Current Issues with Will Drafting

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1 **Inheritance and Trustees' Powers Act 2014**

1.1 Definition of "personal chattels"

Section 55 AEA 1925. Old definition:

> "Personal chattels" mean carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores, but do not include any chattels used at the death of the intestate for business purposes nor money or securities for money:

Section 3 ITPA 2014 provides:

> (1) For paragraph (x) of section 55(1) of the Administration of Estates Act 1925 (definitions) substitute-
>
> (x) "Personal chattels" means tangible movable property, other than any such property which-
>
> consists of money or securities for money, or
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> was used at the death of the intestate solely or mainly for business purposes, or
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> was held at the death of the intestate solely as an investment.

Commencement of new definition:

> (2) If a will or codicil containing a reference to personal chattels defined (in whatever form of words) by reference to section 55(1)(x) of the Administration of Estates Act 1925 was executed before the coming into force of subsection (1), then unless the contrary intention appears subsection (1) is to be disregarded in interpreting the reference to personal chattels.

1.2 *Amendment of s.31 Trustee Act 1925 (distribution of trust income)*

Amended as follows:

> (1) Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property—
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> (i) 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~~ <u>as the trustees may think fit</u>, whether or not there is—
>
> (a) any other fund applicable to the same purpose; or

(b) any person bound by law to provide for his maintenance or education; and

(ii) if such person on attaining the age of [eighteen years] has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest:

~~Provided that, in deciding whether the whole or any part of the income of the property is during a minority to be paid or applied for the purposes aforesaid, the trustees shall have regard to the age of the infant and his requirements and generally to the circumstances of the case, and in particular to what other income, if any, is applicable for the same purposes; and where trustees have notice that the income of more than one fund is applicable for those purposes, then, so far as practicable, unless the entire income of the funds is paid or applied as aforesaid or the court otherwise directs, a proportionate part only of the income of each fund shall be so paid or applied.~~

1.3 *Amendment of section 32 Trustee Act 1925 (Power of advancement)*

Amended as follows:

(1) Trustees may at any time or times pay or apply any capital money subject to a trust, or transfer or apply any other property forming part of the capital of the trust property for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment , transfer or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs:

Provided that—

(a) ~~the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount~~ property (including any money) so paid, transferred or applied for the advancement or benefit of any person must not, altogether, represent more than ~~one-half of~~ the presumptive or vested share or interest of that person in the trust property; and

(b) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property ~~the money so paid or applied~~ the money or other property so paid, transferred or applied shall be brought into account as part of such share; and

(c) no such payment, transfer or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money ~~paid~~ or other property paid, transferred or applied unless such person is in existence and of full age and consents in writing to such payment , transfer or application.

(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.

Three changes:

(1) Extension from one half to the whole (important) though the Law Commission said "It was suggested that trustees may not be aware of the restriction where it does apply, and that inadvertent breaches of trust therefore occur"
(2) Extension from capital money to any trust property (just tidying the wording, no practical effect).
(3) Hotchpot rule

1.4 *Commencement*

ITPA comes into force on 1st October 2014.

Section 10 ITPA 2014

> (1) Section 8 [power of maintenance] applies in accordance with subsections (4) and (5).
> (2) Section 9 [power of advancement], apart from subsection (3)(b), applies in relation to trusts whenever created or arising.
> (3) Section 9(3)(b) [extension of half to whole] applies in accordance with subsections (4) and (5).
> (4) Subject to subsection (5), the provisions mentioned in subsections (1) and (3) apply only in relation to trusts created or arising after the coming into force of those provisions.
> (5) Those provisions also apply in relation to an interest under a trust (not falling within subsection (4)) if the interest is created or arises as a result of the exercise, after the coming into force of those provisions, of any power.

1.5 *Where does that leave wills using STEP Standard Provisions?*

STEP standard provisions (1st and 2nd editions) provides:

> **5 Powers of Maintenance and Advancement**
> Sections 31 and 32 Trustee Act 1925 shall apply with the following modifications.
> 5.1 The proviso to section 31(1) shall be deleted.
> 5.2 The words "one half of" in section 32(1)(a) shall be deleted.

1.6 *New intestacy rules where there is a surviving spouse*

> (1) If the intestate leaves no issue: the residuary estate shall be held in trust for the surviving spouse or civil partner absolutely.
> (2) If the intestate leaves issue:
> (A) the surviving spouse or civil partner shall take the personal chattels absolutely;
> (B) the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a fixed net sum, [£250k] free of death duties and costs, to the surviving spouse or civil partner, together with simple interest on it from the date of the death at the rate provided for by subsection (1A) until paid or appropriated; and
> (C) subject to providing for the sum and interest referred to in paragraph (B), the residuary estate (other than the personal chattels) shall be held—

(a) as to one half, in trust for the surviving spouse or civil partner absolutely, and

(b) as to the other half, on the statutory trusts for the issue of the intestate.

2 **Revocation of wills by marriage: Conversion of civil partnerships to marriage**

Section 18 Wills Act 1837 (Will to be revoked by marriage)

(1) Subject to subsections (2) to (5) below, a will shall be revoked by the testator's marriage.
(2) A disposition in a will in exercise of a power of appointment shall take effect notwithstanding the testator's subsequent marriage unless the property so appointed would in default of appointment pass to his personal representatives.
(3) 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 the will should not be revoked by the marriage, the will shall not be revoked by his marriage to that person.
(4) 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 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.
(5) Nothing in this section applies in the case of a marriage which results from—
(a) the conversion of a civil partnership into a marriage under section 9 of the Marriage (Same Sex Couples) Act 2013 and regulations made under that section; or
(b) the changing of a civil partnership formed under Part 3 of the Civil Partnership Act 2004 into a marriage under—
(i) the Marriage (Scotland) Act 1977;
(ii) the Marriage and Civil Partnership (Scotland) Act 2014; or
(iii) any order made under section 104 of the Scotland Act 1998 in consequence of the Marriage and Civil Partnership (Scotland) Act 2014.

3 **Discretionary will trusts: End of the three month trap**

Section 144 IHTA now to provide:

(1) Subsection (2) below applies where property comprised in a person's estate immediately before his death is settled by his will and, within the period of two years after his death and before any interest in possession[1] has subsisted in the property, there occurs—
(a) an event on which tax would (apart from subsection (2) below) be chargeable under any provision, other than section 64 or 79, of Chapter III of Part III of this Act, or
(b) an event on which tax would be so chargeable but for section **65(4)**, 75, 75A or

1 For completeness, defined in ss.1A: "Where the testator dies on or after 22nd March 2006, subsection (1) above shall have effect as if the reference to any interest in possession were a reference to any interest in possession that is—
(a) an immediate post-death interest, or
(b) a disabled person's interest."

76 above or paragraph 16(1) of Schedule 4 to this Act.

(2) Where this subsection applies by virtue of an event within paragraph (a) of subsection (1) above, tax shall not be charged under the provision in question on that event; and in every case in which this subsection applies in relation to an event, this Act shall have effect as if the will had provided that on the testator's death the property should be held as it is held after the event.

Commencement: Draft Finance Bill clauses: "The amendment made by this section has effect in cases where the testator's death occurs on or after 10 December 2014."

Not in Finance Act 2015 but expected in Finance (no.2) Act 2015.

This abolishes the former three month trap. Formerly, if an absolute appointment to a spouse or charity is made within three months, no IHT relief is available. See s.144(1) IHTA 1984, as (somewhat over-literally) construed in *Frankland v IRC* [1997] STC 1450.

Implications for will drafting: delete a provision (if you had one) which prevents appointments out of discretionary will trusts within 3months.

4 Advice and guidance

4.1 *SRA: Ethics guidance Drafting and preparation of wills*

Issued 6 May 2014 (updated 11 July 2014)

http://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/guidance-on-the-drafting-and-preparation-of-wills.page

4.2 *Preparing a will when your client is leaving a gift for you, your family or colleagues*

http://www.lawsociety.org.uk/support-services/advice/practice-notes/preparing-wills-when-your-client-is-leaving-a-gift-for-you-your-family-or-colleague/

4.3 STEP Code for Will Preparation in England & Wales

http://www.step.org/sites/default/files/About_Us/Prof_Standard/STEP_Code_for_Will_Preparation_v3.pdf

"in providing will preparation services, STEP members should operate within an ethical environment."

Where a member of STEP undertakes will preparation, the client should be informed of the Code and a copy of it should be made available to the client in a format accessible to that client. (Is this in the interest of the client or of STEP?)

The STEP Code applies from 1 April 2014 to all STEP members who prepare wills in England & Wales.

Mostly important as a reminder of the self evident and perhaps to facilitate disciplinary proceedings.

Relevant to non-STEP members (though no STEP disciplinary sanction). But note para 12(iii):

> An individual will drafter who is not a member of STEP, cannot make use of this Code, reproduce any part of it or claim compliance with it.

4.4 Trusts Discussion Forum

Worth subscribing: *http://www.trustsdiscussionforum.co.uk/*

The Trusts Discussion Forum is a moderated mailing list dedicated to discussion by practitioners of topics relating to the drafting and administration of trusts, wills and other private client issues including taxation.

The forum was founded by James Kessler QC in 1998 and is now moderated by Richard Vallat and Sarah Dunn.

The forum is administered by STEP but is open to members and non-members alike.

4.5 Will writing software

Express Wills *http://www.sweetandmaxwell.co.uk/expresswills/*

The will drafting software "Express Wills" allows users to incorporate the will trusts from DTWT. But The Solicitors Indemnity Fund have issued this warning:

> It is dangerous to place too much reliance upon equipment in the office. The fact that a document has been produced by a word processor does not obviate the need to check the document carefully, as shown in the two examples below.
> The indemnified law firm received instructions to prepare a lease of premises on behalf of a client. The client required the lease to contain an upwards only rent review. A draft lease was produced with commendable speed with the assistance of a word processor. The draft was not checked. It was taken for granted that the draft was correct. In fact a section of the rent review clause was omitted. No one knew why. The effect of the omission was to create an upwards and downwards rent review clause.
>
> To avoid this type of claim...
> o Do not assume that a document generated by a word processor is correct.

This has been the source of jokes for more than 200 years:
http://www.kessler.co.uk/wp-content/uploads/2012/04/Eldon_on_computer_errors.pdf

Extract from DTWT 30.1 The counsel of perfection is as follows. Every document should be

reviewed twice after it has reached its final form. The penultimate review should be made by the drafter, at least 24 hours after last examining the document. This enables the drafter to apply a fresh mind to the work. The final review should be made by a person other than the drafter. Where counsel has prepared the draft, this duty rests on the instructing solicitor. A draft produced in-house should be reviewed by another member of the firm.

5 The future

5.1 *Deeds of variation*

Budget 2015: The government will review the use of deeds of variation for tax purposes.

DTWT para 18.8

Why not use a Deed of Variation?
Another solution for estates with an untransferable NRB problem is to give the estate to the surviving spouse absolutely. The survivor could then make a deed of variation after the death, so as to use the NRB. However this is slightly risky: for various reasons the survivor may not make (or may be unable to make) the necessary arrangements.[1] It would be safer to make the NRB gift by will. In practice we suspect it will often happen that the entire estate is given to the surviving spouse, and the matter will have to be put right by a deed of variation. Where the exact IHT position is not known for certain when the Deed of Variation is executed, the documentation should employ a formula similar to that used in the draft wills in this book.

Giles v Royal National Institute for the Blind [2014] EWHC 1373 (Ch) [rectification of a deed of variation]

5.2 *Law Commission Reform of law of wills*

The law commission say:
http://lawcommission.justice.gov.uk/areas/wills.htm

> We expect to start work on this project early in 2015, publishing our report, with final recommendations and a draft Bill, early in 2018

A sensible unrushed timetable

> It is estimated that 40% or more of the adult population does not have a will, and where they do, the state of the law means it will often be found to be invalid.
> The primary wills statute, the Wills Act 1837, dates from the Victorian era. The law governing testamentary capacity, the mental capacity to make a will, derives from a case from 1870.

1 A further problem is that a trust made by deed of variation is within the scope of s.624 ITTOIA 2005, the IT settlement provisions. However, this problem would not affect typical NRB trusts as the NRB trust usually has no income; and even in other cases it does not greatly matter if the settlement provisions apply. Indeed, it will often be better if they do apply.

Is the problem the date 1837?

> There is concern that the current law discourages some people from making wills, that it is out of step with social and medical developments, and that it may not work in such a way as to give best effect to a person's intentions on death. It has been criticised for being difficult to understand and apply, and for sometimes being unworkable in practice. In the case of mental capacity, this presents a growing problem, since conditions that affect capacity are becoming more common as people live longer.
>
> This project will review the law of wills, focussing on four key areas that have been identified as potentially needing reform:
> (1) testamentary capacity,
> (2) the formalities for a valid will,
> (3) the rectification of wills,
> (4) mutual wills.
> It will consider whether the law could be reformed to encourage and facilitate will-making in the 21st century: for example, whether it should be updated to take account of developments in technology and medicine. It will also aim to reduce the likelihood of wills being challenged after death, and the incidence of litigation. Such litigation is expensive, can divide families and is a cause of great stress for the bereaved.

PR aspects of the statement?

6 The quality of will writing today

6.1 SRA research

The SRA, the Legal Services Board, the Legal Services Consumer Panel and the Office of Fair Trading commissioned research from IFF Research into the consumer experience of will writing services. This research included a shadow shopping exercise in which some 101 wills bought by real consumers from a variety of provider were assessed by a panel of experts. Of 41 wills drafted by solicitors, some 9 were failed in terms of the quality of the will.

Wills that were assessed as failed, did so for one or more specific reasons, including:
• **Inadequacy** - where the content of the will does not account for an estate fully, fails to make adequate provision or neglects to take certain outcomes in to consideration. It also includes wills which are legally invalid;
• **Requirements** - where the client's requests have not been met (as specified in the testator questionnaire) through omission or conflicting specification;
• **Legality** - where the actions specified in the will are potentially illegal;
• **Inconsistency** - where the language, logic and/or content of the will is contradictory;
• **Detail** - where items, people and requests are described in insufficient detail; and
• **Presentation** - where the language and format of the document is lacking.

6.2 *Legal Ombudsman report: Complaints in focus: Wills and probate*

http://www.legalombudsman.org.uk/downloads/documents/publications/willwriting-report-fi

nal-141016.pdf

Summary:
• The regulated wills and probate market is suffering from a number of quality issues as evidenced by high levels of complaints about costs, delays, and the remit of service providers;
• Service providers could better manage client and beneficiary expectations by: avoiding misleading promotions and marketing; being clear about potential costs and timeframes for completing work; and explaining the limits of their roles and responsibilities – thereby reducing the number of avoidable disputes; and,
• A disjointed approach to regulation and consumer redress could be leaving consumers confused about which service providers to use and where to go for help when things go wrong.
In addition, we conclude that:
• All consumers of wills and probate service providers should have access to redress. Regulators, representative bodies, and government should work together to find a solution to the problems caused by an unregulated sector.

What are the complaints?
1. We resolved 1013 wills and probate related complaints in 2013-14. This works out to 12.7% of the total complaints resolved.
2. 18% of wills and probate related complaints in this area are about costs. This is 'costs excessive' (9.5%) and 'costs information deficient' (8.9%) combined.
3. Delays (12%), failure to follow instructions (12%), and failure to advise (12%) are the other main reasons behind complaints.

The debate about whether to regulate will writing and estate administration or at least provide a safety net for consumers, perhaps in the form of a voluntary ombudsman scheme, will no doubt rumble on.

6.3 *Intestate population: Law Society statistics*

73 per cent of 16-54 year olds don't have a will, while 64 per cent of people over the age of 55 have made their final wishes clear in a will.
Men are more likely to have a will and keep it updated than women.

http://www.lawsociety.org.uk/news/press-releases/millions-of-britons-have-no-will/

6.4 *Need for Lasting Powers of Attorney*

Life planning day is Monday, 16 June, 2014.

8.1 The Government agrees with the House of Lords that uptake of Lasting Powers of Attorney is low.
8.2 Many individuals make a Lasting Power of Attorney only following a health crisis, when there is a clear and immediate need. The reluctance to plan ahead mirrors the situation with will making, which many people think they can "put off" until they are older.
8.3 Our vision is instead for the registering of Lasting Powers of Attorney to become a matter of course and to be considered as a "life planning" arrangement – much like life assurance policies.

We are considering a "life planning day" to take place in 2015 which will raise awareness of Lasting Powers of Attorney and other life planning mechanisms such as will making and advance decisions.[1]

Pilot trusts

Autumn statement (Dec 2014):

2.73 Inheritance Tax and trusts – Following consultation launched after Budget 2014, the government will not introduce a single settlement nil-rate band. The government will introduce new rules to target avoidance through the use of multiple trusts. It will also simplify the calculation of trust rules.

Nothing in the first Finance Act 2015 but draft clauses published and reform should be expected in F(no.2)A 2015.

Take care when reviewing existing wills:

> Draft clause 62B Protected settlements
> (1) For the purposes of this Chapter, a settlement is a .protected settlement. if it commenced before 10 December 2014 and either condition A or condition B is met.
> (2) Condition A is met if there have been no transfers of value by the settlor on or after 10 December 2014 as a result of which the value of the property comprised in the settlement was increased.
> (3) Condition B is met if-
> (a) there has been a transfer of value by the settlor on or after 10 December 2014 as a result of which the value of the property comprised in the settlement was increased, and
> (b) that transfer of value was the transfer of value under section 4 on the settlor's death before 6 April 2016 and it had the result mentioned by reason of a protected testamentary disposition.
> (4) In subsection (3)(b) "protected testamentary disposition" means a disposition effected by provisions of the settlor's will that at the settlor's death are, in substance, the same as they were immediately before 10 December 2014.

7 Sharia compliant wills

Extract from Drafting Trusts & Will Trusts (12th ed 2014 para 18.4)
Freedom of testation conferred by English law includes freedom to make a will in accordance with the principles of Muslim (Sharia) law.
The difficulty in preparing a Sharia-compliant will is (1) identifying the applicable rules (which vary between Sunni, Shia or other traditions) and (2) the inability to know in advance what the terms of the will should be: the identity of the heirs and their entitlements depends on the position at the date of death.

1 "Valuing every voice, respecting every right: Making the case for the Mental Capacity Act" The Government's response to the House of Lords Select Committee Report on the Mental Capacity Act 2005 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/318730/cm8884-valuing-every-voice.pdf

There are three main options:
(1) The will sets out the anticipated inheritance scenarios. This should in principle be possible, but it may be complicated, and the Law Society advised that there is a risk of missing a crucial scenario.
(2) The will gives the estate to a discretionary trust (will form (1)). A letter of wishes:
(a) States the desire that the estate should pass on Sharia principles in the [Sunni/Shia/other specified] tradition.
(b) Identifies some suitable person or office to advise the executors what those principles should be.
(c) As Sharia principles allow testamentary freedom to give (in short) one third of the estate to charity or individuals who are not heirs, the letter identifies the testator's wishes for that part (and the class of beneficiaries in the will is drafted accordingly). A distribution within 2 years should raise no IHT problems, as it should fall within s.144 IHTA 1984.
(3) A third option, which should be suitable for small estates, is to give the estate to a named person and express the wish (not binding as a matter of English law) that the legatee should distribute the estate according to Sharia principles. IHT may not be an issue for smaller estates, but if relevant: If the Sharia-compliant distribution is made within 2 years of the death, IHT is charged as if the distribution had taken effect under the Will: s.143 IHTA 1984.
The testator should be advised as to what distribution is likely to happen in practice, so they understand the likely consequences of the letter of wishes. They also need to be reminded that the letter of wishes is not binding.
Where the estate exceeds the nil rate band, it should be possible for a married testator to combine a Sharia-compliant outcome with full use of the IHT spouse exemption, though that may require some careful drafting.
For smaller estates, route (3) or route (1) seems preferable, if it can be done, as route (2) incurs the costs of a deed of appointment and trustees may wish to obtain more formal advice.
The Law Society practice note proved contentious. Leaving aside irrational islamophobic objections, of which there have been some, the problem is that Sharia inheritance law, at least as commonly understood, discriminates against women, illegitimate children, and non-Muslims. It is said that the Law Society failed to give due consideration to this aspect, and were in breach of s.149 Equality Act 2010 ("A public authority must have due regard to the need to eliminate discrimination and advance equality of opportunity").[1] As far as the will drafter is concerned, they should not stereotype Muslim clients with the expectation that they will want a Sharia-compliant will, or encourage sex or other discrimination in their client's testamentary dispositions.[2] However there is little prospect of that. Testamentary dispositions are chosen by a testator, and are a matter for them; the drafter may advise on the best way to achieve an intended outcome, but does not advise on what that outcome should be. The drafter drafts the will on the client's instructions. Client autonomy is a fundamental value in the legal profession. There is not much point in freedom of testation if legal advice is not available to give effect to that freedom.

10 April 2015 **James Kessler QC**

1 Opinion of Karon Monaghan QC (2014) http://freethoughtblogs.com/maryamnamazie/files/2014/09/Law-Society-Sharia-Advice-final-August-2014.pdf
2 Sections 19, 29, Equality Act 2010.