, reference will be made to the Oxford English Dictionary.

The aim of the court is to carry out the intention of the parties; if it is a will, to carry out the intention of the testator or testatrix.

The Common Law has developed some rules of construction

a. **Expressio unius personae vel rei est exclusio alterius.**

If there is a complicated provision or long list, anything outside the

provision or list is not intended to be included.

b. **Ejusdem generis.**

General words following specific words will be construed as limited to the same type of objects or subject matter as the specific words.

“I give all my cameras binoculars telescopes and other equipment to A."

Re Miller, Daniel v. Daniel [18891 61 LT 365.

After giving pecuniary and other legacies, including gifts of certain books, wine and plate, T gave "all the rest of the furniture and effects" at the house where he lived to D. He devised and bequeathed the rest, residue and remainder of his estate and effects to T.

It was held that bank notes, securities, and jewellery found in the house after T's death did not pass to D, but were included in the residuary gift to T.

c. **Noscitur a sociis.**

Linked words will be construed in the same way.

“I give my house Blackacre the carpets and curtains and my antique furniture to A."

d. **If words appear more than once in a document, they will usually be given the same meaning every time.**

4. Punctuation.

Punctuation marks can make a document easier to read, but be careful how you use *commas* as they can alter the sense of a document.

Houston v. Burns [19181 AC 337.

A will contained the following provision:

I hereby direct my trustees to hold such residue until such time or times as they see fit and apply the same for such public, benevolent, or charitable purpose in connection with the parish of Lesmahagow or the neighbourhood."

It was argued that the provision meant that the money should be applied for charitable purpose which are of a public or benevolent

nature, *in which even it would have been valid,* but it was held that the money could be applied for public or benevolent or charitable purposes, and was void for uncertainty.

In the context of wills, commas may be appropriate in two situations:

1. To divide the items in a list including the last;

2. To separate co-ordinated main clauses.

“I give my watch my camera my binoculars my lawnmower my books my pictures and my computer to A."

“I give my watch, my camera, my binoculars, my lawnmower, my books, my pictures, and my computer to A."

“I give all my property to my trustees and 1 direct that they shall.."

I give all my property to my trustees, and I direct that they shall..."

Colons.

In the context of wills, colons are useful to introduce a list:

I give to A:

[a] my furniture; [b] my paintings; etc.

Semicolon.

A semicolon is used whenever you want a clearer break in a sentence than a comma would give. They are also used between items in lists.

Dash.

This is used to make a break in a sentence, and used in this way it will not be found very often, if at all, in wills. However, it is used to replace the colon when introducing lists.

Powers of trustees/personal representatives.

Advancement: section 32 Trustee Act 1925 permits trustees to advance up to one half/whole of the capital to a beneficiary.

Appropriation: section 41 of the Administration of Estates Act 1925 permits personal representatives to appropriate assets in satisfaction of legacies.

Businesses: personal representatives have limited powers to run businesses.

Charging clause: this should still be included despite Trustee Act 2000.

Delegation: individual trustees can delegate their powers under section 25 Trustee Act 1925 and section 1 of the Trustee Delegation Act 1999; collectively trustees can delegate their powers under the Trustee Act 2000 and section 9 of the Trusts of Land and Appointment of Trustees Act 1996.

Insurance: under section 19 of the Trustee Act 1925 trustees can insure against whatever risks they consider appropriate for the full reinstatement value, pay premiums out of income or capital, and have a discretion as to whether insurance money should be used to reinstate the property.

Investment: Trustees can invest as if they were absolutely entitled. Trustees must have regard to the 'standard investment criteria' and the requirement to obtain advice.

Maintenance: section 31 of the Trustee Act 1925 authorises the trustees to apply the income for the maintenance education or other benefit of a beneficiary.

Infants: an infant cannot give a valid receipt, although there are some exceptions.

Receipt: A sole trustee can give a valid receipt, except for the proceeds of sale or other capital money arising under a trust of land.

Sale: Trustees have wide powers of sale and a wide discretion as to the method of sale.

Trustees can convey land to beneficiaries or partition the land.

Advancement.

Section 32 of the Trustee Act 1925 empowers trustees to advance capital to a beneficiary.

Only one-half of the presumptive share of a beneficiary can be advanced, and when the beneficiary becomes absolutely and indefeasibly entitled, the advancement must be brought into account.

Inheritance and Trustee Powers Act 2014.

S32 is amended to make it clear that it is not limited to money – it applies to any property forming part of the trust property. In addition, the whole of the trust fund can be advanced.

A new subsection is inserted:

"(1A) In exercise of the foregoing power trustees may pay, transfer or apply money or other property on the basis (express or implied) that it shall be treated as a proportionate part of the capital out of which it was paid, transferred or applied, for the purpose of bringing it into account in accordance with proviso (b) to subsection (1) of this section."

These amendments apply to trusts whenever created apart from the removal of the limitation on how much of the trust fund can be advanced, which will only affect trusts coming into effect after the provisions come into effect (1 October 2014).

What is meant by **'**advancement or benefit**'**?

In Pilkington v IRC [1964] AC 612 Lord Radcliffe at page 635 said that it meant 'any use of money which will improve the material situation of the beneficiary'.

Prior interests.

An advancement cannot be made unless the person with a prior interest consents.

Money advanced for a particular purpose.

If trustees advance money for a particular purpose, it will not be necessary for the trustees to ensure that it is applied for that particular purpose if they have grounds for thinking that this will be done.

Common alterations.

It is common to include variations which:

(a) permit the personal representatives to advance the whole of the capital;

(b) dispense with the requirement that the advance should be brought into account, or give the trustees a discretion as to whether the advance should be brought into account;

(c) dispense with consents of beneficiaries with prior interests.

(d) permit the trustees to advance capital to a life tenant.

STEP Standard Provisions.

4(b)/4(b) permits the whole of the capital to be advanced.

3(7)/3(7) permits the trustees to pay money to a beneficiary.

Appropriation.

Section 41 of the Administration of Estates Act 1925 authorises personal representatives to appropriate any part of the real or personal estate, including things in action, of the deceased in the actual state or condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased.

Valuation.

Section 41(3) provides that the personal representatives may ascertain and fix the value of the respective parts of the real and personal estate and the liabilities of the deceased as they may think fit, and shall for that purpose employ a duly qualified valuer where necessary.

The relevant date for fixing the value is the date of appropriation.

Intestacy.

Section 41(9) specifically provides that the section applies whether the deceased died intestate or not.

In Kane -v- Radley-Kane and others [1998] 3 WLR 753 James Radley-Kane died intestate in May 1994 leaving a widow, the first Defendant, and three sons. The widow was, in fact, the step-mother of the three sons.

The deceased owned 36% of the ordinary shares in a company called Shiredean Limited, which were valued for probate purposes at £50,000. The net value of the deceased's estate was £93,000. Letters of Administration were granted to the widow, and she regarded herself as entitled to the whole estate under the intestacy rules.

In January 1997 the shares in Shiredean were sold for £1,131,438.

The Plaintiff, one of the sons, issued proceedings claiming that the appropriation of the shares by the widow in her own favour was invalid.

It was held that this was the case. However, the judge stated that if the assets had been equivalent of cash, for example government stock, then the appropriation would have been valid.

Common alterations.

(a) To permit appropriation without obtaining any consent.

(b) To permit personal representatives to appropriate in their own favour.

(c) A mechanism for valuing property.

STEP Standard Provisions.

3(19)/3(18) permits PRs to appropriate assets without consent.

Trustees and powers of appropriation.

Section 41 applies only to personal representatives, and does not apply to trustees, who have the following powers of appropriation:

(a) If there are separate trusts of separate property, the trustees can appropriate assets to the value of the separate amounts given.

(b) If there is a trust for sale, and there is nothing in the trust instrument to indicate that an appropriation should not be made, the trustees may make an appropriation.

Normally any adult beneficiaries must agree.

Businesses.

Sole traders.

The personal representatives can continue the business, but only for the purpose of selling it, and only for a year. The personal representatives are personally liable for debts they incur, but there is a right of indemnity from the estate.

The personal representatives can only use the assets employed in the business at the date of death.

Common variations.

It is common to include clauses which provide for the following:

(a) to run the business as long as the personal representatives like;

(b) to use other assets;

(c) to appoint a manager;

(d) indemnity.

Partnerships.

It may be that no extra provision is necessary because of the terms of the partnership agreement.

Companies.

Usually no special provision is required.

The personal representatives can be authorised to give the warranties which are usually given on a sale of shares.

STEP Standard Provisions.

3(8)/3(8) provides that the trustees may carry on a trade in any part of the world alone or in partnership.

3(18)/3(17) provides that trustees are under no duty to enquire into the conduct of a company in which they are interested, unless they have knowledge of circumstances which call for an enquiry.

Charging clauses.

Section 29(1) provides that a trustee who–

(a) is a trust corporation, but

(b) is not a trustee of a charitable trust,

is entitled to receive reasonable remuneration out of the trust funds for any services that the trust corporation provides on behalf of the trust.

A professional trustee is similarly entitled. Section 29(2) provides that a trustee who–

(a) acts in a professional capacity, but

(b) is not a trust corporation, a trustee of a charitable trust or a sole trustee,

is entitled to receive reasonable remuneration out of the trust funds for any services that he provides on behalf of the trust. All the other trustees must agree in writing that he may be remunerated for the services. Note that a sole trustee cannot charge.

Section 28(5) defines what is meant by acting in a professional capacity. A trustee acts in a professional capacity if he acts in the course of a profession or business which consists of or includes the provision of services in connection with–

(a) the management or administration of trusts generally or a particular kind of trust, or

(b) any particular aspect of the management or administration of trusts generally or a particular kind of trust,

and the services he provides to or on behalf of the trust fall within that description.

Section 29(3) defines reasonable remuneration. In relation to the provision of services by a trustee, it means such remuneration as is reasonable in the

circumstances for the provision of those services on behalf of that trust by that trustee.

A trustee who has been appointed as an agent of the trustees, or nominee or custodian under the powers conferred by Part IV or the trust instrument is also entitled to remuneration under s 29 (s 29(6)).

Section 29(5) provides that a trustee is not entitled to remuneration under s 29 if any provision about his entitlement to remuneration has been made–

(a) by the trust instrument, or

(b) by any enactment or any provision of subordinate legislation.

Section 31(1) confirms this position by providing that a trustee is entitled to be reimbursed out of the trust funds or may pay out of the trust fund expenses properly incurred when acting on behalf of the trust. Section 31(2) provides that the section applies to a trustee who has been authorised under a power conferred by Part IV or the trust instrument–

(a) to exercise functions as an agent of the trustees, or

(b) to act as a nominee or custodian,

as it applies to any other trustee.

Section 28(1) provides that subsections (2) to (4) apply to a trustee if–

(a) there is a provision in the trust instrument entitling him to receive payment out of trust funds in respect of services provided by him on behalf of the trust, and

(b) the trustee is a trust corporation or is acting in a professional capacity.

Section 28(2) provides that the trustee is to be treated as entitled under the trust instrument to receive payment in respect of services even if they are services which are capable of being provided by a lay trustee. Section 28(6) provides that a person acts as a lay trustee if he–

(a) is not a trust corporation, and

(b) does not act in a professional capacity.

Section 15 of the Wills Act 1837 provides that a gift to an attesting witness or the spouse of an attesting witness is void. Section 28(4) provides that any payments to which the trustee is entitled in respect of services are to be treated as remuneration for services and not as a gift for the purposes of s 15 of the 1837 Act.

STEP Standard Provisions.

11/10 gives the trustees/personal representatives power to charge.

Compounding liabilities.

Section 15 of the Trustee Act 1925 empowers personal representatives or two or more trustees to, *inter alia*, 'compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust'.

STEP Standard Provisions.

No equivalent provision.

The power to delegate.

Delegation by individual trustees.

S 25 Trustee Act as substituted by s 5 TDA permits a trustee to delegate all functions.

Note the following points:

1. The delegation commences with the date of execution of power if there is no other provision;

2. It can last for a maximum of 12 months;

3. Written notice must be given to anyone who has power to appoint another trustee and the other trustees within seven days of the giving of the power;

4. There is a prescribed form:

"THIS GENERAL POWER OF ATTORNEY is made on
by
of
as trustee of

I appoint
of
to be my attorney *[if desired, the date on which the delegation commences or the period for which it continues]*
in accordance with section 25(5) of the Trustee Act 1925."

If the prescribed form is used, or the power is expressed to be made under s 25(5), the attorney can do anything the trustee could have done;

5. Delegation has to be to a single attorney.

6. The donor is liable for the acts of the donee;

7. The attorney can delegate the power to transfer;

8. A company registrar is not affected by knowledge that the donor is a trustee;

9. Personal representatives and tenants for life can also delegate.

S 1 Trustee Delegation Act 1999 permits the donee of power of attorney to exercise trustee functions as long as donor has a beneficial interest in land, capital proceeds of a conveyance of land, or income from land.

Note the following points:

1. It is subject to contrary intention.

2. The donor is liable for the acts of the donee.

3. It applies to both ordinary and enduring and lasting powers.

4. The registrar of a company is not affected by notice of any trust.

5. Post TDA powers - where s 1 applies, any general ordinary or enduring or lasting power will enable the attorney to exercise the trustee functions of the donor.

However, s 7 TDA preserves the two trustee rule.

Power to appoint trustee.

S 36(6A) as inserted by TDA confers on the donee of an enduring power a limited power to appoint a new trustee. The section applies to a person who is-

both a trustee and attorney for the other trustee (if one other) under a registered power*, or*

for both of the other trustees (if two others), under a registered power;

or

attorney under a registered power for the trustee (if one) or

attorney for both or each of the trustees (if two or three) [s 36(6A)].

The attorney must as attorney under the power intend-

(a) to exercise any function of the trustee or trustees by virtue of s 1(1) TDA; or

(b) to exercise any function of the trustee or trustees in relation to any land, capital proceeds of a conveyance of land or income from land by virtue of its delegation to him under s 25 TA 1925 or the instrument (if any) creating the trust [s 36(6B)].

Delegation by trustees collectively – s9 TLATA 1996.

The following conditions must be satisfied:

1. Delegation must be to a beneficiary;

2. The beneficiary must be beneficially entitled to an interest in possession in land.

3. The power must be given by all the trustees jointly.

4. The delegation can be for any period.

5. An enduring power cannot be used.

6. Beneficiaries to whom powers delegated are trustees for some purposes.

7. Trustees are only liable for breach of trust if they did not exercise reasonable care in the selection of the attorney.

8. The power can be revoked by any trustee; it is also revoked by appointment of another trustee.

9. If a beneficiary ceases to be beneficially entitled to an interest in possession, the power is revoked.

Trustee Act 2000.

The Trustee Act 2000 substantially changed the law. Sections 21, 23 and 30 of the Trustee Act 1925 are repealed. Instead, Part IV of the 2000 Act contains a comprehensive code dealing with the appointment of agents, nominees and custodians.

Delegable functions.

The Law Commission considered that it should be possible to delegate administrative powers, but not distributive powers.

Section 11(1) provides that trustees may authorise any person to exercise any or all of their delegable functions as their agent.

Section 11(2) defines the trustees' delegable functions. These are any function other than -

(a) any function relating to whether or in what way any assets of the trust should be distributed;

(b) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital, (this is a decision about the distribution of assets);

(c) any power to appoint a person to be a trustee of the trust; or

(d) any power conferred by any other enactment or the trust instrument which permits the trustees to delegate any of their functions or to appoint a person to act as nominee or custodian.

Charity Trustees.

Section 11(2) does not apply to charitable trustees. Instead 11 (3) provides that in the case of a charitable trust, the trustees' delegable functions are –

(a) any function consisting of carrying out a decision that the trustees have taken;

(b) any function relating to the investment of assets subject to the trust (including, in the case of land acquired as an investment, managing the land and creating or disposing of an interest in the land);

(c) any function relating to the raising of funds for the trust otherwise than by means of profits of a trade which is an integral part of the carrying out of the trust's charitable purpose;

(d) any other function prescribed by an order made by the Secretary of the State.

Section 11(4) provides that for the purposes of subs (3)(c) a trade is an integral part of carrying out a trust's charitable purpose if, whether carried on in the United Kingdom or elsewhere, the profits are applied solely to the purposes of the trust and either –

(a) the trade is exercised in the course of the actual carrying out of a primary purpose of the trust, or

(b) the work in connection with the trade is mainly carried out by beneficiaries of the trust.

Who can be appointed?

The trustees can appoint one of their number, but they cannot appoint a beneficiary.

If two or more persons are appointed to act as the agents of the trustees, they must exercise their functions jointly.

A persons may be appointed to act as the agent of the trustees, even though he is also appointed to act as the nominee or custodian of the trustees.

Duties of agents.

Section 13(1) provides that a person who is authorised under s 11 to exercise a function is subject to any specific duties or restrictions attached to the function. The Act then goes on to provide as an example that a person who is authorised under s 11 to exercise a general power of investment is subject to the duties under s 4.

Section 13(2) provides that a person who is authorised under s 11 to exercise a power which is subject to a requirement to obtain advice is not subject to the requirement if he is the kind of person from whom it would have been proper for the trustees, in compliance with the requirement, to obtain advice.

Section 11(1) Trusts of Land and Appointment of Trustees Act 1996 imposes a duty on trustees to consult beneficiaries and give effect to their wishes. Section 13(3) of the Trustee Act 2000 provides that subs (4) and (5) apply to a trust to which s 11(1) of the 1996 Act applies. Subs (4) provides that the trustee may not under s 11 authorise a person to exercise any of their functions on terms that prevent them from complying with s 11(1) of the 1996 Act. Subs (5) provides that a person who is authorised under subs 11 to exercise any function relating to land subject to the trust is not subject to s 11(1) of the 1996 Act.

Remuneration and terms of employment of agent.

Section 14(1) provides that the trustee may authorise a person to exercise functions as their agent on such terms as to remuneration and other matters as they may determine.

The Act then goes on to restrict this absolute discretion.

Section 14(2) provides that the trustees may not authorise a person to exercise functions as their agent on any of the terms mentioned in subs 3 unless it is

reasonably necessary for them to do so. The terms mentioned in subs (3) are –

a term permitting the agent to appoint a substitute;

(b) a term restricting the liability of the agent or his substitute to the trustees or any beneficiary;

(c) a term permitting the agent to act in circumstances capable of giving rise to a conflict of interest.

Asset Management Functions.

Agreement.

Section 15(1) provides that the trustees may not authorise a person to exercise any of their asset management functions as their agency except by an agreement which is in, or is evidenced in, writing.

Policy statement.

Section 15(2) provides that the trustees may not authorise a person to exercise any of their asset management functions as their agent unless –

(a) they have prepared a statement (known as a policy statement) that gives guidance as to how a function should be exercised; and

(b) the agreement under which the agent is to act includes a term to the effect that he will secure compliance with -

(i) the policy statement

(ii) if the policy statement is revised or replaced under s 22, the revised or replacement policy statement.

Section 15(3) provides that the trustees must formulate any guidance given in the policy statement with a view to ensuring the functions will be exercised in the best interests of the trust.

Section 15(4) provides that the policy statement must be in, or evidenced in, writing.

Definition of asset management functions.

Section 15(5) provides that the asset management functions of trustees are their functions relating to –

(a) the investment of assets subject to the trust

(b) the acquisition of property which is subject to the trust and disposing of, or creating or disposing of an interest in, such property.

(c) managing a property which is subject to the trust and disposing of, or creating or disposing of an interest in, such property.

Appointment of nominees and custodians.

Nominees.

Section 16(1) provides that the trustees of a trust may –

(a) appoint a person to act as their nominee in relation to such of the assets of the trust as they determine, and

(b) take such steps as are necessary to secure that those assets are vested in a person so appointed.

An appointment under the section must be in, or evidenced in, writing, and the section does not apply to any trust having a custodian trustee as defined in the Public Trustee Act 1906 (s 16(2) and (3)).

Custodians.

Section 17(1) provides that the trustees of a trust may appoint a person to act as a custodian in relation to such assets of the trust as they have determined.

Section 17(2) provides that a person is the custodian in relation to assets if he undertakes safe custody of the assets or of any documents or records concerning the assets.

Section 17(3) provides that an appointment under the section must be in, or evidenced in, writing.

Section 17(4) provides that the section does not apply to any trust having a custodian trustee as defined in the Public Trustee Act 1906.

Section 18(1) provides that if trustees retain or invest in securities payable to bearer, they must appoint a person to act as a custodian of the securities. This does not apply if a trust instrument or any enactment or provision of subordinate legislation contains a provision which permits the trustees to retain or invest in securities payable to bearer without appointing a person to act as a custodian (s18(2)).

Section 18(3) provides that an appointment under the section must be in, or evidenced in, writing.

Section 18(4) provides that the section does not apply to any trust having a custodian trustee.

Note that Section 25(2) provides that s 18 does not impose a duty on a sole trustee if that trustee is a trust corporation.

Who can be a nominee or custodian?

Section 19(1) provides that a person may not be appointed under ss 16, 17 or 18 as a nominee or custodian unless one of the relevant conditions is satisfied. Section 19(2) provides that the relevant conditions are that –

(a) the person carries on business which consists of or includes acting as a nominee or custodian; or

(b) the person is a body corporate which is controlled by the trustees.

(c) the person is a body corporate recognised under section 9 of the Administrations of Justice Act 1985.

Section 19(3) provides that the question whether a body corporate is controlled by trustees is to be determined in accordance with the s 840 of the Income and Corporation Taxes Act 1988.

Section 19(4) provides that the trustees of a charitable trust which is not an exempt charity must act in accordance with any guidance given by the Charity Commission concerning the selection of a person for appointment as a nominee or custodian under s 16, 17 or 18.

Section 19(5) provides that subject to subs (1) and (4), the persons whom the trustees may appoint as a nominee or custodian under s 16, 17 or 18 include –
(a) one of their number, if that one is a trust corporation, or

(b) two (or more) of their number, if they are to act as joint nominees or joint custodians.

Can a solicitor or accountant who is a trustee be appointed sole custodian?

It will be recalled that s 16 deals with the power of trustees to appoint nominees. Section 19(6) provides that the trustees may under s 16 appoint a person to act as their nominee even though he is also –

(a) appointed to act as their custodian (under s17 or 18 or any other power), or

(b) authorised to exercise functions as their agent under s 11 or any other power.

Section 19(7) provides that the trustees may under those sections appoint a person to act as their custodian even though he is also –

(a) appointed to act as their nominee (under s 16 or any other power), or

(b) authorised to exercise function as their agent (under s 11 or any other power).

Thus the same person can be nominee, agent or custodian.

<u>Remuneration.</u>

Section 20(1) provides that the trustees may appoint a person to act as a nominee or custodian on such terms as to remuneration and other matters as they may determine.

Section 29 contains further provisions dealing with the remuneration of a trustee who has been appointed as agent, nominee or custodian.

Section 32(1) applies if a person other than a trustee has been-

a) authorised to exercise functions as an agent of the trustee, or

b) appointed to act as a nominee or custodian.

Section 32(2) provides that the trustees may remunerate the agent, nominee or custodian out of the trust funds for services if –

a) he is engaged on terms entitling him to be remunerated for those services, and

b) the amount does not exceed such remuneration as is reasonable in the circumstances for the provision of the services by him on behalf of that trust.

Section 32(3) provides that the trustee may reimburse the agent, nominee or custodian out of the trust funds for any expenses properly incurred by him in exercising functions as an agent, nominee or custodian.

Terms of contract with nominees or custodian.

Section 20(2) provides that the trustees may not appoint a person to act as a nominee or custodian on any of the terms mentioned in subs (3) unless it is reasonably necessary for them to do so. The terms mentioned in subs (3) are –

a) a term permitting the nominee or custodian to appoint a substitute;

b) a term restricting the liability of the nominee or custodian or his substitute to the trustees or to any beneficiary;

c) a term permitting the nominee or custodian to act in circumstances capable of giving rise to a conflict of interest.

Review.

For the whole of the time that the agent, nominee or custodian continues to act for the trust, the trustees must keep under review the arrangements under which the agent, nominee or custodian acts, and how those arrangements are being put into effect. If circumstances make it appropriate to do so, the trustees must consider whether there is a need to exercise any power of intervention that they have, and if they consider there is a need to exercise such a power, they must do so (s 20(1)).

Section 22(4) provides that a power of intervention includes –

a) a power to give directions to the agent, nominee or custodian; and

b) a power to revoke the authorisation or appointment.

If the trustees have authorised an agent to exercise asset management functions, the duty under s 22 (1) includes, in particular –

a) a duty to consider whether there is any need to revise or replace the policy statement made for the purpose of s 15,

b) if they consider that there is a need to revise or replace a policy statement, a duty to do so, and

c) a duty to assess whether the terms of the policy statement are being complied with.

Section 22(3) provides that s15(3) and (4) apply to the revision or replacement of a policy statement under s 22 as they apply to the making of a policy statement under that section. Section 15(3) requires that the trustees must formulate any guidance given in the policy statement with a view to ensuring that the functions will be exercised in the best interests of the trust. Section 15(4) provides that the policy statement must be in, or evidenced in, writing.

Liability of trustee for default of agent.

Section 23(1) provides that a trustee is not liable for any act or default of the agent, nominee or custodian unless he has failed to comply with the duty of care applicable to him, under para 3 of Sch 1 –

a) when entering into the arrangement under which the person acts as agent, nominee or custodian, or

b) when carrying out his duties under s22.

Section 23(2) provides that if a trustee has agreed a term under which the agent, nominee or custodian is permitted to appoint a substitute, the trustee is not liable for an act or default of the substitute unless he has failed to comply with the duty of care applicable to him, under para 3 of Sch 1 –

a) when agreeing that term, or

b) when carrying out his duties under s 22 in so far as they relate to the use of the substitute.

Section 24 deals with the effect of trustees exceeding their powers. If trustees exceed their powers in authorising a person to exercise a function as their agents, or in appointing a person to act as a nominee or custodian, the authorisation or appointment is still valid.

General.

Section 25(1) provides that a sole trustee can exercise all the powers described above.

Section 26 provides that the powers conferred by the Act on the trustees to appoint agents, nominees and custodians are in addition to powers conferred on trustees otherwise than by the Act.

It is provided by s 27 that the provisions about appointing agents, nominees and custodians apply in relation to trusts whether created before or after the commencement of the Act.

STEP Standard Provisions.

3(11) and 3(13)/3(10) and 3(12) confers wide powers of delegation on trustees.

Insurance.

The Trustee Act 2000 has replaced the original s 19 with a new section. The substituted s 19 provides that a trustee may insure any property which is subject to the trust against risk of loss or damage due to any event. The premiums may be paid out of the trust funds (s 19(1)). Section 19(5) provides that 'trust funds' means any income or capital funds of the trust.

Section 19(3) provides that property is held on a bare trust if it is held on trusts for–

(a) a beneficiary who is of full age and capacity and absolutely entitled to the property which is subject to the trust, or

(b) beneficiaries each of whom is of full age and capacity and who (taken together) are absolutely entitled to the property subject to the trust.

If property is held on a bare trust, the beneficiary or each of the beneficiaries may direct that any property specified in the direction is not to be insured, or that it is only to be insured on such conditions as may be specified (s 19(2)). If such a direction is given, the power to insure ceases to be a delegable function for the purposes of s 11 of the Trustee Act 2000 (power to employ agents).

Possible amendments.

It is common to make the following variations to the power:

(a) Section 19 does not impose any duty on the trustees to insure; such a duty could be imposed.

(b) The trustees may be given an express discretion as to whether insurance money should be used to reinstate the settled property.

STEP Standard Provisions.

3(10) provides that the trustees may insure trust property for any amount against any risk.

Investment.

Section 3(1) provides that subject to the provisions of Part II of the Act, a trustee may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust (the general power of investment).

Loans secured on land.

Section 3(3) provides that the general power of investment does not permit a trustee to make investments in land other than in loans secured on land. However, s 8 does contain a power to invest in land.

Section 3(4) provides that a person invests in a loan secured on land if he has rights under any contract under which:

(a) one person provides another with credits, and

(b) the obligation of the borrower to repay is secured on land.

'Credit' is given a wide meaning in s 3(5), where it is defined as including any cash loan or other financial accommodation. Section 3(6) provides that cash includes money in any form.

Standard investment criteria.

Section 4(1) provides that in exercising any power of investment, a trustee must have regard to the standard investment criteria.

The duty applies whether or not the powers under the Act are being exercised.

Section 4(2) provides that a trustee must from time to time review the investments of the trust and consider whether, having regard to the standard investment criteria, they should be varied.

Section 4(3) provides that the standard investment criteria, in relation to a trust, are –

(a) the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind, and

(b) the need for diversification of investments of the trust in so far as is appropriate to the circumstances of the trust.

Gregson v. HAE Trustees [2008] EWHC 1006 (Ch).

The founders of Courts PLC created a settlement of shares in the company. Another company was formed to act as trustee. It was always the intention of the settlors that the shares should be retained so that the family did not lose control of the company.

Courts PLC became insolvent with a deficit of £70 million. As a result, the shares held by the trustee became worthless.

A beneficiary sued the directors of the trustee company for breach of trust, and also for not diversifying the trust investments.

It was held that the directors of a trustee company could not be sued for breach of trust.

In addition, whilst the trustees were under a duty under the Trustee Act 2000 to consider diversification of the investments, that did not mean they had to do so. In this case, it was clearly the intention of the settlors that the assets should not be diversified.

Duty to obtain advice.

Section 5(1) provides that before exercising any power of investment, a trustee must obtain and consider proper advice about the way in which, having regard to the standard investment criteria, the power should be exercised.

Section 5(2) provides that a trustee must obtain and consider proper advice about whether, having regard to the standard investment criteria, the investments should be varied.

Section 5(3) provides that a trustee need not obtain such advice if he reasonably concludes that in all the circumstances it is unnecessary or inappropriate do so.

'Proper advice' is defined in s 5(4) as the advice of a person who is reasonably believed by the trustee to be qualified to give it by ability and practical experience of financial and other matters relating to the proposed investment.

Application of general power.

The general power of investment is in addition to powers conferred on trustees otherwise than by the Act, but it is subject to any restriction or exclusion imposed by the trust instrument or by any enactment or any provision of subordinate legislation (s6(1)).

Section 6(2) provides that for the purpose of the Act, an enactment or a provision of subordinate legislation is not to be regarded as being, or as part of, a trust instrument.

Section 7(1) provides that Section 3, 4, 5 and 6 apply to trusts whether created before or after the commencement of the Act.

Section 7(2) provides that no provision relating to the powers of a trustee contained in a trust instrument made before 3 August 1961 is to be treated (for the purposes of s 6(1)(b)) as restricting or excluding the general power of investment.

Section 7(3) provides that a provision contained in a trust instrument made before the commencement of Part II which –

(a) has effect under s 3(2) of the Trustee Investment Act 1961 as a power to invest under that Act, or

(b) confers power to invest under that Act,

is to be treated as conferring the general power of investment on a trustee.

Acquisition of Land.

Section 8(1) provides that a trustee may acquire freehold or leasehold land in the United Kingdom –

(a) as an investment
(b) for occupation by a beneficiary, or
(c) for any other reason

Section 8(2) provides that 'freehold or leasehold land' means –

(a) in relation to England and Wales, a legal estate in land,
(b) in relation to Scotland –

(i) the estate or interest of the proprietor of the *dominium utile* or, in the case of land not held on feudal tenure, the estate or interest of the owner, or

(ii) a tenancy, and

(c) in relation to Northern Ireland, a legal estate in land, including land held under a fee farm grant.

Personal representatives.

Generally, the Act applies to personal representatives administering an estate according to the law as it applies to a trustee carrying out a trust for beneficiaries (s35(1)). However, the definition of a beneficiary under s 8(1)(b) is to be read as a reference to the person who under the will of the deceased or under the law relating to intestacy is beneficially interested in the estate.

Powers of trustees.

Section 8(3) provides that for the purpose of exercising his functions as a trustee, a trustee who acquires land under this section has all powers of an absolute owner in relation to the land.

Trusts of Land and Appointment of Trustee Act 1996.

Section 6(3) of the Trusts of Land and Appointment of Trustees Act 1996 provides that trustees of land have the power acquire land under the power conferred by s 8 of the Trustee Act 2000.

Section 6(9) (inserted by the Trustee Act 2000) provides that the duty of care under s 1 of the Trustee Act 2000 applies to trustees of land when exercising the powers conferred by this section.

STEP Standard Provisions.

3(1)/3(1) provides that the trustees may invest the trust property in any manner as if they were beneficial owner. They may also invest in unsecured loans.

3(2)/3(2) confers wide powers of management on the trustees.

3(6)/3(6) permits trustees to permit a beneficiary to occupy a house on such terms as they think fit.

The power of maintenance.

Section 31 Trustee Act 1925 enables trustees to apply the whole of the income of a trust fund for the maintenance, education or benefit of a beneficiary.

When does s 31 apply?

Section 31 clearly applies to vested gifts, where the beneficiary will be entitled to the income, but in the case of a contingent interest s 31(3) states that it applies to a contingent interest only if the limitation or trust carries the intermediate income of the property.

Inheritance and Trustee Powers Act 2014.

S 31(1)(i) Old wording: "*during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is-*

(a) any other fund applicable for the same purpose: or

(b) any person bound by law to provide for his maintenance or education; ...

New wording: "during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit, the whole or such part, if any, of the income of that property, as the trustees may think fit, whether or not there is-

(a) any other fund applicable for the same purpose: or

(b) any person bound by law to provide for his maintenance or education; ...

The proviso requiring the trustees to take into account various factors in deciding whether or nor to apply the income is repealed.

These provisions only affect trusts coming into effect after the provisions are brought into effect.

<u>How is the power exercisable?</u>

Section 31(1) provides that the trustees may, at their sole discretion, pay to the beneficiary's parent or guardian, if any, or otherwise apply for his benefit or towards his maintenance, education or benefit, the whole or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is:

(a) any other fund applicable for the same purpose; or

(b) any person bound by law to provide for his maintenance or education.

<u>What factors should the trustees take into account in deciding whether or not to exercise their discretion?</u>

The trustees must take into account the following matters::

(a) The age of the infant.

(b) The requirements of the infant.

(c) The circumstances of the case.

(d) Other income applicable for the same purpose.

If the income of more than one fund is applicable for the maintenance, education or benefit of the infant, a proportionate part only of the income of each fund shall be so paid or applied.

Entitlement at 18.

A beneficiary who does not attain a vested interest at 18 is entitled to the income until he either attains a vested interest or dies, or until the failure of his interest (s 31(1)(ii)).

What happens to any income which is not applied for the benefit of the beneficiaries?

If any of the income is not applied for the maintenance, education or benefit of the beneficiary, it must be accumulated and invested. It must then be paid to a beneficiary who:

(a) attains the age of 18 years, or marries under that age, and his interest in such income during his infancy or until his marriage is a vested interest; or

(b) on attaining the age of 18 years or on marriage under that age becomes entitled to the property from which such income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest (s 31(2)).

Section 31(2)(ii) provides that in any other case the trustees shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes.

The receipt of a married infant is a good discharge.

Common variations.

It is common to make the following variations to the statutory power of maintenance:

(a) The trustees are given a complete discretion as to whether the income should be applied for the maintenance, education or benefit of a beneficiary.

(b) The entitlement to income may be postponed to an age greater than 18.

STEP Standard Provisions.

4/4 deletes the proviso to s 31(1).

6/5 gives the trustees power to apply the income for the benefit of an infant, and to pay all the income to an infant on attaining 18.

Powers with regard to minors.

Personal representatives and trustees cannot pay the income or hand the capital to a minor, but there are various exceptions to this rule. They are:

(a) Under s 21 of the Law of Property Act 1925 a married infant has power to give a valid receipt for all income but not capital.

(b) Section 31 of the Trustee Act 1925 authorises trustees to apply income for the maintenance of an infant beneficiary. Such payments are to be made to the parent or guardian of the child. Section 32 authorises the advancement of a maximum of one-half of the capital.

(c) *Payment into court*. Section 63(1) of the Trustee Act 1925 provides that trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into court. Section 63(2) provides that the receipt of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into court.

(d) The will or trust instrument may authorise payment to the infant or to the guardian or parent of the child.

(e) Section 42 of the Administration of Estates Act 1925 applies where the will does not appoint trustees, and the infant is absolutely entitled; the personal representatives can then appoint a trust corporation or two or more individuals not exceeding four (whether or not including the personal representatives) to be trustees.

(f) Section 41 of the Administration of Estates Act 1925 enables personal representatives to appropriate any asset in satisfaction of any legacy if the beneficiaries agree; in the case of an infant beneficiary, the consent can be given by the parent or guardian of the infant.

STEP Standard Provisions.

6/5 empowers the trustees to pay the income to the parent or guardian of the minor or the minor himself or herself if over 16.

Power of trustees to give receipts.

Section 14(1) of the Trustee Act 1925 provides that the receipt in writing of a trustee for any money, securities, investments or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge to the person paying, transferring, or delivering the same and shall effectually exonerate him.

Section 14(2) provides that the section does not, except where the trustee is a trust corporation, enable a sole trustee to give a valid receipt for:

(a) the proceeds of sale or other capital money arising under a trust of land;

(b) capital money arising under the Settled Land Act 1925.

It is not possible to displace this section by a provision in the trust deed.

STEP Standard Provisions.

None.

Sale.

The powers.

Trustees have extensive powers to sell trust property.

The 1996 Act provides that trustees are also under a duty to consult the beneficiaries of full age and beneficially entitled to an interest in possession in the land so far as practicable (s 11(1)). They must give effect to the wishes of those beneficiaries so far as consistent with the general interest of the trust; if there is a dispute, the views of the majority by value prevail (s 11(1)). The duty to consult can be excluded, and will not normally apply to a trust created before the Trusts of Land and Appointment of Trustees Act 1996 came into force (1 January 1997), or to a trust created or arising under a will made before 1 January 1997 (s 11(2)), or in the case of a transfer to all the beneficiaries if they are of full age and capacity and absolutely entitled.

Method of sale.

Section 12 of the Trustee Act 1925 confers a wide discretion on the trustees as to the mode of sale.

Section 12(2) provides that a trust or power to sell or dispose of land includes a trust or power to sell or dispose of part thereof, whether the division is horizontal, vertical, or made in any other way.

Duty of trustees.

It is the duty of trustees to obtain the best possible price for trust property (*Buttle v Saunders [1950] 2 All ER 193*).

Power to convey the land to beneficiaries.

Section 6(2) of the Trusts of Land and Appointment of Trustees Act 1996 permits the trustees to convey the land to the beneficiaries if they are all of full age and capacity, even if the beneficiaries have not required the trustees to do so.

Power to partition land.

The trustees have power to partition the land under s 7 where the beneficiaries (i) are of full age and absolutely entitled in undivided shares to land subject to the trust, and (ii) agree to the partition. The trustees may provide for the payment of any equality money by way of mortgage or otherwise.

The effect of relationship breakdown on wills.

A decree absolute of divorce or nullity or dissolution order will cause the appointment of a spouse or civil partner as executor or trustee to fail, and any gift to the spouse or civil partner lapses.

If a will contains a gift of a life interest to a spouse or civil partner, divorce or a dissolution order has the effect of accelerating the life interest.

Separation, judicial separation and separation orders have no effect on a will.

Marriage automatically revokes a will, unless it appears from the will that the testator was expecting to be married to a particular person, and that he intended that the will or a gift in it should not be revoked by the marriage.

The formation of a civil partnership automatically revokes a will, unless it appears from the will that the testator was expecting to form a civil partnership with a particular person, and that he intended that the will or a gift in it should not be revoked by the formation of the civil partnership.

It is possible to have a will in two parts, one of which will be revoked by a subsequent marriage or the formation of a civil partnership, and one which is not to be revoked.

It may be possible to make gifts to an intended spouse or civil partner conditional on the marriage taking place or the formation of a civil partnership.

The effect of divorce on wills.

If spouses divorce, the appointment of the other spouse as executor or trustee lapses, and any gift to the former spouse is ineffective.

Section 18A(1) Wills Act 1837 provides:

"Where, after the testator has made a will, an order or decree of a court of civil jurisdiction in England and Wales dissolves or annuls his marriage or his marriage is dissolved or annulled and the divorce or annulment is entitled to recognition in England and Wales by virtue of Part II of the Family Law Act 1986 –

> (a) provisions of the will appointing executors or trustees or conferring a power of appointment, if they appoint or confer the power on the former spouse, shall take effect as if the former spouse has died on the date on which the marriage was dissolved or annulled, and
>
> (b) any property which, or an interest in which is devised or bequeathed to the former spouse shall pass as if the former spouse had died on that date.

There are similar provisions in s18C re civil partnerships.

IHT treatment of trusts.

IHT.

All trusts are taxed for IHT purposes as if they were trusts without an interest in possession, the relevant property regime.

Three exceptions:

1. Trusts created on death for the benefit of one life tenant - “an immediate post death interest".

2. Trusts created either in the settlor’s lifetime of or on death for a disabled person as defined in s 89 IHTA.

3. Trusts created on death by a parent for a minor child who will be fully entitled to the assets in the trust at age 18.

1. Immediate post death interest.

In order for a settlement to qualify as an immediate post death interest, the following conditions must be satisfied:

1. The settlement must be effected by will or under the law relating to intestacy.

2. The life tenant must have become beneficially entitled to the interest in possession on the death of the testator or intestate.

3. S 71A does not apply to the property in which the interest subsists or the interest is not a disabled person’s interest.

4. Condition 3 has been satisfied at all times since the life tenant became beneficially entitled to the interest in possession.

2. Trusts for disabled persons.

Section 89(1) of the Inheritance Tax Act 1984 applies to settled property transferred into a settlement after the 9th March 1981 and held on trusts:

a) under which, during the life of a disabled person, no interest in possession in the settled property subsists and

b) which secure that, if any of the settled property or income arising from it is applied during the disabled person's life for the benefit of a beneficiary, it is

applied for the benefit of the disabled person.

Section 89(4) defines a disabled person as a person who, when the property was transferred into the settlement, was:

a) incapable by reason of mental disorder within the meaning of the Mental Health Act 1983, of administering his property or managing his own affairs; or
b) in receipt of an attendance allowance or disability living allowance by virtue of entitlement to the care component at the highest or middle rate.
c) in receipt of personal independence payment by virtue of entitlement to the daily living component.
d) in receipt of an increased disablement allowance.
e) in receipt of constant attendance allowance.
f) in receipt of armed forces independence payment.

Under section 89(2) the disabled person is treated as beneficially entitled to an interest in possession of the settled property.

A life interest trust will also come within the definition of a trust for a disabled person.

Self settlement will also be permitted provided that the property is held on trusts:

1. Under which during the life of the disabled person no interest in possession in the settled property subsists;

2. If any of the trust property is applied during the life of the disabled person then it must be applied for the benefit of the disabled person;

3. If there is any power to bring the trusts to an end during the life of the disabled person, if such power is exercised:

(i) the disabled person or another person will, on the trusts being brought to an end, be absolutely entitled to the settled property, or

(ii) on the trusts being brought to an end a disabled person’s interest within section 89B(1)((a) or (c) will subsist in the settled property.

A trust can still be a disabled persons' trust even if the trustees have the power of advancement conferred by s32 Trustee Act 1925. However, the trustees must not be able to apply capital or income otherwise than for the benefit of the disabled person amounting to more than the lower of £3,000 or 3% of the amount that is the maximum value of the settled property during the period in question.

3. Trusts for bereaved minors.

In order for a trust to be treated as a trust for bereaved minors, the following conditions must be satisfied:

1. The property must be held on the statutory trusts for the benefit of a bereaved minors under section is 46 and 47 (1) of the Administration of Estates Act 1925; or

2. Held on trusts of the benefit of a bereaved minor, and the following conditions are satisfied:

(A) the trust must be established under the will of the deceased parent of the bereaved minor;

(B) the trust must provide that the bereaved minor, it he has not done so before attaining the age of 18, will on attaining that age become absolutely entitled to the settled property, any income arising from it, and any income that has arisen from the property held in the trust for his benefit which has been accumulated before that time;

(C) the trust must also provide that so long as the bereaved minor is living and under the age of 18, if any of the settled property is applied for the benefit of a beneficiary, it is applied for the benefit of the bereaved minor, and

(D) the trust must also provide that so long as bereaved minor is living and under the age of 18 either the bereaved minor is entitled to all of the income (if there is any) arising from any of the settled property or no such income may be applied for the benefit of any other person.

A “bereaved minor” is defined as a person who has not yet attained the age of 18 and at least one of whose parents has died. A stepparent and someone with parental responsibility for a child can also create such a settlement.

A trust can still be a bereaved minors' trust even if the trustees have the power of advancement conferred by s32 Trustee Act 1925. However, the trustees must not be able to apply capital or income otherwise than for the benefit of the bereaved minor amounting to more than the lower of £3,000 or 3% of the amount that is the maximum value of the settled property during the period in question.

It is possible to have a trust for a bereaved minor contingent on them attaining the age of 25 or any age between 18 and 25, but there will be a charge to IHT when the child satisfies the contingency.

Any other trust for children/grandchildren will be subject to the relevant property regime.

Hold over relief on trusts for bereaved minors.

Hold over relief is available whatever the nature of the assets when a minor attains 18 or 25.

If more than one minor is entitled, and the assets cannot be easily divided, there will not be any deemed disposal until the youngest minor satisfies the contingency. This will mean that hold over relief will be limited to business assets.

If the trust is subject to the relevant property regime, then hold over relief is available whatever the nature of the assets.

Practice point.

Consider a terminable life interest trust or a bare trust for minors.

1. **Spouse – absolute gift or life interest?**
2. **NRB legacy to children.**
3. **NRB discretionary trust.**
4. **Two year discretionary trust.**
5. **Absolute gift to children/grandchildren.**
6. **Contingent gifts to children/grandchildren.**
7. **Trusts for vulnerable persons.**

S1 gives NRB legacy to the trustees of a discretionary trust, residue to spouse.

The trustees can accept an IOU from the surviving spouse for the NRB.

S1 dies.

Trustees accept IOU from S2.

S2 dies leaving an estate of £1,000,000.

IOU for NRB deductible.

Assuming NRB always £325,000, taxable estate reduced to £350,000.

I give my house Greenacre to A.

or

I give my diamond ring to A.

- **I give all my books on animals to A.**

“I give 1000 shares in Tesco plc to A.”

“I give my 1000 shares in Tesco plc to A.”

To my daughter A contingent on A attaining 25

T gives residuary estate to all his children.

T has two children, A and B.

A predeceases leaving three children

To W, but if she predecease, to the children.

To H, but if he predeceases, to the children.

To W, but if she predecease, to A.

To H, but if he predeceases, to B.

1. **T makes a will transferring assets to A for life then to B.**

2. **T creates a discretionary trust either during T's lifetime or in a will.**

The terms of the trust would have to require the trustees to apply the income and capital for the benefit of the disabled person during the lifetime of the disabled person, and there must be no interest in possession.

3. **T makes a will containing a gift to all my children contingent on them attaining the age of 18.**

Assume nil rate band is £325,000 when S1 dies, and when S2 or S3 die £350,000/£375,000.

S1 dies leaving all assets to S2.

S2 marries S3.

S3 dies leaving all assets to S2. Nrb IS £350,000.

On S2's death, NRB is £750,000. S1's NRB has been lost.

S1 dies leaving all assets to S2. NRB is £325,000.

S2 marries S3.

S2 makes will with discretionary trust and gives the trustees double NRB legacy, residue absolutely to S3, or IPDI, substitution gift to children.

S3's spouse has predeceased leaving whole estate to S3. S3 has similar will.

S2 dies. NRB is £350,000.

Trustees take IOU or impose charge for double NRB. No IHT because of NRB and spouse exemption.

S3 dies.

IHT saving – IOU or charge £700,000+S3's NRB £750,000 =£1,450,000.

Assume NRB is £325,000.

C1 leaves an estate of £825,000.

IHT at 40% on £500,000 = £200,000.

C2 leaves £625,000 inherited from C1 plus £400,000 personal estate.

IHT at 40% on £700,000 = £280,000,

If C1 had created NRB discretionary trust and given trustees power to accept an IOU from C2 residue to C2 on C2'S death -

IHT payable on £400,000 personal estate plus £625,00 inherited from C1 less IOU for £325,000 less NRB = 40% on £375,000 = £150,000.

If C1 had created discretionary trust and given legacy to trustees of £500,000 and had given trustees power to accept an IOU from C2 residue to C2 on C2'S death -

IHT payable on £400,000 personal estate plus £625,00 inherited from C1 less IOU for £500,000
less NRB = 40% on £200,000 = £80,000.

C1 could leave residence to descendants and claim one residential enhancement.

In association with…

Built on technology and talent acquired from the purchase of DPL Professional, a specialist in the development of expert Will and Trust systems since 1992, Arken.legal offers intelligent solutions to digitise your Will and estate planning business. Arken.legal's flagship product, Arken, is the heart of the product suite. With Arken you'll save time delivering accurate documents that reflect your client's circumstances. Arken's advanced automation and wealth of features and functionality, enables your whole team to quickly create high quality Will documents, no matter how complex. This includes Expression of Wishes, Lasting Powers of Attorney, Severance of Joint Tenancy (SJT) and General Powers of Attorney.

Arken is an ICAEW accredited software.

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Enabling growth in your private client business

Talk to us for more information and to arrange a demonstration

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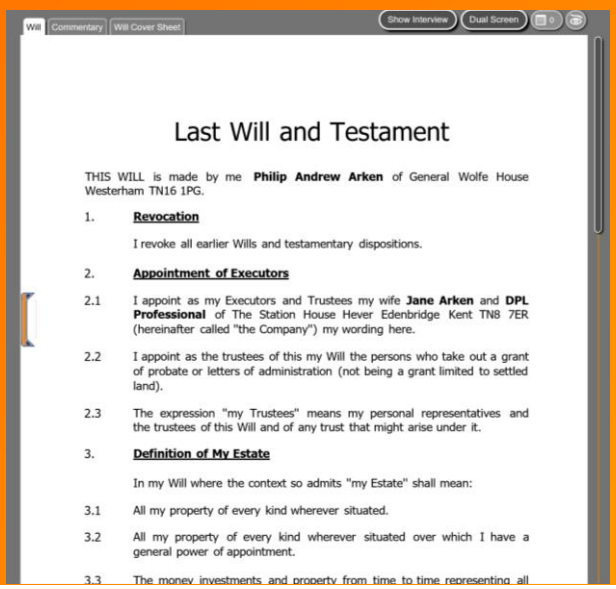
Be productive

- Simple Wills completed in half the time
- Complex Wills completed up to 4 times more quickly
- Save time
- Save money
- Increase profitability



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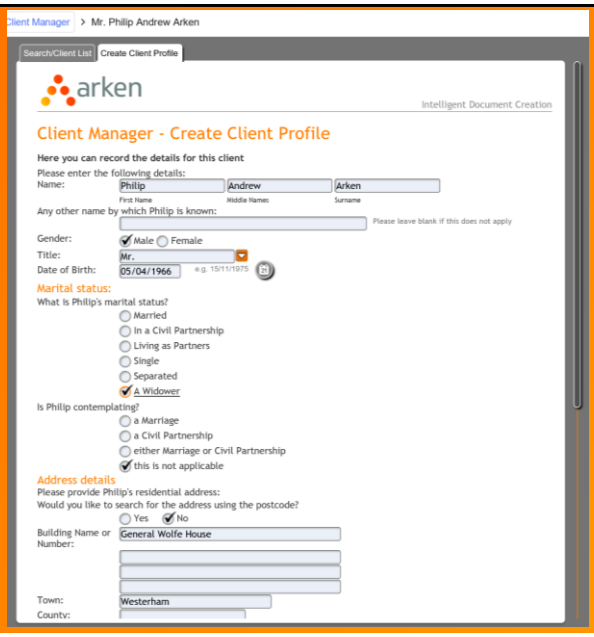
Be confident

- Reliable system with the latest thinking included
- Prompts to ensure nothing is missed
- Accuracy no matter how complex the Will



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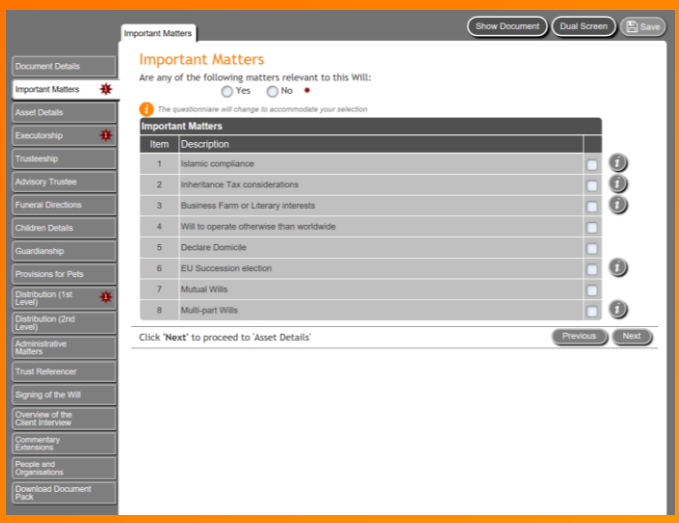
Be trusted

- Built by experts for experts
- Over 25 years of building Will software and with feedback included from over 1000 users
- Industry leading
- Contains information on Trusts and on specialist Wills such as Islamic



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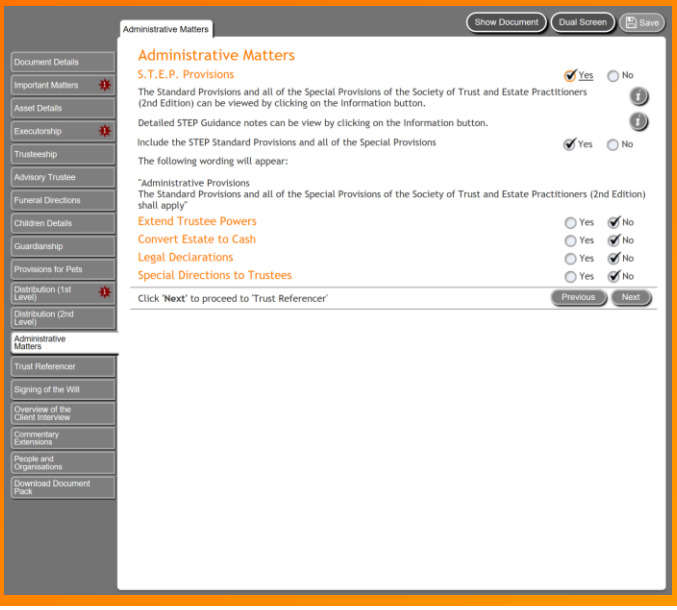
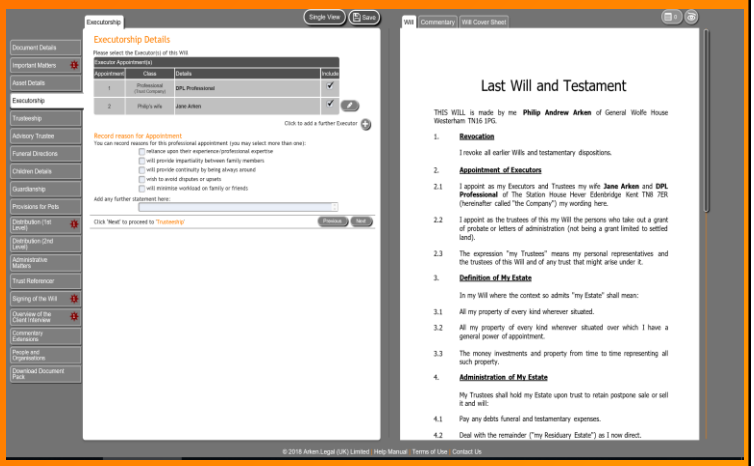
Be secure

- Cloud based solution
- Access it anywhere
- Highest levels of encryption



Easy to use

- Useful navigation bar
- Highlights mandatory fields
- Single or dual screen view
- Intelligent rewording and numbering
- Highlights incomplete information



Easy to create mirror documents

- With just a press of a button, all details are transposed

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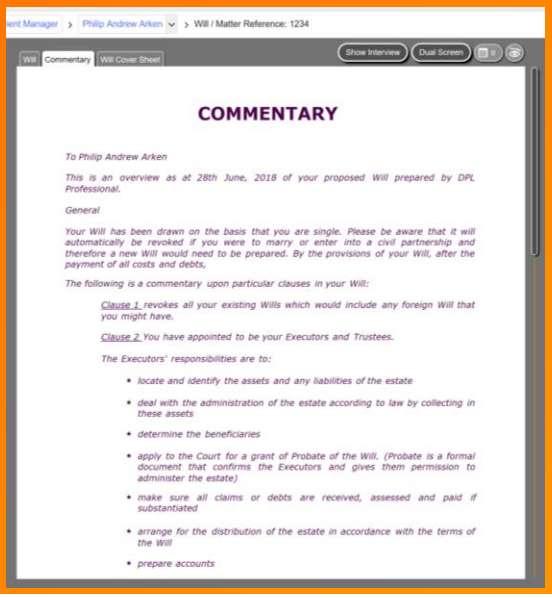
Easy to communicate

- Printable and emailable client packs
- Includes unique commentary explaining Will and LPAs



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