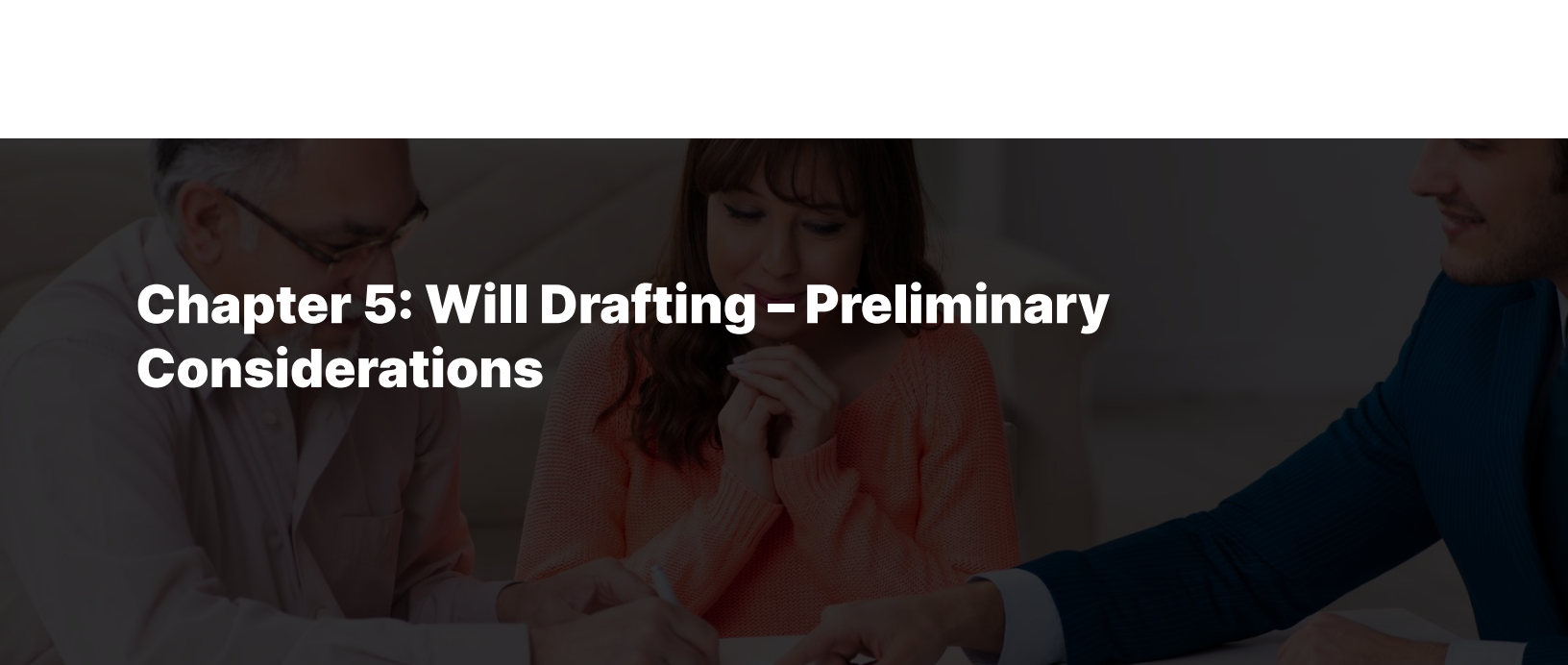




Chapter 5: Will Drafting – Preliminary Considerations

-  5.1 Introduction
-  5.2 Testator's personal circumstances
-  5.3 Appointment of executors and trustees
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5.10 Summary

5.1 Introduction

In this chapter we will look at **the issues** clients will want to consider **before finalising instructions**.

Example

You are invited by Selena, the head of private client, to sit in on a will instruction meeting for Mr and Mrs Charnwood, a married couple in their early 30s who are existing clients of the firm. Mr and Mrs Charnwood own a property business. They have a modest portfolio of five buy-to-let properties in the Midlands.

Neither have made a will in the past. However, Mrs Charnwood has recently given birth to their first child, Emelia, and they both feel that it would be sensible for them both to make wills for the benefit of each other and Emelia should something happen to either or both of them.



As neither have been through this process they have a lot of questions. To start with they want to understand who will deal with the administration of their estates and what would happen to Emelia if they both die while she is still a minor. Their friends have told them that if they both die while Emelia is still a child, she would be made a ward of the state and there is nothing they can do to prevent that.

After putting their concerns at ease Selena takes Mr and Mrs Charnwood through a brief explanation of how a will operates and the issues they may want to consider before finalising instructions.

CONTINUE

5.2 Testator's personal circumstances

5.2.1 Married couples/civil partners separated but not yet divorced/dissolved

It is very important to identify clients who are going through a divorce or dissolution of a civil partnership (dissolution).

Separation, divorce and dissolution can be very painful, and clients will commonly wish to keep the details private. Clients will often not volunteer this information without some questioning.

The will instructions meeting is the perfect time to understand your client's personal circumstances and it is essential that you obtain this information to give proper advice.

You will need to explain to the client that the appointment of a spouse or civil partner as an executor in an existing will will be invalid on divorce or dissolution of a civil partnership – see **s18A** and **s18C WA 1837**. Similarly, **s6 Children Act 1989** provides that the appointment of an ex-spouse or ex-civil partner as guardian of a child who is not their own child will be invalid. However, you need to deal with what happens in the period between separation and the final order of divorce or civil partnership.

Understanding that a marriage only ends on the issue of the final order (and not by effluxion of time or even the issuing of the conditional order) is the starting point.

If your client wishes to **exclude their spouse or civil partner** before they are divorced or the civil partnership dissolved, they need to make and execute a will that gives effect to their

wishes.

If your client wishes the appointment of **their spouse or civil partner as executor** and/or guardian to continue regardless after the divorce/dissolution, the will needs to show this contrary intention to override the provisions of **s18A** and **s18C Wills Act 1837** and **s6 Children Act 1989**.

It is also worth highlighting to the client that a claim may be made under **s14** or **s14A Inheritance (Provision for Family and Dependants) Act 1975 (I(PFD)A 1975)** if a financial provision order or property adjustment order has not been made by the Family Court to the surviving spouse/civil partner within 12 months of the final order being made.

CONTINUE

5.2.2 Contemplation of marriage/civil partnership

If your client is planning on marrying or entering into a civil partnership with their partner, the **will needs to reflect this**, to avoid revocation by the marriage/civil partnership under **s18** or **s18B WA 1837**.

It is not enough for the will to record that marriage or a civil partnership shall not revoke it. The will must record the person the testator intends to marry or enter into a civil partnership with, and that the will is not to be revoked upon such marriage or civil partnership taking place; it should also record whether the will is conditional on the marriage or civil partnership taking place.

While private client practitioners are aware of the provisions of **s18**, most lay people are unaware of this and the failure to obtain full personal information before drafting a will can lead to poor advice and unintended consequences.

5.2.3 Excluding potential beneficiaries

Testamentary freedom in England and Wales is subject to potential challenges as to the validity of a will and claims against the estate under **I(PFD)A 1975**.

If a client wishes to exclude a potential beneficiary (e.g. spouse/civil partner, child etc.), you should advise the client to set out their reasons for this in writing.

The preferred option is for the client to write a letter to their executors explaining why a potential beneficiary has been excluded.

Explanations can also be included in the will; however, if that is the instruction, due to the sensitive nature it is recommended that such explanations should avoid inflammatory language. This is because Probate Registrars have the power to exclude such language before the grant is made and the will becomes a public document.



Link to Practice

As a practitioner you will be expected to discuss this with your client and to keep a detailed note of the explanation given for excluding a potential beneficiary. This note may have to be produced in a claim against your client's estate so write it as if it will be read by a judge.

Remember that part of the test for testamentary capacity is that the testator should know who they

ought to consider whether they choose to or not.

Failure to understand that your client is excluding a potential beneficiary and to discuss this with your client might lead to a suggestion that they did not have capacity and that is why the person was excluded, and professional criticism.



Link to Practice

Probate practitioners are being encouraged to film their clients when they give their will instructions. Where the gifts in the will are likely to lead to family conflict and litigation, such a video can be powerful evidence in court. Some clients will even want their filmed wishes to be played at their wake to their friends and relatives!

CONTINUE

5.3 Appointment of executors and trustees

5.3.1 Types of executor and trustee

Executors fall into three main categories: lay, professional and trust corporation.

LAY EXECUTORS	SOLICITORS, ACCOUNTANTS OR OTHER PROFESSIONALS, ETC.	BANKS OR OTHER TRUST CORPORATIONS
Lay executors tend to be relations and friends. There is no reason why a beneficiary cannot also act as an executor and it is quite common for the residuary beneficiary to be appointed, particularly in the case of a spouse/civil partner. Some individuals, however, might not be suitable as executors, even if they are family, such as: persons who live abroad, minors, people significantly older than the testator, mentally disordered persons, bankrupts, those in prison or others who have shown that they are not good at managing property/money. However, courts do not lightly pass over a testator’s choice, even if it is an unwise one.		



LAY EXECUTORS

SOLICITORS, ACCOUNTANTS OR OTHER PROFESSIONALS, ETC.

BANKS OR OTHER TRUST CORPORATIONS

The advantage of appointing a professional is that as well as making use of their expertise, professionals are independent of those who are likely to benefit under the will. Of course, it is possible to combine a professional appointment with that of a family member or friend who might also be a beneficiary.

If a firm is appointed, it takes effect as an appointment of the partners at the date the will is made unless a contrary intention is shown in the will. Consequently, the will should expressly provide that it is an appointment of the partners at the date of death (or the members or directors at death if the firm is a limited liability partnership (LLP) or an incorporated practice). Provision should also be made for change of name, or becoming an LLP, incorporated practice amalgamation, etc. Of course, the testator could always decide to appoint individual professionals as opposed to an appointment of a firm.



LAY EXECUTORS

SOLICITORS, ACCOUNTANTS OR OTHER PROFESSIONALS, ETC.

BANKS OR OTHER TRUST CORPORATIONS

A trust corporation is a company which meets certain statutory requirements and undertakes the administration of trusts and estates. Some of the larger law firms now have their own trust corporation which has its own identity and can take a grant in its own name rather than in the name of individuals as is necessary with a firm.



CONTINUE

5.3.2 Responsibility and risk

As we have seen in Chapter 4 (see 4.2) an executor's responsibilities are set out in **s25 Administration of Estates Act 1925 (AEA 1925)**, as amended by **s9 Administration of Estates Act 1971** and in the **Trustee Act 2000 (TA 2000)**. These duties must be performed with due diligence, and **s1 TA 2000** imposes a duty *to exercise such care and skill as is reasonable in the circumstances*.

In general, the duties of a personal representative (PR) are:

- to collect and safeguard the assets;

- to pay the debts of the deceased;
- to distribute the estate to the beneficiaries correctly entitled.

If an executor fails to perform their obligations they run the risk of being in breach of duty.

Any breach of duty by a PR is called a ***devastavit***. There are three main areas of liability: misappropriation of assets, maladministration and a failure to safeguard assets.

5.3.2.1 Misappropriation

Examples of misappropriation are where a PR uses estate assets for their personal use (***Re Morgan [1881]***) or enters into collusive sales.

5.3.2.2 Maladministration

Examples of maladministration include the following.

1. Misapplication – applying estate assets, albeit in good faith, otherwise than in the order as provided by the will or statute, for example, paying an ordinary creditor before a preferred creditor. PRs who had no notice of the preferred creditor will not be liable (***Re Fluyder [1898]***) unless they would have had notice if they had advertised under **s27 Trustee Act 1925 (TA 1925)** (***Chelsea Waterworks v Cowper [1795]***).
2. Unjustified expenses – PRs should incur only reasonable expenses. For example, a PR will be liable in *devastavit* if they spend more than is “reasonable” on funeral expenses. This is a question of fact in each case.
3. Wasting the assets – giving away an asset of value or paying debts that the PR is not bound to pay (e.g. where they are statute-barred).
In ***Thompson v Thompson [1821]*** the asset was a leasehold property which had a greater value than the rent payable. The PR was liable when he surrendered the lease without consideration instead of selling the asset at a premium. The converse would

apply if the PR fails to surrender an uneconomic lease, where the rent exceeds the value (**Rowley v Adams [1839]**).

4. Failure to pay debts promptly so that the creditor sues, failure to recover assets so that the claim becomes statute-barred, and delay in obtaining probate (**Re Stevens [1897]**) would all amount to *devastavit*.
5. Failure to collect in the estate assets with due diligence.
6. Failure to distribute the estate to those correctly entitled.

Misapplication can arise if the PR does not take enough care in determining who is entitled under the terms of the will or application of the intestacy rules and ends up giving property to someone who was not actually entitled to it. For example, if the will says “£10,000 to my housekeeper”, the person entitled in this situation would be the person answering the description of “my housekeeper” at the date the will was made (**Re Whorwood [1887]**). So, if instead the PR pays the housekeeper employed by the testator at the date of death, the PR will be liable to the rightful beneficiary for misapplication.

For example, the PR might be an executor distributing under a will in which there is undisposed of residue passing on partial intestacy. The executor ascertains that the closest class of relatives entitled under the partial intestacy are the deceased’s brothers and sisters of the whole blood because there is no spouse or civil partner, no issue and the parents died years ago. The PR locates a brother who tells the executor that there are also two sisters still alive. So, the PR distributes the residue in three shares on the basis that these are the deceased’s siblings who are entitled. What the PR has not been told, because they did not ask the right questions when making enquiries, is that the deceased had another brother who died a few years ago and who left a son who is still alive. Consequently, the executor should have set aside four shares and paid one to the son being the issue of the predeceased brother. Since this was not done, the executor will be personally liable for misapplication to the son to the extent of what the son ought to have received.

Very often, liability for misapplication can be avoided by the PRs seeking protection from liability. So, rather than trying to work out for themselves what the will means and running the risk of getting it wrong and so paying the wrong person, the PRs might consider seeking guidance from the court in the form of specific relief. Again, if there is the possibility of the

existence of other relatives within a class who might be entitled, the PRs should seek protection by inserting statutory advertisements.

5.3.2.3 Failure to safeguard assets – negligence

PRs cannot be held liable for loss in the absence of evidence of a failure to take reasonable care (***Job v Job [1877]***). They would not be liable if assets were lost in a robbery. The burden of proving loss as against the PRs rests with the party alleging the loss.

The risk that an executor may be sued for breach of duty is why lay executors may consider appointing professionals to act in obtaining the grant and administering the estate, especially as for many the process is unknown and will occupy a lot of time.

CONTINUE

5.3.3 Conflicts

This issue can be difficult for the client to grasp. Why, for example, might a spouse and parent of a child who is an executor and trustee be in conflict with their own child?

This is precisely why this issue must be discussed with the client when considering who to appoint as executor and trustee.

While it is relatively common for an executor or trustee to also be a beneficiary in an estate or trust in which the trustees have power to exercise discretion (e.g. an immediate post-death interest with power to advance capital to life tenant, or discretionary trust) such an appointment can put that trustee in an immediate position of conflict, especially if they are a sole executor or trustee.

Consider a trustee exercising the power of investment in which they are also the life tenant. Do they choose an income weighted investment, or investments with less income and more capital growth? The issue that arises is that the trustee may select investments which are more beneficial to the life tenant than to the remaindermen, for example, where the investments generate high income at the expense of any capital growth.



Link to Practice

The initial meeting is an ideal opportunity for you to address these issues at the outset. Take the opportunity to explain to your client how and why conflict might arise and offer potential solutions. For example, appointing different trustees to beneficiaries, or additional trustees, and consider the appointment of a professional to deal with any issues that may arise during the administration of the estate and resulting trust. While your client is not obliged to follow advice given, it will allow them to make an informed decision.



Do you think it is right that a trustee with discretion on how to apply the trust fund can also be a beneficiary of the trust?

CONTINUE

5.4 Charging clauses

“Any of my Trustees who is a solicitor may charge fees for work done by him or his firm (whether or not the work is of a professional nature) on the same basis as if he were not one of my Trustees but employed to carry out the work on their behalf.”

As we have seen (at 4.2.6), lay executors and trustees are not entitled to remuneration for their services under the general law – although they can be reimbursed out of the estate for their expenses incurred in carrying out their duties.

To receive remuneration, there must either be an express clause in the will providing for it, or the remuneration must be authorised, either by the beneficiaries of the estate (but this is possible only if they are all of full age and capacity), or under **s29 TA 2000** which allows the payment of **reasonable remuneration** to a trustee (including a PR) for time spent and work done (even if the work could be done by a lay person) but only if the trustee is either:

- a trust corporation; or
- a trustee who **acts in a professional capacity**, but is not a sole trustee and who has obtained the written **consent of all the co-trustees**.

Acts in a professional capacity means acting in the course of a profession or business which provides relevant services to trusts and so will include CILEX lawyers, solicitors, accountants and other professionals.

5.4.1 Purpose

If **s29 TA 2000** provides that an executor or trustee acting in a professional capacity can charge for time spent in that role, **why have a charging clause at all?**

An express charging provision is still required to allow any trustee **not** falling within **s29** to charge for time spent. This will obviously include a **sole trustee**, even if acting in a professional capacity. An express clause may also extend the implied power to charge reasonable remuneration under **s29** by, for example, allowing a trust corporation, such as a bank, to charge in accordance with its standard terms and conditions, or by allowing a trustee to retain remuneration which they have received as director of a company in which the estate or trust holds shares. It is usual in an express charging clause to say that the trustee may charge for all work, even if it could be done by a non-professional, despite the fact that **TA 2000** now provides that this will be implied into a clause providing for remuneration.

It is also very helpful for professionals to have this spelt out in the will for the other executors, trustees and beneficiaries to see. It can save time in providing explanations to all relevant parties as you can simply refer to the clause (if necessary) when providing your estimate to the other executors, and in some cases, residuary beneficiaries for accepting the appointment.

s28(4)(a) TA 2000 provides that a charging clause does not qualify as a legacy for the purpose of **s15 Wills Act 1837 (WA 1837)**. So, a solicitor or partner in the firm witnessing the will does not prevent such a person from benefiting from the charging clause.

CONTINUE

5.4.2 Risks

Difficulties may arise when a **professional executor** is appointed who is also **a member of the testator's family**. In these circumstances, other executors and the beneficiaries may feel that the testator's choice of a professional executor was inappropriate and both the appointment and fees may be challenged.

A professional may be asked to renounce by co-executors who feel the appointment is either unnecessary or who would like to instruct their own choice of professional and negotiate terms.

5.4.3 Law Society guidance

On 3 September 2020, the Law Society updated its good practice guide in relation to information that must be given to clients looking to appoint a solicitor as a professional executor, to allow the client to make an informed decision.

The client's best interest should be put first. In circumstances in which the estate is small and relatively easy to administer with no obvious issues arising, it may not be appropriate to encourage the appointment of a professional.

However, in more complex estates or in circumstances in which a beneficiary or one of the lay executors may become overbearing, or a conflict may arise, it may be appropriate to encourage the client to appoint a professional from the firm.

If a client is considering appointing a professional from the firm, you should provide an indication of the costs for acting as executor and carrying out the administration.

Information about costs should be as detailed as possible in the circumstances and specify:

- the total cost of the service or, where not practicable, the average cost or range of costs;

- the basis for the charges, including any hourly rates or fixed fees; and
- a description of, and cost of, any likely disbursements.

If the role is to act as executor and trustee and the will creates a will trust that will continue after the administration has concluded, costs information about acting as trustee should also be given.

If you are asked to renounce probate, there is no requirement to do so. However, if minded to consider the request, you should look at the reasons the professional or firm was appointed in the first place.

If circumstances have changed since the will was made and the death of the testator, which may be the case with the passage of time, you should consider what is in the best interest of the estate and whether administration can be handled by a lay executor.

If a decision has been made to renounce probate you should also consider whether it is appropriate to disclaim the appointment of trusteeship as the roles are different.

CONTINUE

5.5 Guardians

5.5.1 Parental responsibility

The possibility of appointing guardians should be considered if the testator has children under the age of 18. The position is now governed by the **Children Act 1989 (CA 1989)**.

For an appointment of testamentary guardian to be effective the testator must have parental responsibility.

The person(s) with parental responsibility must provide a home and protect and maintain the child.

It is easy to assume that a married couple with children both have parental responsibility but that might not always be the case.

In England and Wales, the child's mother automatically has parental responsibility for her child from birth, and if the parents are married when the child is born, both parents will automatically attain parental responsibility.

Same-sex partners will both have parental responsibility if they were civil partners at the time of the treatment, for example, donor insemination or fertility treatment.

An **unmarried father** can get parental responsibility for his child in one of three ways, for example, by:

- jointly registering the birth of the child with the mother (from 1 December 2003) (**s4 CA 1989**, as amended by **s111 Adoption and Children Act 2002**);
- entering into a parental responsibility agreement with the mother;
- obtaining a parental responsibility order from a court.

For **same-sex partners** who are **not civil partners**, the second parent can get parental responsibility by either:

- applying for parental responsibility if a parental agreement was made;
- becoming a civil partner of the other parent and making a parental responsibility agreement or jointly registering the birth.

CONTINUE

5.5.2 Joint guardians

Any person that has parental responsibility for a child can appoint testamentary guardian(s).

It is helpful for everyone with parental responsibility to appoint the same guardians for the same children.

Example

Mr and Mrs Thyme are the parents of Ashe who is five years old and have recently made their wills appointing Mrs Thyme's sister, Skye, and Skye's husband, Jonathan, as

testamentary guardians on the death of the survivor of them.



Mr and Mrs Thyme's circumstances are fairly straightforward. The appointment of the testamentary guardians will not take effect until both Mr and Mrs Thyme die, and only if they both die while Ashe is still a minor.

The appointment of Skye and Jonathan is joint; however, should one of them die the appointment will continue with the survivor.



Link to Practice

Clients should be advised to review their appointment of testamentary guardian regularly and especially when circumstances change. If, for example, Skye and Jonathan emigrate to Australia, it may no longer be appropriate to appoint them as guardians, especially given immigration issues that will arise.

Example

Mr and Mrs Thyme separate two years after making their wills and divorce two years after separating. The divorce was acrimonious and, although both have retained parental responsibility for Ashe, they have agreed which dates Ashe should stay with each of them. When the divorce is finalised, they independently review and make new wills.

Mrs Thyme (now Miss Sage) is happy with her choice of testamentary guardian but changes the provision to take effect on her death. Mr Thyme would prefer his family to look after Ashe on his death and his new will reflects that Ashe's guardians should be his brother, Martyn, and his brother's wife, Emma.

This scenario creates a number of issues. **What happens when either Mr Thyme or Miss Sage dies first, and Ashe is still a minor?**

The answer is that one person with parental responsibility cannot override another's without an order of the court. On the death of either of them the survivor will maintain sole parental responsibility for Ashe. The appointment of guardian will only take effect when the survivor dies.

That introduces a second issue. **What happens if the survivor dies and Ashe is still a minor?**

Both wills appoint different testamentary guardians. If all are still alive, all four appointments (Skye, Jonathan, Martyn and Emma) will take effect. If the guardians cannot agree on who should look after Ashe until he reaches 18, an application will have to be made to the High Court (Family Division) for a care arrangement order.



Link to Practice

If in the above circumstances Mr Thyme was not Ashe's father and Mrs Thyme appoints him as guardian on her death, that appointment will automatically terminate should they divorce. **s4 Law Reform (Succession) Act 1995** (as amended) provides that any appointment of a former spouse/civil partner as guardian is revoked by divorce, dissolution or annulment.

The appointment of guardian seems straightforward, and in many cases it is. However, understanding how appointments operate and who has parental responsibility is key to being able to properly advise your client on options available.

CONTINUE

5.5.3 Choice of guardians

Example

You have introduced a couple (Ajax and Adelpha Baros) to the firm as new clients. They want to discuss making new wills and you have been authorised to conduct the initial will instruction interview on your own. It is a great opportunity to prove to your supervising partner that you have reached this stage in your professional development.

Your friends who are married have recently had a baby girl, Zelda. They would like to put into place provision for Zelda should they both die while she is a minor. They have already considered appointing their mutual friends (Anthony and Declan), who are in a civil partnership, as guardians of Zelda. Anthony and Declan are teachers and your friends feel that they will make fantastic guardians.



Your friends also want to put their entire estate into trust for Zelda until she reaches the age of 25. They both agree that they want Zelda to be mature and settled in life before she has an absolute entitlement to any inherited wealth.

They feel it would be convenient to make Anthony and Declan executors, trustees and guardians, and have asked you whether you feel that this would be a good idea.



What advice would you give Ajax and Adelpha, and why?

It is a useful exercise to encourage clients with young children to select guardians who will be appropriate in the circumstances. Quite often this is straightforward. The clients have already discussed this amongst themselves and have agreed the most suitable guardians.

In the above scenario, the appointment of Anthony and Declan is clearly considered and one in which they both agree. It may seem strange not to select existing family members, but that is not always an option, and, in some circumstances, family members are not the most appropriate.

If, for example, grandparents are selected, that may be appropriate especially if they are still young and able. However, if over time the grandparents become less mobile and/or need assistance themselves their appointment may be less desirable for the wellbeing of the child.

Clients may want to consider existing relationships with their child, financial stability and whether the proposed guardians have their own children.

Geography may also be a consideration for education purposes. Also consider problems that will arise when appointing anyone living overseas. As with the scenario of Skye and Jonathan emigrating to Australia, appointing them as guardians will not grant the child any rights to enter or stay in the country.

When it comes to appointing the same person(s) as guardian and trustee, consideration will have to be given as to whether it is sensible putting the same person in control of the child and the money for the child.

While the guardian will be best placed to assess the child's financial needs, a conflict can arise very quickly and a guardian can be put in a very difficult situation. In some circumstances the guardian may not want to use funds for the child. In other circumstances

the guardian may misapply the child's funds which can lead to disputes between guardian and child arising when the child is older.

Consider the following example in which the guardian is also the trustee.

Example

The guardians are Zane and Amber, the sister and sister's husband of Bethanie who has recently died leaving Jennifer who is 11 years old. The guardians own a semi-detached, two-bedroom house and have a 13-year-old son Ekon and because of the husband's work as a building contractor, their vehicle is a van with three seats. This is not an issue as the husband drops Amber off at work and Ekon at school before going onto work himself. He then collects Ekon and Amber when he finishes work. The sister's estate has a net value of £500,000 which has been placed on trust for Jennifer when she reaches the age of 21.

Consider the following scenarios:

1. Zane and Amber realise that it will not be appropriate for Ekon and Jennifer to share the only available bedroom. Zane and Amber feel it would be appropriate to extend their home to provide for a third bedroom and more space generally given the increased size of the family. The cost of the extension is £120,000. They feel that as Jennifer is the reason they need more space the trust should pay for the extension.
2. It becomes apparent very quickly that Zane and Amber need a family car as there are not enough seats in the existing vehicle to drive everyone to work and school. The guardians feel that the trust should pay for the car as Jennifer is the reason it is needed. Zane has had his eye on a second-hand Land Rover sport for £40,000 and feels that this would be an appropriate family vehicle.
3. Zane and Amber have promised Ekon that in the summer they will be going to Florida for a family holiday of a lifetime. This will include a family room at a 4-star hotel and entrance to all Disney attractions for two weeks. They have been planning this for the last two years and have saved and budgeted carefully. They will now need to factor

Jennifer into the holiday. The cost of an additional seat on the plane, a larger family room so that Jennifer can have her own space and additional tickets for Jennifer to access the theme parks is another £1,600. This has not been budgeted for and the guardians feel that the trust should pay for this additional expense so that Jennifer can come with them.

4. Jennifer is about to start senior school. Bethanie had managed to get her into a private fee-paying school with the benefit of a scholarship. Zane and Amber feel that it is unfair for Jennifer to attend a private school when their son attends the local state school. They would like the trust to pay for their son to attend the same school as Jennifer so that the children are treated equally.



How would you respond to the above four scenarios? Set out your response to each as if recording your decision in a note for the firm's file. The note should record your decision and reasons in each case.

The above situations are just some of the many scenarios that can arise when taking responsibility for another child. It can be easy to see how conflicts can arise and criticism applied on how a child's money is applied, especially when others derive a direct benefit from the application of those funds.

Clients should be advised on the issues that can arise so that a fully informed decision is made as to whether guardians are also the trustees for the children(s) fund.

It may be the case that the proposed guardian is a step-parent who has lived with the child for many years and the above issues are less likely to arise.

Whatever the situation, the possibility of a child complaining about the application of their funds while a minor will always exist, whether a complaint materialises or not. Consideration should therefore be given as to whether a guardian is protected from such a situation arising by appointing separate guardians and trustees.

CONTINUE

5.5.4 Willingness to act

Before anyone is named as guardian in a will, that person should be approached and give their consent. This is because a guardian can disclaim the appointment and that might cause undue hardship for the child while the family or child services make suitable arrangements through the courts.

A willingness to act should be reviewed over time as circumstances change.

A couple who have their own children that are the same age may be very willing to accept responsibility for another child. If, however, over the years that couple have suffered financial hardship leaving them barely able to make ends meet for their own children, their willingness to take on another child may have changed.

Health and infirmity of the proposed guardians may also play a factor in a person's willingness to accept this responsibility.

The age of the child may also be a factor. It is one thing to accept responsibility for a baby, and quite another to take on a teenager and be able to fulfil that role for the benefit of the child.



[CONTINUE](#)

5.6 Foreign element

5.6.1 Foreign property/domicile

It is not uncommon for clients to own assets overseas. This is something that ought to be established at the outset during the will instruction interview.

A client's domicile will be relevant to advice given. Domicile is a common law concept and is used by the courts to determine the relevant laws of a jurisdiction to be applied. The concept of domicile is not necessarily recognised in other jurisdictions. Civil law jurisdictions tend to look at where a person is or was habitually resident.

Under the laws of England and Wales, a person must have a domicile and will obtain a domicile from birth known as domicile of origin. While this is normally treated to be the country in which a person is born, strictly speaking, a legitimate child adopts the domicile of their father and an illegitimate child the domicile of their mother.



A person will adopt a domicile of dependency which is determined by the domicile of the person that they are dependent upon by law. A dependent person is either an unmarried child under the age of 16 or a person suffering from a mental disorder.

Domicile can change by choice; however, this must be a conscious decision and is quite often determined on the facts of each individual. It is however very hard to lose domicile of origin (***Morris v Davies and Others [2011]***).

To add further complication, the above should not be confused with deemed domicile which is a test that HMRC applies to determine domicile for tax purposes.

CONTINUE

5.6.2 Overseas property/foreign will

It is important to understand where assets are situated to properly advise your client and prepare a will that truly reflects the client's wishes.

Overseas asset can be divided into two categories, **moveable** (cash in a bank account, shares in a plc, etc.) and **immoveable** (real property). The distinction becomes important when advising your client on how assets devolve (pass) on death.

As a general rule, subject to certain exceptions that we will look at later in this chapter,

- **moveable assets** will pass under the laws on the country in which the deceased is domiciled or habitually resident; and
- **immoveable assets** are subject to the laws of succession of the country the assets are situated.

While it is helpful to understand how property will devolve on death, it is still recommended that clients with overseas assets make a will in the jurisdiction in which the assets are held. This will also provide a level of certainty, especially if legal conventions change over time.

It should also not be assumed that all countries will follow this approach or the construct of an English will. For example, a lot of countries do not recognise the role of executors. Estates are administered by the beneficiaries.

Even in circumstances in which the English will is recognised, obtaining a grant may prove more difficult and expensive than having a will in the jurisdiction.



Link to Practice

Care should be applied if you are aware of assets overseas, especially if there is already a will

covering assets in any jurisdiction. Drafting should ensure the English will does not revoke the foreign will(s). If advising a client to make a will in a foreign jurisdiction, you should also advise the client to instruct the foreign lawyer to tailor any revocation clause so that it does not inadvertently revoke the English will.

CONTINUE

5.6.3 EU Succession Regulation (Brussels IV)

The **EU Succession Regulation (650/2012)** applies to EU Member States, except for Ireland and Denmark. It applies to deaths on or after 17 August 2015.

The UK did **not** adopt the Regulations as the government was **not** willing to allow another country to dictate how real property is held.

The Regulation means that a Member State will adopt the laws of succession in which the person was habitually resident.

In practical terms, a European country may well override their forced heirs provisions in favour of an English will when applying the laws of succession.

However, for countries that do not recognise executors this can cause confusion.

It is therefore still recommended to have a will prepared in the foreign jurisdiction in which property (whatever the nature) is held.



Link to Practice

It will be more expensive to admit an English will in an overseas jurisdiction, especially a non-English speaking jurisdiction. It may well be that the assets held overseas are modest and the costs of the exercise, of say gaining access to a bank account with the equivalent of a few thousand pounds, may well become disproportionate.

For example, a bank account in Poland will require all English documents to be notarised and apostilled for use in Poland, with certified translations. Normally, an attorney in the jurisdiction will be given power to make the application which will attract additional fees.

In some cases, accounts in foreign jurisdictions are simply abandoned as the costs of accessing the funds are greater than the credit balance of the account in question.

CONTINUE

5.6.4 Elections that can be made if the property is in Spain

Spain is a good example of taking advice in the jurisdiction in which property is situated.

Under Spanish law a person can elect to formally accept or reject a legacy. This may seem strange as in England a legacy is accepted if not disclaimed.

If the beneficiaries administer an estate under Spanish law, when a beneficiary accepts a legacy they also accept all debt that travels with that legacy, whether secured or unsecured. There is no limitation on the debt to the assets in the estate. A beneficiary may well end up with more liability than the asset is worth.

Example

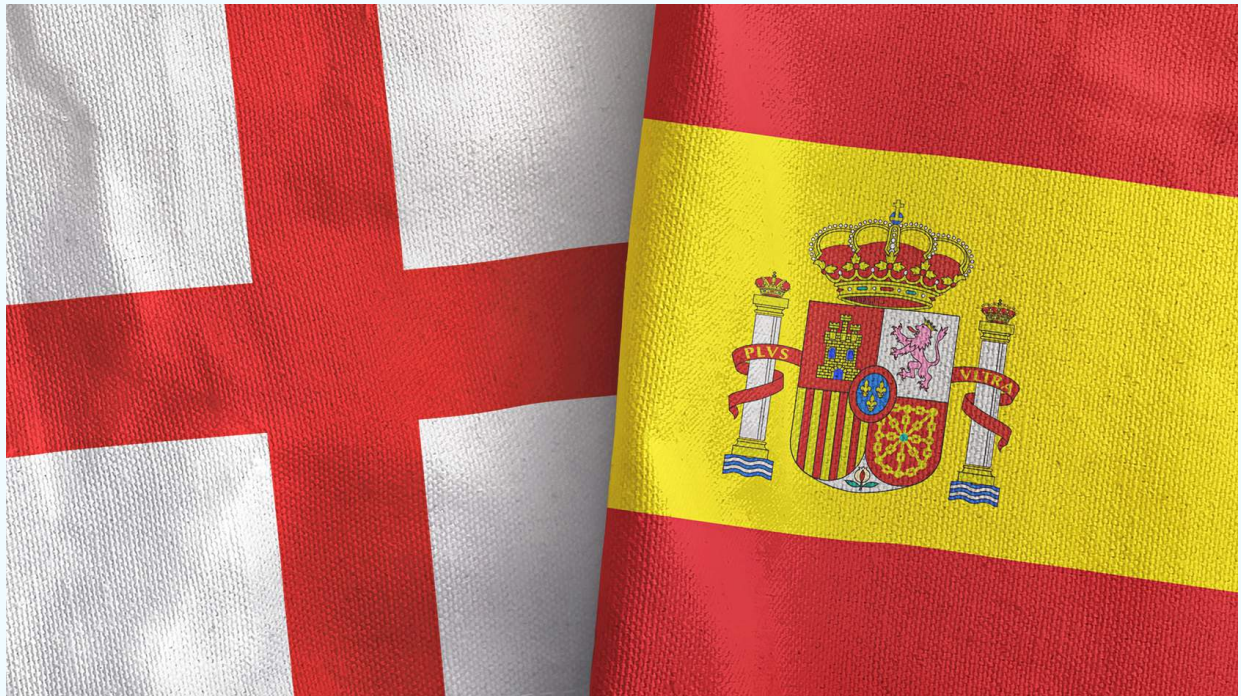
You act in the administration of an estate of James who was domiciled in England and owned a holiday home in Spain. The deceased left the holiday home to his brother John, which came as a surprise to the rest of the family as the deceased refused to have any contact with his brother during the past 10 years.

The story is that John borrowed money from James and he refused to pay it back. During the administration you advise John of this legacy and also recommend that he takes his own advice about the property in Spain. Apart from for any other reason, the property will have to be transferred into John's name.

You are surprised when John calls you to say that he has been advised by Spanish lawyers not to accept this gift. The lawyers have investigated the property and as a result of the current downturn in the Spanish holiday market it is worth approximately £60,000 (which is in line with the valuation you obtained for tax purposes). It transpires, however, that the estate charges for maintaining the complex in which the apartment is situated. These

charges have not been paid for many years, neither have the utilities and local taxes which in aggregate stand at £80,000 outstanding.

John has been advised that if he accepts this gift, he will become personally liable for the debts. For obvious reasons John has decided to reject it.



CONTINUE

5.7 Assets that fall outside the will



Link to Practice

Clients will often misunderstand how assets they have an interest in, own or derive a benefit from during their lifetimes fall outside the direction of a will – as they are held subject to their own terms and sit outside a deceased's estate for probate purposes, although not necessarily inheritance tax (IHT) purposes.

It is the private client practitioner's role to identify these assets and advise their client on how these assets may be directed on death, or what needs to happen to control how an asset may pass on death, if not through their will.

Often advice at the first meeting will have to be general until additional information is obtained, from say, an insurance company or pension provider.

It is important that a client is not left with the impression that a gift will pass in accordance with a will if that is not the case.

In this section we will look at the common scenarios that fall within this category.

5.7.1 Jointly owned assets

Property, whether it is land or personalty (such as a bank account), held by a co-owner under a beneficial joint tenancy will **pass automatically to the surviving joint tenant** and is therefore unaffected by the will or the intestacy rules.



Link to Practice

We have already looked at reducing risk by obtaining official copy entries of freehold or leasehold property to establish ownership and whether the property is registered as held as beneficial joint tenants or tenants in common.

It is also necessary to explain to your client why it is necessary to establish ownership and advise your client on options available.

CONTINUE

5.7.2 Life insurance

Money arising under policies of life assurance can be directed to a third party with the minimum of formality. Under **s11 Married Women's Property Act 1882** (as amended), the policyholder can create an implied trust in favour of the spouse or civil partner and/or children. Alternatively, to benefit others, an express trust of the policy proceeds may be declared.

In these cases, effectively, the money belongs to the beneficiaries under the trust from the date of the declaration and does not form part of the estate of the deceased at death. So, it cannot pass by the deceased's will and, instead, the proceeds go directly to the beneficiaries. The money is not, therefore, available for the payment of the debts of the deceased (***Re Flavell [1883]***). Such policies may be set up to provide cash to pay a mortgage or inheritance tax. Where a policy is taken out purely to benefit the beneficiaries, since the policy money is paid on proof of death, the money may be paid out without the need for a grant of representation that is usually required before assets can be obtained under a will.

This applies only to policies of life assurance assigned to or directed to be held in trust for a third party. Not all such policies are dealt with in that way, so if the deceased had taken out a policy on their own life without having assigned the benefit or imposing a trust, the proceeds will be paid by the life assurance company to the PRs. Those proceeds may well form part of the deceased's estate under the terms of the will (or under the intestacy rules if there is no will).

CONTINUE

5.7.3 Death in service

This type of policy will be linked to the client's employment and payable if the client should die while still employed by the employer that has this policy in place.

The schemes are normally discretionary and paid out, and on death a lump sum is usually payable to whomever was nominated by the client. While nominations are not binding on the pension trustees, unless there is a strong competing claim against the fund (e.g. on behalf of a minor child of the deceased or new spouse/civil partner), they are usually honoured.

CONTINUE

5.7.4 Pensions

Many pension schemes including occupational pension schemes for employees are so drafted that the benefits do not form part of the deceased's estate on their death. Instead, they are payable at the discretion of the trustees of the scheme. Consequently, unless paid to the deceased's estate, the amount payable is not dealt with by the deceased's PRs as property that passes under any will; instead it can be paid by the pension scheme trustees direct to one or more beneficiaries designated by the scheme.

The scheme beneficiaries are usually within the immediate family of the employee, so the pension payment enables funds to go to those who might be financially dependent on the deceased employee without having to wait for a grant of probate or letters of administration. In most cases the employee will be asked by the trustees of the scheme to indicate their wishes as to whom payment should be made, though this is not binding on the trustees. As with a death in service scheme, or life insurance this is sometimes referred to as a **"nomination of a preferred recipient"**.



Link to Practice

You should never assume a policy is held in a certain way and will or will not form part of the client's estate on death.

If the client wants to include a lump sum payable out of a policy or scheme on death as part of their wishes or calculations (e.g. *I am not leaving Adriana McGuffie any legacy because she is the beneficiary of a life policy I have with Prudential plc*), you should always ask the client to make enquiries to establish how the scheme operates, whether there will be a lump sum payable on death (as that is not always the case with pension policies), and obtain an up-to-date valuation of any death benefit.

Alternatively, obtain authority from the client for you to discuss the matter with the policy or scheme administrators.

CONTINUE

5.7.5 *Donatio mortis causa*

A *donatio mortis causa* (plural: *donationes mortis causa*) is a conditional gift made in contemplation of death and which is only perfected (completed) on death.

Suppose, for example, your Aunt Sally believes she is dying. She knows that you have always admired her ring and hands it over to you saying *"I am going and don't need this anymore – when I am gone it is yours."* When Sally dies, the ***donatio mortis causa*** is completed and it becomes valid.



To establish a valid *donatio mortis causa* three requirements must be met, according to Lord Russell CJ in ***Cain v Moon [1896]***.

1

Gift in contemplation of death

The donor must be contemplating death in the near future from some particular reason which they believe to be impending (approaching) (***Re Craven's Estate (No. 1) [1937]***). The actual death may come later than anticipated.

In ***King v Dubrey [2015]*** the Court of Appeal held that, for a *donatio mortis causa* to be established, a donor had to be contemplating her own death. However, that requirement was **not satisfied** just because an elderly donor was approaching the end of her natural life span but **did not have a reason to anticipate death** in the near future from a known cause. The case involved an 81-year-old aunt who presented her nephew with the title deeds to her unregistered house, saying: “*This will be yours when I go.*” He claimed that her use of the words and the way she looked at him made it clear that she knew that her health was failing and that her death was approaching. The court found that, while it was obvious that most of her life was behind her, there was no evidence that she was suffering from any

specific illness. It could not be said that she was contemplating her imminent death at the relevant time. There was no reason why she should not have gone to her solicitors and made a new will. If she had taken that course, the solicitors would have ensured that she understood the consequences of the new will. To have upheld what she had said and done as a *donatio mortis causa* would be to bypass all of the safeguards provided by the **Wills Act 1837**. The Court of Appeal held that **Vallee v Birchwood [2013]** (where the donor died four months after the gift) had been wrongly decided because the donor in that case had not been contemplating death in the near future from a known cause.

The evidence of this belief by the donor may come from their words, for example “*I am done for*” (**Re Lillingston [1952]**). Alternatively, they may be inferred if they are made during a last illness shortly before death, as in **Gardner v Parker [1818]**.

It is not necessary that the donor actually dies from the illness which they expect to be fatal. In **Wilkes v Allington [1931]** the donor knew he was dying from cancer but, in fact, died from pneumonia – the gift was valid.

2

Gift is conditional on donor's death

The gift must be distinguishable from a lifetime gift where the intention is that the gift is immediate and absolute. The court will look at the circumstances at the time the gift was made. For example, if property is handed over during the last days of a donor's final illness, it is more likely to be treated as a *donatio mortis causa* (**Gardner v Parker [1818]**).

Since the gift is conditional on death, the gift will take effect retrospectively from the date of the gift, once the condition, death, has taken place. The donor must have intended that the gift be unconditional on death (**Re Beaumont, Beaumont v Ewbank [1902]**). If the donor recovers from the specific illness or threat of death which they are fearing (such as a particular air journey) the gift will be revoked.

Donor must “part with dominion”

This means that the subject matter of the gift must be physically handed over or its means of control. A simple handover of an item rarely causes problems but the issue of the means of control can cause more difficulty. In ***Reddel v Dobree [1839]*** a cash box was handed over but the key was retained by the donor. Here, the means of control did not pass to the donee and the gift was not valid. By contrast, in ***Woodard v Woodard [1995]*** the keys to a car were handed to the donee. Although the donor retained a duplicate set of keys, his words (a few days before his death from cancer) “you can keep the keys, I won’t be driving it any more” were sufficient to indicate that he intended to part with dominion over the car.

Gifts of bonds, insurance policies and National Savings certificates can be made as the paper documents are needed as essential items of title. In ***Birch v Treasury Solicitor [1950]*** bank and Post Office passbooks were handed over to one donee as gifts to her and her husband. She was treated as having received her husband’s share as his agent – the couple were treated as a single entity.

Difficulties have arisen over gifts of land. Owners of land who are approaching death and want to make a gift of it will rarely have the time to complete the normal conveyancing and Land Registry documentation required to transfer the title. In ***Sen v Headley [1991]*** the Court of Appeal considered a gift by the donor of the keys to a steel box. The donor had said “*the house is yours . . . You have the keys. They are in your bag and the deeds are in the steel box.*” It held that the PRs held the house on a constructive trust for the donee. In ***Vallee v Birchwood [2013]*** the donor gave the deeds to the donee, together with the house keys, although he continued to live in it. The court held that he had parted with the means of transferring the house elsewhere and this was enough to show that he had parted with dominion.



Link to Practice

Gifts of this nature are uncommon now. The cases tend to refer to historic ways of holding wealth. It is less common for people to hold vast amounts of moveable wealth at home. It is normally invested, and while passbooks still exist, they are being replaced with online banking etc.

Most land is registered, and the Land Registry hold the deeds and no longer issues land or charge certificates. It is highly unlikely handing over historic deeds for registered land will have the same effect as deeds for unregistered land.

Consider, also, the increase in litigation over the years especially in relations to estates. It would not take too much to challenge a *donatio mortis causa* especially as someone genuinely expecting to die soon is likely to be on medication, and even if that is not the case there are bound to be other factors present that will cast a shadow over the validity on any high-value gift.

It may well be the case that the most frequent type of *donatio mortis causa* is the gift of lower value sentimental items, that are rarely subject to legal disputes.

CONTINUE

5.7.6 Nominations, severance, creating trusts

Taking instructions for the preparation of a will is more than translating wishes into a format for a will. Part of the process is to understand and investigate what assets the testator owns and how those assets are held, and devolve on the death of the testator.

When looking at life policies, pensions, and death in service schemes, always consider advising your client to complete the provider's form of nomination and to review this with life changing events (the same advice applies to reviewing testamentary documents). It is very simple for your client to contact the administrators and complete its form of nomination. Not only will it help your client achieve their wishes, it also demonstrates a wide knowledge of all factors that affect how assets are held, and pass on death.

In relation to land and other assets held jointly, always consider severing the interest so that your client holds their own interest capable of passing under the terms of their will rather than automatically by survivorship. Severance will not be the answer in all cases, however. It may well be an option that your client will want to consider depending on their circumstances and whether they are happy with the transfer to the survivor. Also, remind your client that severance works both ways. Should the other person die first, their share will not automatically pass to your client.

If your client would like the lump sum from a policy to be applied to discharge IHT, or the mortgage on a property, consider creating a pilot trust for the policy proceeds to be paid into and nominating the trust to receive the fund. A letter of wishes can also be prepared asking the trustees to apply the funds in a specific way. The benefit of this approach is that the funds will not form part of the estate and can be applied in your client's preferred direction.

CONTINUE

5.8 Claims that may be made against the estate

5.8.1 Consideration when will drafting

In addition to ensuring your client has capacity to make a will, is not being subjected to coercion or undue influence, knows and approves the content of the will, and the will is executed in accordance with **s9 Wills Act 1837** to ensure its validity – you will also need to be aware of the potential for certain individuals who fall within a statutory class to have the right to bring a claim against the deceased's estate.

Example

You meet with Mr and Mrs Jones a couple who moved from Wales 20 years ago and now live in Derbyshire. An appointment was made with your secretary for them both to come and see you about making a will. You have been recommended by a friend of theirs because you prepared their friend's wills last year and they were very impressed with the service you gave them.

During the initial interview you ask your clients about their family. Mr Jones doesn't answer and looks a little upset. Mrs Jones explains that they have three children. Their first child Robert is an engineer, their second child Grace is a teacher and their third child Rhys is unemployed and living with a girl who they think takes drugs. They explain that Rhys has money issues; he is always in debt. The final straw was when Mr Jones opened the door to bailiffs who were there to seize goods as a result of a court judgment entered against Rhys. Rhys left the family home after that incident.



Your clients explain that this incident happened three years ago when Rhys was 24 years old. They have had no contact with him since and feel that they have given enough of their lives to help him and that he is old enough to fend for himself and live with the consequences of his decisions.

Mr Jones comments that Rhys should get a job and he's done funding his lifestyle. The background is relevant because your clients go on to say that they do not want to make provision for Rhys, he's had all he is going to get from them, and when they die their estates should go to Robert and Grace equally and in default to their children. Rhys is to be excluded.

Your role, which is to prepare a will that reflects your clients wishes has not changed. However, this information has added an additional layer for consideration and advice.

To understand the issues that a scenario such as this introduces, we will look at the provisions that allow certain individuals to bring a claim against an estate.

The starting point is the **Inheritance (Provision for Family and Dependents) Act 1975 (I(PFD)A 1975)**. The Act does not give any person automatic provision from an estate; it gives a right for certain classes of individual to make a claim for reasonable financial provision, and whether that claim succeeds will turn on the facts of the case.

Those that can make a claim fall into the following categories.

- **s1(1)(a)**: Spouse or civil partner of the deceased
- **s1(1)(b)**: A former spouse or civil partner who has not yet remarried or entered into a further civil partnership
- **s1(1)(ba)**: A person living in the same household as spouse or civil partners. (There is a minimum two year requirement for this provision to apply)
- **s1(1)(c)**: Child of the deceased
- **s1(1)(d)**: Person treated as a child of the family
- **s1(1)(e)**: Person maintained by the deceased.

For claims by a spouse or civil partner under **s1(1)(a)**, the claim is for such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance.

For claims by all others who do **not** fall into the **s1(1)(a)** category, the claim is such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.

Understanding the principles will help you to recognise potential future issues. Explaining those issues to your clients will allow them to make informed decisions.

In addition to understanding the general effect of **I(PFD)A 1975**, it may assist your clients to understand what assets are caught by the Act and anti-avoidance provisions.

5.8.1.1 The property available – the meaning of “net estate” (s25(1) I(PFD)A 1975)

The term “**net estate**” might be defined as all the property that the deceased owned at the date of their death and could have disposed of by their will (the testator is treated as able to dispose of the property even if they did not have the required mental capacity), less:

- funeral, testamentary and administration expenses;
- debts and liabilities; and
- IHT.

The amount of IHT to be deducted is calculated after the court has made an order. If IHT has been paid prior to the grant, the appropriate adjustments are made.

Property owned at the date of death was considered in an unusual case involving an insurance policy. In *Lim v Walia [2014]* the deceased and the claimant (her husband) were a married couple who held a life insurance policy which included a provision for early payment if one of the insured couple could show that they were suffering from a terminal illness. The deceased died leaving a young son from a new relationship. The husband was entitled to a grant and, because of the size of it, to the estate on intestacy. At first instance it was held that, immediately before her death, the deceased had been beneficially entitled to a joint tenancy of the terminal illness benefit, but the Court of Appeal held that she had had a severable interest in the terminal illness benefit that ceased to have a value because it was not claimed before she died. As a result, the half share of the proceeds of the life policy which was paid out on her death did **not** form part of the net estate under **s25(1) I(PFD)A 1975** and the husband therefore retained the proceeds.

The net estate available for an order is extended to include:

1. a nomination in force at the date of death (**s8(1)**). In *Goenka v Goenka, Welsh and Others [2014]* the court held that a nomination by the deceased of a large sum payable under the NHS pension scheme created under a statutory instrument was included in the net estate;

2. *donatio mortis causa* (see 5.7.5);

3. property held on a joint tenancy.

In relation to point (3), the court may order that the deceased's severable share **to such extent as appears to the court to be just in the circumstances of the case** shall be treated as part of the net estate (**s9(1)**). The date on which the deceased's severable share is to be calculated is now subject to **s9(1A) I(PFD)A 1975** (inserted by **ITPA 2014**).

s9(1A) provides that the value is to be calculated as at the date of the hearing of the application, unless the court orders it to be assessed at another date (e.g. the date of death). This amended sub-section confirmed *Dingmar v Dingmar [2006]* which held that the deceased's share of a jointly owned house should be calculated at the date of trial, rather than on the (much lower) value at the date of death. The time limit for applications in respect of the deceased's share of joint property under **s9** ends six months after the date of the grant. The court has the discretion to extend the time limit.

5.8.1.2 Anti-avoidance provisions (ss10 and 11 I(PFD)A 1975)

Prior to **I(PFD)A 1975**, a testator intent on avoiding a possible claim could, for example, give away assets prior to death or enter into a contract to leave property in any event and then not leave the property, thereby inviting an action for damages against the estate; the action would have to be resolved prior to determination of the net estate. The provisions in **ss10** and **11 I(PFD)A 1975** seek to counter these and other steps.

5.8.1.3 Order for the donee to make financial provision (s10 I(PFD)A 1975)

A court can order a donee to make financial provision for the applicant if it is satisfied that:

- the deceased made a disposition within six years of the death with the intention of defeating a claim under **I(PFD)A 1975**; and

- the deceased was not given full valuable consideration for the disposition; and
- by exercising its powers, the court would facilitate the making of financial provision for the applicant.

“Disposition” means parting with any type of property right – for example, a payment of money, conveyance, transfer, appointment and gift.

The creation of liabilities is not, in itself, a disposition – for example, where the deceased had the chance to obtain for themselves a profitable trading contract with a third party but arranged for a friend to benefit, thereby diverting the proceeds.

The enjoyment of property after the disposition does not affect the disposition.

For example, where X transfers their house to Y more than six years before X's death but continues to live in the house after the transfer, this would not bring the disposition within **s10**. Compare, however, where X takes a life interest in a settlement created more than six years before their death but X retains a power of appointment over the property.



Intention is determined upon the balance of probabilities. **s12(1) I(PFD)A 1975** expressly provides that the intention to defeat **I(PFD)A 1975** need not be the sole intention in making the disposition.

If the deceased received consideration, this is valued at the time it was paid. It would be possible, therefore, to purchase a future right and still regard the consideration given as being for full value, thereby avoiding **I(PFD)A 1975**.

The value of property caught by **s10** is the value at death. The court can make an order even if the donee has parted with the property, in which case, it is the value at the date of disposal by the donee. If the donee has died, their PRs are not liable (**s12(4) I(PFD)A 1975**).

5.8.1.4 Power to modify deceased's contract for disposition (s11 I(PFD)A 1975)

Whereas **s10** is directed at the situation where the deceased sought to reduce their net estate by reducing their assets, **s11 I(PFD)A 1975** deals with the situation where the deceased sought to increase their liabilities.

By virtue of **s11**, the court has the **power to modify the effect of a contract** entered into by the deceased to leave property by will. The conditions are:

- the deceased made a contract by which they agreed either: to leave a sum of money or property to a person in a will; or
- that a sum of money or property would be paid or transferred to a person out of their estate; and
- the contract was made with the intention of defeating a claim under **I(PFD)A 1975** and at the time of the contract, full and valuable consideration was not given or promised by the donee;

and by exercising the powers, the court would make financial provision for the applicant.

If no valuable consideration was given by anyone, intention to defeat the claim is presumed. This is to be contrasted with the position under **s10** where the intention must be proved.

I(PFD)A 1975 applies only to contracts to pass property on death. A contract to transfer property during life is outside **I(PFD)A 1975**; for example, a person could enter into a lifetime covenant to pay a sum of money, but any payment to the covenantee would have to be satisfied before the net estate could be ascertained.

Note, however, the dictum of Lord Cross in **Schaefer v Schuman [1972]**:

“[W]hether contracts made by a testator not with a view to excluding the jurisdiction of the court under the Act but in the

normal course of arranging his affairs in his lifetime should be liable to be wholly or partially set aside by the court . . . is a question of social policy on which different people may reasonably take different views.”

- Lord Cross

There is no time limit in the case of contracts falling within **s11**, save a cut-off in respect of contracts made prior to the commencement of **I(PFD)A 1975** (1 April 1976).

The court will have regard to the circumstances in the making of the contract, the relationship (if any) of donor to donee and their respective financial circumstances.



Link to Practice

Explaining the nature and effect of claims that can arise under **I(PFD)A 1975** can be complicated especially if your client would like advice on eligibility of a certain individual and prospects of success. Sometimes it will become necessary to refer a client to either a lawyer in the contested probate department of the firm (if one exists), or a barrister specialising in this area.

It is natural to want to find a way around a potential future issue. It is helpful to be able to explain the effect of trying to discourage claims and the anti-avoidance provisions to prevent your

clients from finding “clever” ways in an attempt to circumvent the Act.



Activity

The leading case in relation to claims against estates by adult children and in relation to provision limited to maintenance is *Ilott v The Blue Cross and Others [2017]*.

After reading the case, answer the following questions:

1. What was the original County Court judgment?
2. What was the judgment in the Court of Appeal?
3. Which decision did the Supreme Court uphold, and why?

5.8.1.5 Discouraging claims

It is not uncommon to see clauses in wills which attempt to discourage beneficiaries from bringing an action against the estate. They are normally coupled with a legacy just large enough to make the beneficiary think twice about risking its loss. In ***Nathan (Deceased), Nathan v Leonard [2003]*** the court considered whether such a clause is repugnant to public policy.

The condition was, in effect, that a beneficiary who chose to challenge the will would lose the benefits given to them by the will. The court found that, although this might well have a strong deterrent effect on the beneficiary making a claim under **I(PFD)A 1975**, such a condition was not repugnant or contrary to public policy.



Link to Practice

There is a difference between:

- a testator leaving a small legacy to someone they might like to exclude on the basis that it may be sufficient to discourage a claim on the grounds that while the legacy may be modest compared to the estate or what the other beneficiaries will receive, it may still be sufficient to qualify as reasonable provision in the circumstances; and
- leaving a gift to someone conditional on a claim not being made, as in the case of ***Nathan (Deceased), Nathan v Leonard [2003]***. In that case, even though the court held that such a provision was not contrary to public policy, if a claim is brought the provision made for the beneficiary will be nil and could potentially strengthen a claim.

5.8.1.6 Leaving a letter explaining a decision

If a client wants to exclude a person that might make a claim, it is recommended that the client write a letter or note setting out their reasons for the decision. While not conclusive, it goes to testamentary freedom and may well prove persuasive when the court is considering a claim.



Link to Practice

s1 Civil Evidence Act 1995 enables the court to admit written or oral statements as to why the deceased made little or no provision for the applicant.

CONTINUE

5.8.2 Letter of wishes

If looking at ways of addressing potential claimants, it can be useful to consider creating a discretionary trust and including the potential claimant within the class of beneficiaries.

Under a discretionary trust the excluded person (X) has no absolute right to anything, and it can give the trustees more flexibility when dealing with that individual. It will also give them the freedom to agree terms of settlement if a claim is brought without seeking every beneficiary's consent.

The testator can write a letter of wishes in which they set out their wishes that X should not be considered when exercising discretion to make payments to anyone within the class of beneficiaries and explain the reason why. The testator can also set out what he would like the trustees to do to either avoid a claim or in circumstances in which a claim has been made.



Link to Practice

While this option may seem attractive as it addresses the issue in another way, remember to explain to your clients that **the letter is not binding** and **the trustees will have to do what they feel is right**. Adopting such a hard approach in refusing to consider a person within a class of beneficiaries may well result in a claim against the trustees for breach of trust.

This solution effectively puts the decision off to a later date and in the hands of trustees.

CONTINUE

5.9 Other wills

5.9.1 Living wills

The term “living will” can be confusing because such a document has no connection with ordinary wills. “Living will” is a generic term which is now accepted as referring either to an **advance decision** (which is legally binding) and an **advance statement** (which is not legally binding but must be taken into consideration when making a decision). An advance decision sets out the person’s wishes about the kind of medical treatment they wish to receive should they not have the capacity to express their views at a later date; an advance statement deals with matters other than medical care – it may address such matters as personal care, food preferences, etc.

It is necessary to distinguish between **advance decisions** (introduced by the **Mental Capacity Act 2005 (MCA 2005)**) and advance statements. If a client says they have made a living will, or is considering doing so, it is essential to establish which kind of statement they have in mind. As will be seen, one important aspect of the difference between the two lies in their relationship with lasting powers of attorney (LPAs).

5.9.1.1 Advance decisions to refuse treatment

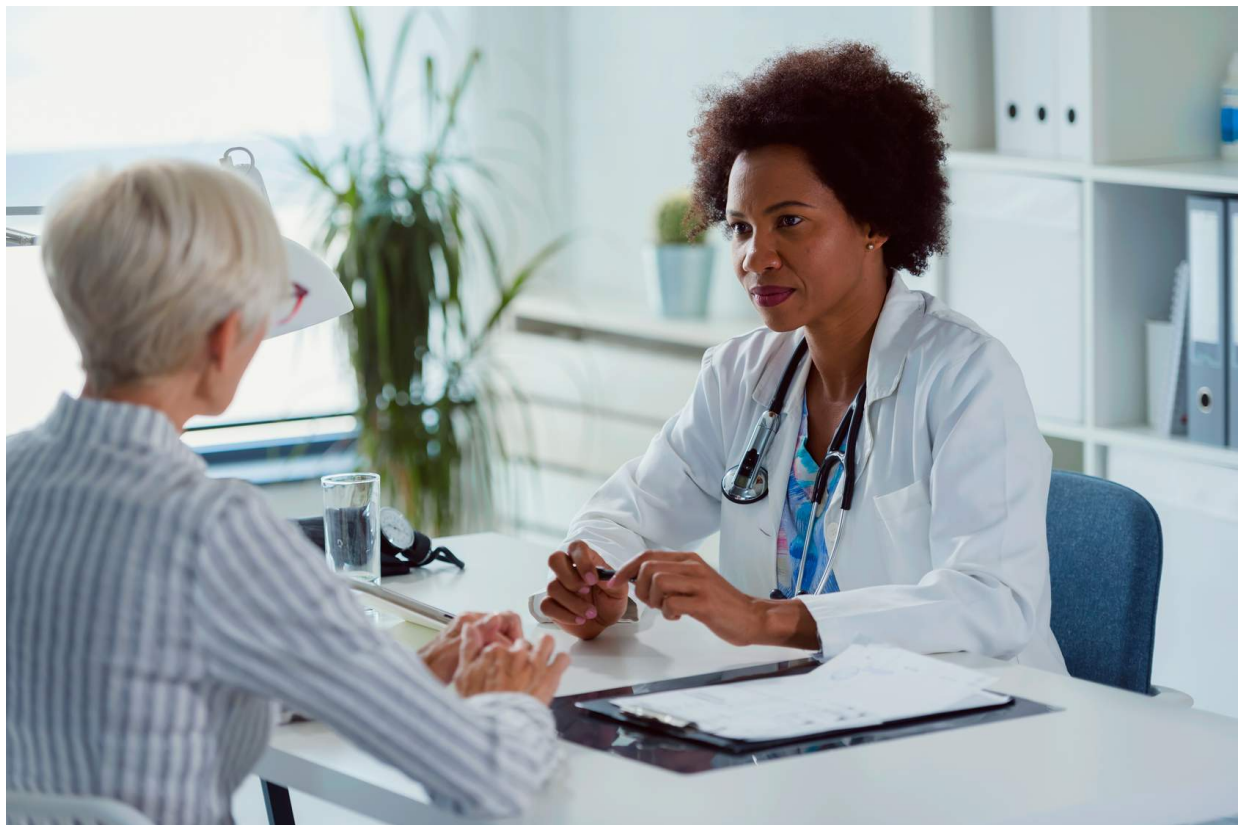
A mentally capable adult has no right to demand a particular treatment but has the right to refuse any medical treatment (for an example of this principle, see *Kings College Hospital NHS Foundation Trust v C and Another [2015]*).

MCA 2005 recognises that this right extends to a decision to refuse treatment made in advance if a situation later arises which was envisaged when that advance decision was

made.

Provided that the provisions mentioned in the advance decision apply to the particular circumstances encountered by those supplying treatment, it will be as if the person had capacity to refuse that treatment. Consequently, medical practitioners will not be liable for complying with the advance decision to refuse treatment if they reasonably believe the advance decision to apply, even if such action results in the person's death.

The advance decision must, of course, be **as clear as possible** about what types of treatment the person wishes to **refuse**, though precise medical terminology is not necessary. The decision need not be in writing (though there are obvious advantages in it being so), **unless the decision is to refuse life-sustaining treatment**. Such decisions must be written and signed by the person making it (or on their behalf) and witnessed. The decision will be invalid if the person lacks capacity when they make it.



If, during a conversation with their doctor, a patient (with capacity) says that they would never want joint replacement surgery, that decision will be legally valid; but if they say that they would not want to be given fluid intravenously in order to keep them alive, that would not be valid unless it was also put in writing, signed, witnessed and, ideally, dated.

Although advance decisions can exclude “artificial” life-sustaining treatment, the decision cannot:

- promote or facilitate suicide or euthanasia;
- refuse basic care, such as warmth and shelter;
- refuse food and drink by mouth; or
- demand care the doctors consider inappropriate.

An advance decision can be revoked by the person making it, provided the person has the capacity to do so. If the person does revoke a written advance decision, they would be wise to ensure all copies are destroyed.

5.9.1.2 Advance statements

An advance statement is not legally binding and need not be in writing. It must be taken into account when decisions are being made on a person's behalf, but those making such decisions need not give effect to the requests it contains.

5.9.1.3 Living wills and lasting powers of attorney

Since an **advance statement** is not a legal document, it has no direct interaction with an LPA, except that a health and welfare attorney should take note of any relevant wishes it contains. It is, in fact, possible to set out the advance statement, or at least a reference to it, in the health and welfare LPA itself, which should help to ensure that it does not get overlooked.

The relationship between **advance decisions** and **health and welfare LPAs** is a little more complex because a situation could arise where the two documents conflict and so the issue is which one should prevail.

The basic rule is that the advance decision will remain valid despite the presence of any other LPA (**s25(7) MCA 2005**).

However, there is an important exception in that under **s25(2)(b) MCA 2005**; an advance decision will not be valid if the maker has, under an LPA created after the advance decision was made, conferred authority on the donee (or, if more than one, any of them) to give or refuse consent to the treatment to which the advance decision relates. Only an LPA which addresses the question of the same medical care covered in the previous advance decision will supersede that advance decision.

Consequently:

- if a person makes an advance decision refusing life-sustaining treatment **after** having made an LPA giving an attorney power to decide whether to accept such treatment or not, then the advance decision will prevail;
- if the advance decision was made **before** the LPA, then the attorney will have the power to decide whether to consent to or refuse such treatment, notwithstanding that the earlier advance decision refused it, provided the LPA covers the same medical care as that mentioned in the advance decision. If the LPA does not do so, then the earlier advance decision will prevail over the LPA.

Note finally that if comparing the respective dates of an advance decision and an LPA for the purpose of **s25(2)(b) MCA 2005**, the date an LPA is created is the date of its registration, not the date when it was signed (**Re E [2014]**).

5.9.1.4 My Living Will tool

[My Living Will](#) is a tool created by a group of senior healthcare professionals, senior lawyers and an ethicist with a view to helping people control end-of-life decisions. It provides comprehensive information about living wills and enables someone who has capacity to create a personalised and individualised advance decision refusing treatment or an advance statement of preferences and wishes. If a person has not appointed an attorney under an LPA, they are asked to name a “key person” who could become a party to any discussion and decisions about the person.

It is understood that a senior member of the Court of Protections (CoP) has reviewed the website and is content that it conforms to **MCA 2005** in both detail and spirit.

CONTINUE

5.9.2 Statutory wills

It may happen that a person needs a new will but lacks capacity to make one themselves. The need may be identified by the person’s deputy, or their attorney, or somebody else with knowledge of the person’s financial affairs. There may be a will already in place, but it is now inefficient for IHT purposes (perhaps because it leaves the entire estate to the person’s spouse/civil partner, who already has extensive assets of their own), or the person may have no will, and the intestacy provisions would not give effect to what would, in all probability, be the person’s wishes.

It is possible for an interested person (usually a property and affairs attorney or a deputy) to apply to the CoP for permission to execute a will (a “statutory will”) on behalf of the person lacking capacity, incorporating the provisions which it is believed the person themselves would include if they had the ability to do so. Here again, we see the application of the **best interests** principle: **ss5.46** and **5.47 MCA 2005 Code of Practice**, for example, make it clear that a person’s values and beliefs should be taken into account and that decision-makers should consider any other factors the person who lacks capacity would consider if they were able to do so. This might include the duties of a responsible citizen. Usually, the court is happy to consider statutory wills which save IHT, on the basis that this is a common

objective for testators. It should be remembered, however, that the will is supposed to give effect to the perceived wishes and best interests of the person lacking capacity, not of their beneficiaries, so it may be that it would be necessary for the applicant to demonstrate to the court that the person lacking capacity would not regard such a will as contrary to their duties as a citizen.

In ***Re D, VAC v JAD [2010]*** the testatrix had clearly lost mental capacity. Her three children were already in dispute over which of her several wills was valid and there was a very high likelihood of litigation after her death. Her deputy applied to the CoP for a statutory will to be drawn up dividing her residue equally between the disputing children with legacies for grandchildren. The court held that the testatrix's best interests under **s1 MCA 2005** were best served by taking into account the memory her family would have of her after her death as having "done the right thing". It ordered the statutory will to be drawn up.

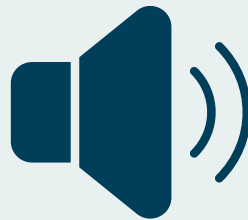
In ***NT v FS [2013]*** Behrens J reviewed recent decisions on statutory wills. He said that while the overarching principle was that any decision made on behalf of the testator had to be in the testator's best interests, this was not the same as enquiring what he would have decided if he had had capacity. It is not a test of substituted judgment but requires the court to apply an **objective test** of what would be in the testator's best interests after following the structured decision-making process laid down by **s4 MCA 2005** and considering all relevant circumstances.

Behrens J went on to say that **MCA 2005** contained no hierarchy between the various factors to be borne in mind. The weight to be attached to each would inevitably differ depending on the individual circumstances of the particular case. There may, however, be one or more features which, in a particular case, would be of **"magnetic importance"** in influencing, or even determining, the outcome. However, the weight to be attached to the testator's wishes and feelings would always be case-specific and fact-specific. In some cases, they may carry much weight; in others, and even where the circumstances may have some superficial similarity, they may carry very little weight.



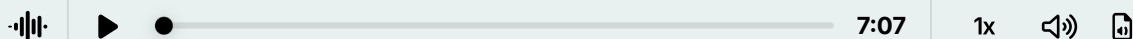
Link to Practice

In circumstances in which you have been approached by a person (normally a family member) on behalf of someone who has lost capacity, consider advising in relation to making an application to the CoP for a statutory will, and whether it would be in the incapacity person's interests to do so.



Law Explained: Will drafting – preliminary considerations

This recording outlines the issues to consider in relation to the **Inheritance (Provision for Family and Dependants) Act 1975** when taking will instructions.



Audio Transcript

Hello. This recording is designed to support Chapter 5 of your book, on will drafting – preliminary considerations, and in this recording I will be looking at the potential claims that may be made against an estate.

This needs to be considered from two points of view: first of all, from the point of view of drafting the will and ensuring, wherever possible, that it reflects the testator's wishes, even where the testator wishes to exclude a particular member of their family; and, secondly, from the point of view of the

personal representatives when they are trying to ensure they administer the estate properly and with as little risk as possible.

It is important to remember that the **Inheritance (Provision for Family and Dependants) Act 1975** applies to all estates, whether the deceased made a will or died intestate. The Act was introduced as a counterpoint to the concept of testamentary freedom and as a way of ensuring that principles of fairness were applied when an estate was being distributed. Take the intestacy rules, for example. We're going to be looking at these in much more detail later in the book, and we will see that intestacy makes no provision whatsoever for informal relationships and people who are not blood relatives. This, some would argue, represents a significant gap in a modern society where, particularly amongst younger people, it is more common to be living together than married or in a civil partnership, and families are often much more diverse than the traditional picture of mum, dad and two children.

The rules under the Act are relatively simple. If you are a person who receives nothing, or if some provision has been made but you feel it is not enough under the will or intestacy, if and only if you are in one of the categories specified under the Act you can bring a claim against the estate. A common trap which learners fall into is assuming that anyone who feels aggrieved can make a claim, which as we will see is not the case.

The claimant must show that the distribution of the estate fails to make reasonable provision for them. In this there are two separate tests: where the applicant is a spouse or civil partner, the test is what is reasonable in all the circumstances, whereas other categories of applicant are required to show that the disposition of the deceased's estate does not make reasonable financial provision for their maintenance. Put simply, Victoria Beckham could claim against David Beckham's estate an amount that reflects the lifestyle she was used to, whereas David's children would be limited to what they could show they needed for their maintenance.

As I said previously, the first step to consider is what needs to be done to protect an individual who is thinking of making their will. It is clearly very important to ensure that you take full instructions from your client, and gain a clear picture of all the people in their life who could conceivably have a claim. This means you will need to ask them whether they currently have a spouse, civil partner or cohabitee, about any previous marriages or civil partnerships which have been dissolved, any children they have (whether adult or infant), including children who don't live with them, anyone else who might be considered a child of their family (stepchildren are a good example, and again both adults and infants qualify; I once dealt with a claim under this category where the claimant was in his fifties), and finally anyone who is being maintained by your client.

Once you have full details, you will be able to carry out an analysis of whether each individual mentioned could bring a claim, and the likelihood of success if they did so. If your investigation reveals someone who could bring a claim who the testator has decided not to mention in their will, you will need to discuss this further with your client, point out to the client the risk as you see it of a family provision claim, and ascertain whether the client wishes to change their instructions following your advice. Remember that the client might have good reasons for not wishing to benefit a particular individual, but always suggest that they write a letter which can be left with the will explaining why they have excluded that person. The reason, by the way, that we suggest using a letter rather than putting an explanation in the will itself is that, once probate has been granted, the will becomes public – and clients rarely wish to air their family grievances in this way. A letter of explanation will not

prevent a claim but can be used in court as evidence of why the deceased chose not to benefit the claimant.

Turning now to the situation where we are dealing with a deceased's estate. In many ways the process is similar – we will want to investigate with the PRs whether there is any likelihood of a claim being brought because someone who fits one of the categories has not benefited, or feels they have not benefited enough, under the will or intestacy. We would then need to take our thought processes a step further and consider the likelihood of success of any such claim, bearing in mind the statutory factors in s3 of the Act. These include the financial needs and resources of the claimant and anyone else who's either a beneficiary or potential beneficiary; the obligations and responsibilities of the deceased; the size and nature of the net estate of the deceased; and any physical or mental disability of the applicant or any other person who may be entitled. Whilst it is impossible to anticipate what, if any, order a court would make, this sort of analysis should give the PRs a fairly clear understanding of the risk to the estate. Bear in mind that, normally speaking, claims must be made within six months of the grant, although this time limit can be extended by the court in appropriate circumstances, and again normally the costs are borne by the estate – so there can often be a benefit in settling claims before they get to court rather than risking a greater loss to the estate.

I hope that this recording has given you a flavour of this important piece of legislation, which you should always have in the forefront of your mind, both when drafting wills and dealing with estates.



Law in Context

Further discussion about advance decisions and the medical choices involved is set out in the following NHS article: [Advance decision to refuse treatment \(living will\)](#).

CONTINUE

Knowledge check

This knowledge check is a self-assessment to see how well you understood the content of this chapter and it does not count towards your course mark.

There are 6 questions in this knowledge check.

Question 1 of 6

Which of the following statements about domicile are correct?

(Select 2 correct answers)

- ☐ All children adopt the domicile of their mother.
- ☐ Domicile is used by the courts to determine the relevant laws of a jurisdiction to be applied.
- ☐ Domicile is recognised in all jurisdictions.
- ☐ Domicile may be changed by choice.

SUBMIT



Complete the question above before moving on.

Question 2 of 6

Ivana has recently died leaving a valid will. Which of her assets will pass outside her estate?

(Select 3 correct answers)

☐

Her house which is owned as joint tenants with her husband Torsten.

☐

A cash ISA in her sole name.

☐

A lump sum payable from her pension fund at the discretion of the pension trustees.

☐

A death in service benefit from her employer.

SUBMIT



Complete the question above before moving on.

Question 3 of 6

Who is most likely to have parental responsibility for the child in question in the following situation?

Charity, whose unmarried mother Hannah has had nothing to do with her father David since she was born.

☐

Hannah

☐

David

☐

Hannah and David

SUBMIT



Complete the question above before moving on.

Question 4 of 6

Who is most likely to have parental responsibility for the child in question in the following situation?

Jack, whose parents Emily and May were in a civil partnership when he was conceived by in vitro fertilisation.

- ☐ Emily
- ☐ May
- ☐ Emily and May

SUBMIT



Complete the question above before moving on.

Question 5 of 6

Who is most likely to have parental responsibility for the child in question in the following situation?

Imran, whose parents, Jamil and Iba, were married; Iba died last week.

- ☐ Iba

- ☐ Jamil
- ☐ Iba and Jamil

SUBMIT



Complete the question above before moving on.

Question 6 of 6

Who is most likely to have parental responsibility for the child in question in the following situation?

Harry, whose parents Frankie and James are not married; James has been granted a parental responsibility order.

- ☐ Frankie
- ☐ James
- ☐ Frankie and James

SUBMIT



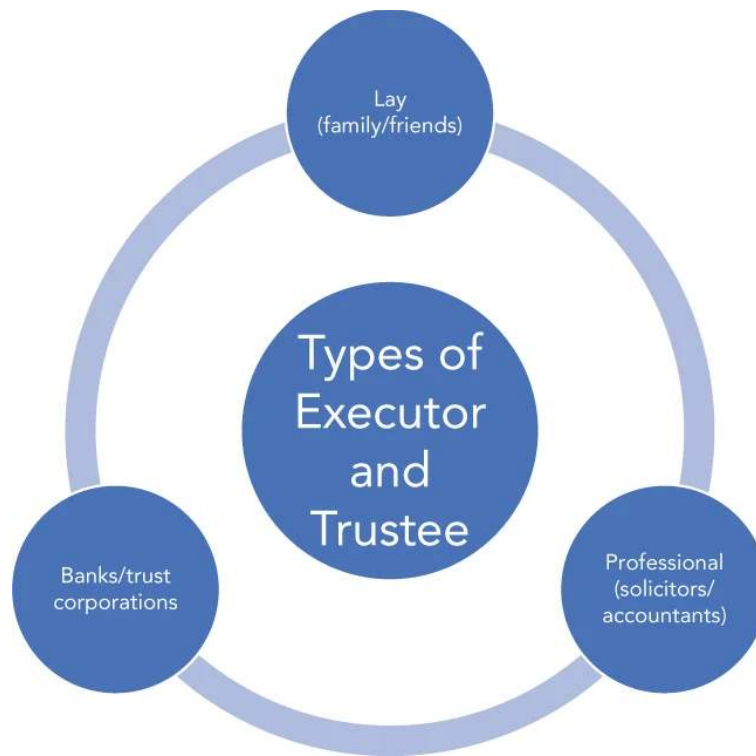
Complete the question above before moving on.

5.10 Summary

Types of Executor and Trustee

- Lay (family/friends)
- Professional (solicitors/accountants)
- Banks/trust corporations

Figure 5.9a



Responsibilities and Risk

- s25 AEA 1925: Collect in assets; pay liabilities; and distribute
- Misappropriation (*Re Morgan [1881]*)
- Surrendering an asset that has a greater value than the cost (*Thompson v Thompson [1821]*)
- Failure to take reasonable care (*Job v Job [1877]*)
- Unjustified expenses – an executor should only incur reasonable expenses
- Failure to pay debts promptly
- *Re Stevens [1897]*
- Failure to collect in estate assets and failure to distribute to those entitled
- Paying an ordinary creditor before a preferred creditor

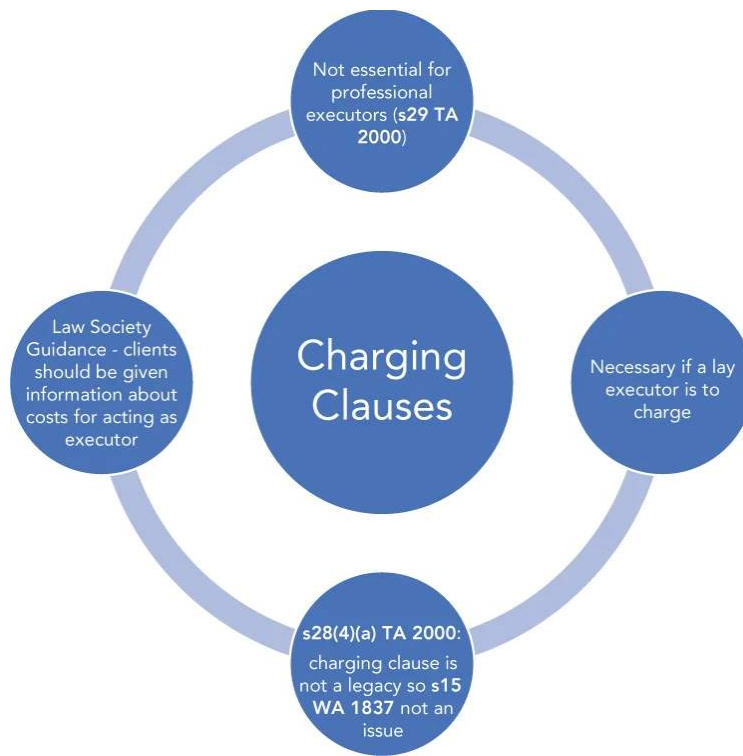
Figure 5.9b



Charging Clauses

- Not essential for professional executors (s29 TA 2000)
- Necessary if a lay executor is to charge
- s28(4)(a) TA 2000: charging clause is not a legacy so s15 WA 1837 not an issue
- Law Society Guidance – clients should be given information about costs for acting as executor

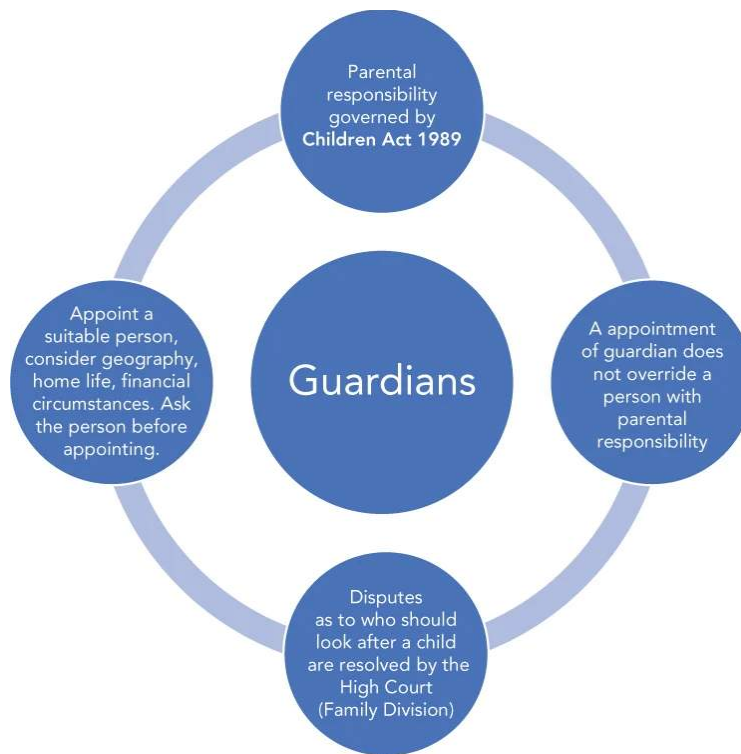
Figure 5.9c



Guardians

- Parental responsibility governed by Children Act 1989
- An appointment of guardian does not override a person with parental responsibility
- Disputes as to who should look after a child are resolved by the High Court (Family Division)
- Appoint a suitable person, consider geography, home life, financial circumstances. Ask person before appointing.

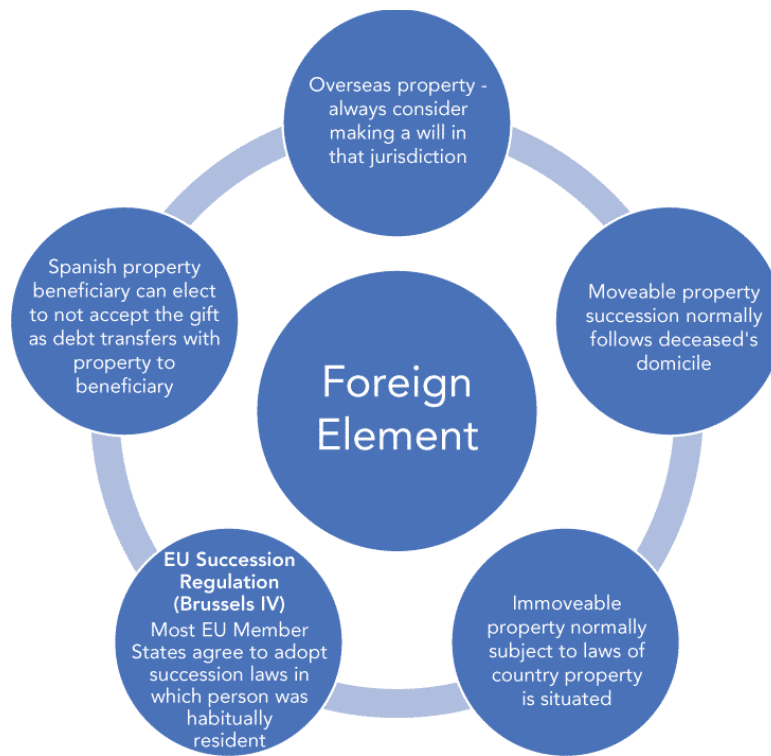
Figure 5.9d



Foreign element

- Overseas property: always consider making a will in that jurisdiction
- Moveable property succession normally follows deceased's domicile
- Immoveable property normally subject to laws of country property is situated
- EU Succession Regulation (Brussels IV): Most EU member states agree to adopt succession laws in which person was habitually resident.
- Spanish property beneficiary can elect to not accept the gift as debt transfers with property to beneficiary

Figure 5.9e



Assets that fall outside the estate

- Jointly owned assets property and personalty
- Life insurance (review terms and consider nomination)
- Death in Service (look at company's policy and consider nomination)
- Pensions (review terms, obtain up-to-date valuation and consider nomination)
- *Donatio mortis causa* (gift in contemplation of death): gift conditional on death and subject matter physically handed over
- Also consider creating a pilot trust to receive lump sum benefits from a policy

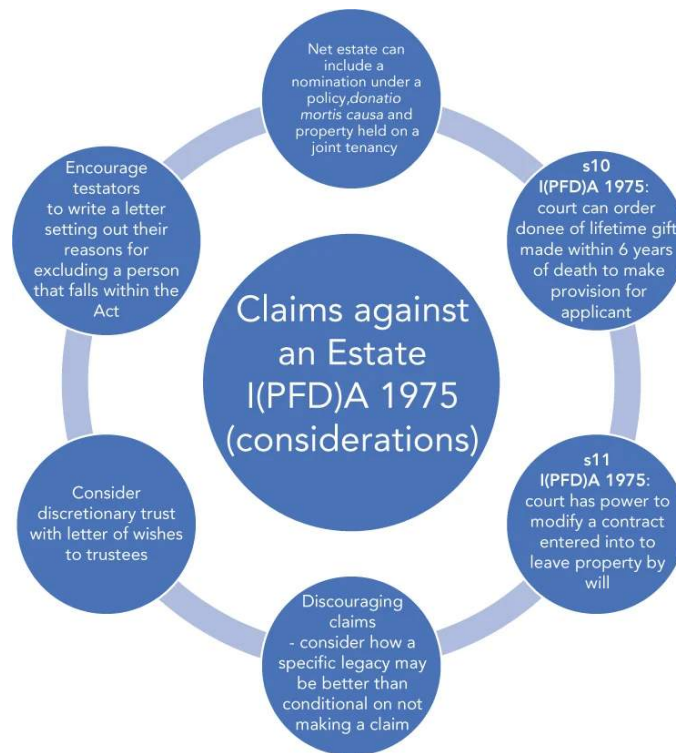
Figure 5.9f



Claims against an Estate – I(PFD)A 1975 (considerations)

- Net estate can include a nomination under a policy, *donatio mortis causa* and property held on a joint tenancy
- s10 I(PFD)A 1975: Court can order donee of lifetime gift made within 6 years of death to make provision for applicant
- s11 I(PFD)A 1975: Court has power to modify a contract entered into to leave property by will
- Discouraging claims: consider how a specific legacy may be better than conditional on not making a claim
- Consider discretionary trust with letter of wishes to trustees
- Encourage testators to write a letter setting out their reasons for excluding a person that falls within the Act

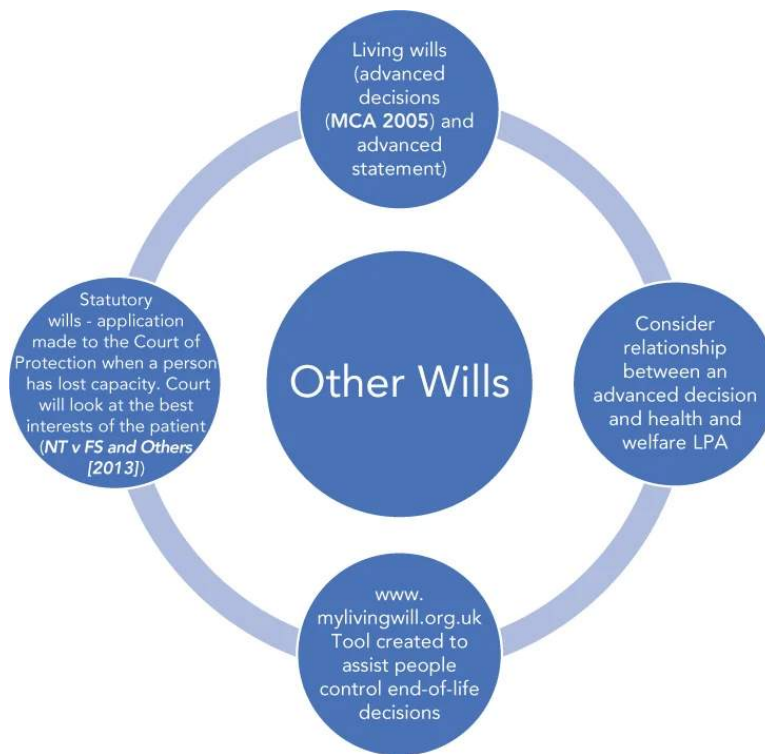
Figure 5.9g



Other wills

- Living wills (advanced decisions (MCA 2005) and advanced statement
- Consider relationship between an advanced decision and health and welfare LPA
- My Living Will tool created to assist people control end-of-life decisions
- Statutory wills: application made to the Court of Protection when a person has lost capacity. Court will look at the best interests of the patient (*NT v FS and Others [2013]*)

Figure 5.9h



You have completed Chapter 5.

EXIT