Wills and Estate Planning – the modern family

The increasing complexity of the modern family can create serious challenges for those undertaking will writing and estate planning. With one in five children in the U.K. being born outside marriage, the shape of the family is changing. Many families now include, what used to be, the unconventional – stepchildren, half-brothers and sisters, same sex parents, parents living together who are unmarried, married parents who live apart, sometimes in different countries, with every conceivable combination of responsibility for, and arrangements for access to, children. Even so, it is estimated that one half to two thirds of the adult population do not have a will. For those who do have a will, it is not always the case that it has the intended effect. It may be challenged on grounds of lack of capacity or undue influence; it may be ambiguous or uncertain; it may not be executed properly; it may simply be inadequate by failing to address effectively important issues including, for example,

- The appointment of executors and guardians for any children under 18;
- Setting an age for children to inherit and providing for funds in the meantime;
- Ensuring assets are substantially protected (e.g. from the impact of care home fees);
- Managing gifts to charities or other organisations;
- Reducing the tax burden;
- Providing for specific funeral arrangements.
Keep an accurate record of all your instructions and advice. Ensure your engagement letter records accurately what you have agreed to do for the client and what you are not going to do. For example, inheritance tax mitigation can be very complex – not something that someone coming to you for a simple will may have given any thought to. Are you qualified to advise? If your retainer does not include giving tax advice, make sure your engagement letter states that clearly – you may need to rely on that letter when the nature and extent of your instructions is questioned by beneficiaries in circumstances where the estate faces a hefty tax liability.

Ensure your file tells the whole story. We have recently dealt with a notification involving an elderly client who refused to provide in his will for his troubled son, even though the son never worked, but lived with his father and received a monthly allowance from him. It was clear to the solicitor writing the will that the son could claim under the Inheritance (Provision for Family and Dependants) Act 1975 and he advised the client accordingly. His advice included the likelihood that the son would succeed in his claim, and that the costs would have to be met by the estate. Thankfully, this advice was recorded in a letter to the client which has provided a defence to the claim by the beneficiaries that the solicitor’s failure to provide for the son in the deceased’s will and the resulting costs of the son’s claim, have eroded their own entitlement under the will.

- **Disappointed beneficiaries** – the Inheritance (Provision for Family and Dependants) Act 1975 exists for the support of disappointed potential beneficiaries. Instructions should be sought as to whether there exists someone who may be able to make a claim under this Act on the client’s death. As family life becomes increasingly complicated, the potential for Inheritance Act claims increases. If the testator/testatrix supports any child with regular maintenance payments, there could be grounds for legal action if that child is not provided for in the will. It should be remembered that the cost of defending such claims usually comes out of the deceased’s estate.

Two further common causes of claims by disappointed beneficiaries are the failure by solicitors to prepare a will and to have the same executed before the testator/testatrix dies, and invalid gifts of property in circumstances where the subject property is held on a joint tenancy which has not been severed as at the date of death.

- **Discretionary gifts** – can be used to address the needs of the modern family. A flexible discretionary will may be worth considering, i.e. a will which leaves the residue to the executors to decide who is to benefit, when and by how much. The class of beneficiaries is usually well defined and generally includes a combination of named beneficiaries and those that fit into a particular class (e.g. children and remoter descendants). The testator should choose as executors, individuals who are independent of the beneficiaries and family if possible, to avoid favouritism (perceived or actual), family rows or undue pressure being exerted on them.

- **Charitable gifts** – with an increase in people either not having children, or, for a variety of reasons, becoming disconnected from them, it is not surprising some people choose to leave their estate, or part of it, to charity. The decision in *Philips v RSPB and others* [2012] EWHC 618 (Ch) highlights the importance of carefully drafting alternative gift wording to avoid uncertainty and the potential costs of legacy disputes. In this case, the gift was preserved for charity only because the charitable company had not been struck off the register of companies until after the testatrix’s death; it had continued to exist, even though it was not operational and had been removed from the register of charities.

**Guardians** – this is a tricky issue where those with parental responsibility are no longer in a relationship. Following court approval, guardians will step in if all parties with parental responsibility are unable or unwilling to look after the children. It will be difficult to resolve who the guardians should be if each parent has appointed different guardians and subsequently both die at the same time. Ultimately the court will decide, but it can be a lengthy process with no certain outcome. It would be better for the children if both parents appoint the same guardians. Clients should be warned what may happen if they don’t, so they can make the best decision they can for the children.
Instructions and Advice (continued)

• **Trusts.** Clients may see trusts as something that only wealthy people consider putting in place to ensure that, when the settlor dies, or is no longer able to care for them, his or her dependants have an income stream. The truth is there are many situations in which setting up a trust may be a logical and sensible decision to take; trusts are not just for rich people. For example, clients in a second marriage with children from respective first marriages, may want the surviving spouse to be able to live in the family home after the first death, but ultimately want their children, or some of them, to benefit from the assets. A trust would allow the spouse to live in the house for life and the funds to be divided between intended beneficiary children on that spouse’s death.

There are, however, tax consequences of trusts and, unless you have sufficient expertise to advise on these, you should always tell your clients to take separate tax advice first.

• **Domicile.** Don’t make assumptions, particularly given the large number of clients who may be resident in England and Wales but who were not born here. In one case we have dealt with, our insured failed to properly address the issue of domicile for a client who was born in the USA but lived in England. He owned considerable assets both in England and in Canada. Revenue & Customs determined that the client was domiciled in England, as a result of which his worldwide estate was included for the purposes of calculating IHT albeit that the burden of the IHT, £600,000, fell on the estate in England. The beneficiary here was left with nothing.

Know the law

All staff must be up to date with current legislation and case law to be able to properly advise clients. Examples of recent changes include:

- **The Civil Partnership Act 2004** for same sex couples, created spouse exemption for tax purposes and recognition for succession law, immigration law and social security benefits.
- On 17 July 2013, **The Marriage (Same Sex Couples) Act 2013** was passed and will come into force by statutory instrument during 2014. Same sex couples in England and Wales will be able to marry and refer to themselves as married, probably from 29 March 2014. This will simplify the status of same sex couples married in England or Wales, with British nationality and with assets held in England and Wales. Care still needs to be taken properly to advise same sex couples married outside England or Wales, who are not British nationals or who own assets outside England and Wales.
- Keep your eye out for the **Inheritance and Trustees’ Powers Bill**, currently working its way through the House of Lords. If it is approved, it will make changes to the current intestacy and family provision rules. The Inheritance (Provision for Family and Dependants) Act 1975 hasn’t been fully reviewed since it came into force.
- Another one to look out for is the Supreme Court’s decision in the **Marley v Rawlings** case. This involves mirror wills prepared for Mr and Mrs Rawlings who erroneously executed each other’s will rather than their own. The High Court and the Court of Appeal both found the wills invalid, the latter refusing to consider whether it had power to rectify the will under section 20 of the Administration of Justice Act 1982. The Supreme Court heard the appeal on 3 December 2013 and at the time of going to print the decision had not been handed down.

In addition, it is essential to understand that property owned abroad (in France, for example) may be subject to the succession laws in that country and the property may not pass to the intended beneficiary under a UK made will. For that reason you should be advising your client of the need for a foreign will to deal with overseas assets.
See you in court

Lack of equality – many claims involve children from multiple marriages where everything is left to the current spouse assuming he/she will do the right thing by the children of their deceased spouse’s earlier marriages. Such assumptions frequently result in litigation.

Unmarried co-habitants – sometimes wills are contested by the family of the deceased or by the person he or she was living with. Even people who are not living with their partners have been known to join the fray, particularly if they can claim to have been maintained by the deceased before death.

Children – wills often identify classes of beneficiaries as, for example, “children”, “issue” or “legitimate children” but the use of these descriptions can sometimes fail to address the deceased’s wishes, for example, by unintentionally excluding step-children.

Incapacity/undue influence – the first port of call for any disappointed beneficiary is to challenge the mental capacity of the testator/testatrix or to allege undue influence. Your will writing process should demonstrate a working understanding of both Kenward v Adams and Banks v Goodfellow when ascertaining testamentary capacity.

Charities – bequests to charities can give rise to claims, particularly from disappointed beneficiaries. Many charities, however, are equipping themselves with legal advisers to assist them in retaining legacies wherever possible. In Gill v Woodall & Ors [2010] EWCA Civ 1430, a residuary gift in Mrs Gill’s will to the RSPCA, thereby disinheriting her only child, was declared invalid by the High Court on the grounds of undue influence on the part of Mr Gill. The charity appealed, hoping to overturn the decision of undue influence, but the Court of Appeal found, turning on the particular facts, that Mrs Gill could not be assumed to have had full knowledge of the contents of her will. The will was declared invalid without the need to consider the question of undue influence. This case demonstrates the court’s reluctance to find in favour of a will that goes against the “norm” and highlights the need for contemporaneous evidence to explain the exclusion of a close family member.

Other points of interest

Letters of wishes

By their very nature, and for good reason, letters of wishes are non-binding. They are usually used to direct executors/trustees how the settlor would wish them to exercise their discretion. The discretion is that of the executors/trustees; the letter of wishes does not form part of the will/trust. This position was confirmed in a Jersey case, Re Rabaiotti 1989 Settlement [2000 JLR 173] which held: wishes expressed by a settlor are an important factor for trustees to consider and it is entirely legitimate for a trustee to follow those wishes. A trustee should not feel obliged to deviate from the letter of wishes to demonstrate objectivity. However, a trustee should have sufficient information about the beneficiaries, their lives, needs and resources when making a decision about the application of trust funds. Settlors must be advised of this when writing a letter of wishes so that promises made by a settlor to a beneficiary, for example, do not turn into a disappointed beneficiary claim on the settlor’s death.

Recent cases

Duty of care – this was the subject of a recent High Court case, Feltham v Freer Bouskell [2013] EWHC 1952, which followed the 1995 House of Lords case of White v Jones. The case involved a claim brought by Ms Feltham against solicitors, Freer Bouskell (FB), who were instructed by her step-grandmother, Ms Charlton, to draw up a new will under which Ms Feltham was to benefit significantly. At the time of the instruction, Ms Charlton was suffering short-term memory loss and FB, rightly, required a doctor’s report confirming mental capacity. Crucially, FB took on the responsibility of instructing the doctor but failed to chase him for his report and, as they had concerns about undue influence on the part of Ms Feltham, also failed to draw up the new will. As a result, Ms Charlton drew up her own “home-made” will with the help of Ms Feltham. On Ms Charlton’s death, two beneficiaries under the old will challenged the validity of the new will on the grounds of mental capacity and Ms Feltham had to make payments to those beneficiaries and incurred significant costs settling their claim. She brought a negligence claim against FB. The court held that under the White v Jones principle, FB had assumed a duty of care to Ms Charlton that extended to Ms Feltham. FB had breached that duty by failing to chase the doctor and draw up the new will. The judge held that, if FB had had concerns, they should have refused to act, or taken proper steps to satisfy themselves as to capacity. Ms Feltham was allowed to recover the payments and costs made. A key issue here is the need to act quickly or not at all. Had FB refused instructions, they would not have been criticised.
Other points of interest (continued)

**Unsuccessful challenge** – in *Wharton v Bancroft and others* [2011] EWHC 3250 (Ch), indemnity costs were awarded against three adult daughters who challenged the deathbed will of the late Mr Wharton. The judge stated that the case had been legally and factually weak. This serves as a reminder that part of your client care role may be to help clients leave their emotions to one side when establishing whether the challenge they wish to bring has a proper foundation.

**Substituted gift** – *Rainbird and another v Smith and others* [2012] EWHC 4276 involved a claim by the child of a deceased beneficiary under a will, where the beneficiary pre-deceased the testator. The gift was to such of three named children “as shall survive me and if more than one in equal shares absolutely”. The wording was held to be sufficiently unambiguous to exclude section 33 of the Wills Act 1837. There was therefore no substituted gift of the deceased child’s potential share for the children.

**Deathbed gift** – in *Vallee v Birchwood* [2013] EWHC 1449 (Ch), a deathbed gift was held to be valid even though the donor died some 4 months later. This is one of only a handful of reported cases on deathbed gifts of land and the first to be upheld where the gift was made so long before the donor’s death. The judge was satisfied that the gift was made in contemplation of the donor’s impending death, the gift was contingent on his death and he had handed over the title deeds and keys thereby parting with dominion over the house.

The points made above only touch on the ways the changing face of the modern family may impact on the way you advise your clients. The inherent complexity makes this field an interesting one to work in but it is essential that you are fully up to date and that your working practices ensure that the wills you write will have the intended effect.

---

**Who to contact**

**solicitors@risk**  
**Editor:** Andrew Nickels  
**Telephone:** 0207 648 3698  
**Email:** riskman@uk.zurich.com

**Sales**  
**Telephone:** 0845 606 3322  
**Sales fax:** 0845 600 4036  
**Claims helpline:** 0845 600 4035  
**Claims fax:** 0845 600 4034

**Zurich Financial Lines**  
London Underwriting Centre,  
Third Floor, 3 Minster Court,  
Mincing Lane, London  
EC3R 7DD  
www.zurichprofessional.co.uk

The material contained in **Risk** is issued by Zurich and does not establish, report or create the standard of care for solicitors, nor does it represent a complete analysis of the topics presented or constitute legal advice. It is intended to highlight issues which may be of interest to our customers. Readers should conduct their own appropriate research on how to act in any particular case.