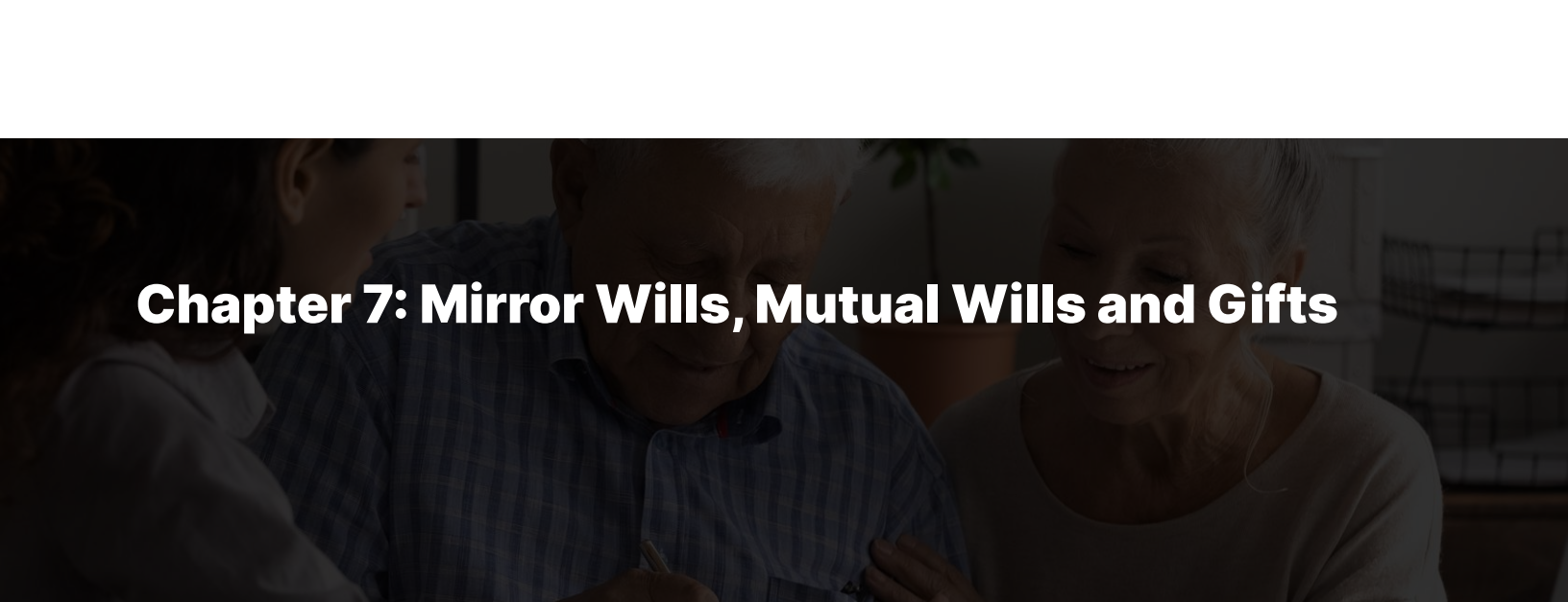




Chapter 7: Mirror Wills, Mutual Wills and Gifts



7.1 Introduction



7.2 Mirror wills and mutual wills



7.3 Gifts



7.4 Failure of gifts



7.5 Extrinsic evidence



Knowledge check



7.6 Summary

7.1 Introduction

In this chapter we will look at **mirror** and **mutual wills**, terms that are often misapplied. You will learn about the importance of knowing **the difference between the two**, and how to advise a client on both so as to avoid potential issues arising down the line.

We will also look at **terminology** and **rules applicable to certain types of gifts**. This section is relevant to both preparing wills and administering estates. Occasions will arise in which clients preparing wills require an explanation of how certain gifts will operate and how to advise clients on the administration of certain types of gifts.

We will also look at **circumstances in which testamentary gifts fail** – an important section in which understanding will assist in helping clients to avoid unintended consequences.

Finally, we will look at **extrinsic evidence** which can be used when issues arise in interpreting ambiguous provisions in a will.

Example

A will instruction meeting has been set up by Mr Fish, a private client lawyer in the firm you work for. Mr Fish has asked you to join him as part of your training to get more experience in meetings of this nature. One day he expects you to be able to conduct meeting like this solo.

The clients arrive and you are introduced to Jemal and Laura Sterling, a married couple in their 30s who have three children: Charlotte aged seven, David aged five and Nigel aged six months old. They explain that they may want more children. Laura is a teaching assistant in a primary school and loves children and Jemal is a police officer.



They have both decided that now is the time to make wills. They think they really should have addressed this earlier, but life seemed to get in the way and there has always been something else to deal with.

Jemal explains that their wishes are very straightforward: they want their estates to pass to each other, and when the survivor dies to pass to their children in equal shares. Laura confirms she agrees with this.

Neither believe in inheriting wealth too early, and when they both die their children should inherit their shares when they are 25.

To make it easy, should a child die before reaching the age of 25 they would like that child's share to pass to the other children and not any grandchildren. They may review this as time goes on but that is their preference at the moment.

Finally, Laura adds that they want to make provision for the situation that when the first of them dies the survivor cannot change their will - adding that she did not want their children's inheritance passing to a certain female police constable Jemal seemed to be interested in. Jemal sighs, saying that it was a passing thing at a Christmas party and nothing happened. Both, however, agree that neither of them should be able to change their wills without mutual agreement or first giving notice to the other that they intend to change their will.

Mr Fish is quick to pick up on this and suggests the solution may well lie in creating a flexible life interest will trust so that the survivor can still benefit from the first to die's share, but the trust will ring-fence what is left for their children. But both Jemal and Laura explain that they do not want to create trusts and want each other's estate to pass to the survivor to enjoy during the survivor's lifetime but ensure that whatever is left is to pass to their children at 25.

CONTINUE

7.2 Mirror wills and mutual wills

7.2.1 Mirror wills

Mirror wills are prepared for two individuals (usually spouses, civil partners or cohabiting partners) in which the individuals have the **same** or very **similar wishes**.

Wills tend to be prepared at the same time, and the provisions in both wills very closely mirror each other (hence the term).

With mirror wills **both parties are free to change** their wills at any time.



Link to Practice

You will find that mirror wills are very common and there is an economy in preparing wills for couples in similar terms. Firms often offer a reduced rate for the preparation of mirror wills as opposed to two separate wills. This makes sense as the will instruction interview can be done with both at the same time and drafting is significantly reduced.

When preparing mirror wills, as the first will is generally copied to produce the second, the second will **should be carefully read to ensure generic references** (e.g. his/her) are amended accordingly and **references to remote family** (e.g. uncle/aunt) are also amended to accurately record the relationship to the testator.

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7.2.2 Mutual wills

The concept of testamentary freedom and the power to revoke and change a will during a testator's lifetime can cause concern when financial ties are present, especially if the intention is to aggregate estates in the future after the first dies. The doctrine of mutual wills developed so that parties who want to make wills in very similar terms are able to **agree not to revoke or change provisions after the first of them dies**. In effect, when the first of them dies, the law will impose a **constructive trust** on the survivor, which will take away their freedom to make a new will and break the agreed provisions.

The principle is described in the headnote to **Stone v Hoskins [1905]**: "*Where two persons have made an arrangement as to the disposal of their property and then executed mutual wills in pursuance of that arrangement, the one of them who predeceases the other dies with the implied promise of the survivor that the arrangement shall hold good; and if the survivor, after taking a benefit under the arrangement, alters his will, his personal representative takes the property upon trust to perform the contract, for the will of the one who has died first has, by the death, become irrevocable. But, on the contrary, where the one who dies first has departed from the bargain by executing a fresh will revoking the former one, the survivor, who has, on the death of the other party to the arrangement,*

notice of the alteration, cannot claim to have the later will of the deceased set aside or modified, either by way of declaration of trust or otherwise."

The agreement must be evident – an agreement cannot simply be inferred from mirror wills.

"To enforce a mutual will there has to be clear evidence on the balance of probabilities that there has been agreement between the two parties to dispose of their property in a similar way in mutual wills" (per Nourse J in **Re Cleaver [1981]**).

In **Re Oldham [1925]** Astbury J stated that *"the fact that the two wills were made in identical terms does not necessarily connote any agreement beyond that of so making them"*.

The survivor of the parties to the agreement cannot, after the death of the first party, be allowed to depart from the arrangement. Any new will is admitted to probate, but equity imposes a constructive trust on the personal representatives (PRs) to give effect to the terms of the agreement. The trust becomes binding once the first testator dies while the mutual wills are still in force. This is known as the **crystallisation** of the trust.

While both parties are alive, the relationship is founded upon contract and the arrangement can be ended unilaterally, with or without notice to the other, for example, by revocation of the will as in **Stone v Hoskins [1905]**.

CONTINUE

7.2.3 Difference

The difference between mirror wills and mutual wills is straightforward and significant.

Mirror wills

A testator is **free to change** a mirror will at any time, with or without notice to the other person

Mutual wills

If the will is a mutual will the testators enter into an agreement **not to revoke or change** their wills subject to the terms agreed between them, and should one die the agreement becomes **irrevocable** as it is no longer possible to either give notice of change or agree to change the wills

CONTINUE

7.2.4 The implications of a mutual will

There are a number of issues with mutual wills.

- The constructive trust imposed on the survivor does not take into account changes in circumstances after the first has died (e.g. the survivor remarrying and/or having more children).
- The assets of the trust are not ring-fenced and the survivor is free to dispose of them as they see fit.
- If the terms of the agreement have not been clearly recorded it may be challenging to determine what assets are the subject of the constructive trust. Is it limited to the assets of the first to die, or the joint assets held when the first dies?

- Over time the assets of the trust may become intermingled with assets added after the first to die.
 - Looking at Jemal and Laura's situation, if they were to make mutual wills and Jemal dies two years later with the agreement still in place, what happens if Laura moves on in life, meets someone new, remarries and has another child with her new partner?
 - What happens if 40 to 50 years later, a dispute arises because Laura has died, and her surviving husband has left the entirety of their estates to his child?
 - How easy is it going to be to unravel which assets should be the subject of the constructive trust and which belong to the later husband and subject to his will?
- It is also not always apparent from the face of the will that the parties have entered into an agreement and the wills are mutual.

Because of problems that are inherent with mutual wills, creating will trusts are seen as the preferred option. The terms of the trust are clear and on the death of the first, it is the trustees' duty to ensure assets the subject of the will trust are transferred into the trust and held on the terms of the trust so they cannot be dealt with by anyone else.

Key Case

For an up-to-date look at how the court can reach a decision of wills being mutual when it is not apparent on

the face of it, see ***Legg and Another v Burton and Others [2017]***. In this case the judge came to a decision that the wills were made subject to an agreement not to revoke without giving notice to the other. This existence of a mutual will was not apparent in the will. In fact, the will was drafted to suggest that no agreement was in place at the time they were made.



Activity

Read ***Legg and Another v Burton and Others [2017]***.

1. Why did the judge come to the conclusion that the wills were mutual wills instead of mirror wills?
2. What could the lawyer who prepared the wills have done to ascertain the situation with the clients when taking their instructions?



Link to Practice

Instructions to create mutual wills are uncommon, this is in part because the creation of a will trust is more effective and certain. It is clear that mutual wills can cause issues to arise in the future and some firms will deem them high risk because they can lead to litigation. For that reason, always check with a senior member of staff in the private client department before accepting instructions to prepare mutual wills. This is because some firms have policies that they will not prepare mutual wills.

If involved in the preparation of mirror wills, always check to ensure there has not been any discussion as to whether the survivor can change their will at any time, and make a detailed note of the response given.

If you do prepare mutual wills, ensure the wills refer to the existence of the agreement and preferably record the terms of that agreement in the will. That way you do not have to worry about the agreement becoming separated and lost over time.

In contrast, if preparing mirror wills record in the body of the will that while the terms may be similar with each other there has been no agreement between the testators not to revoke. A paragraph along the following lines covers the position.

“Although this will is in similar terms to the will of [] there is no agreement between us not to revoke or change our wills. I am free to revoke or change my will at any time.”

The clause will also remind you to highlight that parties are free to change their wills at any time when sending the draft to your client for approval.

Also make sure that regardless of the instruction, you make detailed notes of advice given and responses to that advice on this subject. That note may become very important if a dispute arises as to whether a will is mirror or mutual.



Do you think there is still a place for mutual wills in today's society? Set out your reasons for and against this doctrine.

CONTINUE

7.3 Gifts

7.3.1 Class gifts and class closing rules

These are defined by Lord Selbourne in ***Pearks v Moseley [1880]*** as:

"A gift to several persons uncertain in number at the time of the limitation who answer to a general description and who are to take one divisible subject in proportionate shares the size of which will vary according to the number who ultimately answer the description."

A **class gift** is a gift of property to be divided amongst persons who fulfil a general description – for example, *"the children of X"* or *"the children of X who attain the age of 21"*. The size of each beneficiary's share will **depend upon the number of beneficiaries who fit the description** which, in the examples given, could not be known until at least the death of X. In the meantime, the PRs would be unable to distribute anything to any member of the class.

A gift of an individual amount to each member of a class (e.g. *"£500 to each of the children of X"*) is not strictly a class gift, since the amount of each beneficiary's gift is fixed: all that may be uncertain is how many beneficiaries are entitled. However, the problems are not, in many respects, dissimilar: in the example given, until the death of X, the PRs will not know how much to retain to give effect to the gift.

The courts have devised **class closing rules** to overcome the problem of delay by providing an earlier date upon which the class will close. Potential beneficiaries born after the class has closed are not entitled. The rules vary in detail according to the type of gift but, in

essence, the class closes as soon as there is one beneficiary entitled to call for an immediate distribution.

As rules of construction, the class closing rules are **not** applicable if the testator has shown a clear contrary intention in their will. However, some emphatic phrase such as “**whenever born**” or “**at whatever time they may be born**” is needed to exclude the operation of the rules.

Note that references in the rules to persons “living” or “in existence” include references to persons *en ventre sa mère* (in the mother’s womb) at the time and subsequently born alive.

s33 Wills Act 1837 (WA 1837) (as substituted by **s19 Administration of Justice Act 1982 (AJA 1982)**) provides that, in the absence of a contrary intention, where the class gift is to the **children or remoter issue** of the **testator** and a member of the class predeceases the testator leaving issue who survive the testator, such issue join the class and take *per stirpes* the share which their parent would have taken. For example, the testator provides for a gift “*to my children*”. He had two children, A and B, at the date of the will. B predeceases the testator leaving children, C and D. The gift will be divided in two; one half will pass to A and the other half will be shared equally between C and D.

This is an important provision, but it has its limitations. The section applies only to gifts in favour of the testator’s children or remoter issue. It does not apply to other class gifts, for example, to “*my brother’s children*”: in such cases, a member of the class who predeceases the testator simply drops out of the reckoning.

The class closing rules differ according to the type of gift involved (but remember that these rules will give way to a contrary intention expressed in the will).

CONTINUE

7.3.2 Immediate vested and deferred vested gift

7.3.2.1 Immediate vested —

When we talk about the vesting of gifts in the context of class closing rules, we mean that the asset or share of it can be ascertained by establishing the number within the class. In other words, the asset or share of the asset will vest in each beneficiary when the beneficiary class closes.

If when the survivor of Jemal and Laura dies, Charlotte is aged 25 or older, the class will close and while Charlotte will be able to take her share immediately, the shares for David and Nigel will vest in them until they each reach 25 when they can also take their share.

7.3.2.2 Deferred vested gift —

Fast forward 15 years, Charlotte is now aged 22, David aged 20 and Nigel aged 15. Jemal and Laura review their wills as Charlotte's situation concerns them. She dropped out of school to be with a boy and when that relationship ended, she was a single parent.

Charlotte is in a new relationship and her son is now aged two, and while Jemal and Laura love to see their grandson, they must admit that Charlotte does not make the greatest life decisions and seems easily led by her partners.

Jemal and Laura have decided to change their wills to create a life interest for the survivor of them in their respective estates (see 2.5.6). Their main asset is the house and as part of the process they have severed their joint tenancy and now hold the property as tenants in common in equal shares (see 5.7.1 and 5.7.6).

They both prepare new wills, and in addition to creating the life interest trust in favour of each other, have also decided that when the survivor of them dies, the share originally earmarked for Charlotte will pass to her children instead. They feel that they have already supported Charlotte financially during her lifetime and that Charlotte's children would benefit more from that share.

In this scenario the class will close when the survivor of Jemal and Laura dies, provided David has reached the age of 25. Any children of Charlotte's born before the survivor's death will qualify.

7.3.3 Contingent gifts

7.3.3.1 Immediate —

If a will contains a contingency (e.g. age) that a beneficiary must reach before attaining a vested interest in their share, the class will close if, when the testator dies, at least one of the beneficiaries in the class had reached the age contingency.

Looking at Jemal and Laura's original will (see 7.2.1), if, when the survivor of them dies, Charlotte (or any other child should Charlotte predecease the survivor) is aged 25 or over, the class closes.

If, at the date of the survivor's death, no member of the class has fulfilled the contingency, it remains open until such time as the first member does so; those then living who fulfil the contingency later will also be entitled.

7.3.3.2 Deferred —

This situation arises in circumstances in which the gift to the ultimate beneficiaries must wait for an intervening event, and there is a contingency (e.g. age) in place for the ultimate beneficiaries.

The scenario at 7.3.2 is a good example, the intervening event being the death of the life tenant.

In this scenario, any children of Charlotte's born before the life tenant dies and before David reaches the age of 25 will be counted within the class.

However, if Charlotte had another child, the life tenant died and after David reached 25 – that child would be excluded as the class.

7.3.4 Early closing

The courts have also provided for early closing. If there is a deferred class gift and the prior interest fails (e.g. because the tenant for life predeceases the testator), the gift to the class is accelerated so as to become an immediate class gift. The class closing will be determined, therefore, by the rules appropriate to immediate vested or contingent class gifts as the case may be. If the life interest terminates when the life tenant disclaims or surrenders their interest, it seems probable that there will be no acceleration of the closing of the class (*Re Harker's Will Trusts [1969]*, where the judge refused to follow a contrary view taken in *Re Davies [1957]*).

7.3.5 Gifts to children by description

These rules apply generally to gifts, whether vested or contingent, to children. They also apply to a class gift to any other relations by description whether or not they are relations of the testator, for example, “my brothers”, “my sister’s children”, “my nephews”, etc. If the effect of these rules is **not** in keeping with what the testator wants, the draftsman must include words which clearly show a contrary intention.

Before considering the rules, remember that the **Marriage (Same Sex Couples) Act 2013** now allows same-sex weddings in England and Wales. Although it states marriage has the same effect in relation to same-sex couples as it has in relation to opposite-sex couples, it does not alter the effect of any will, codicil or trust document made **before 13 March 2014**.

So, in the absence of express definitions, a legacy in a will made before 13 March 2014 expressed to be contingent on “marriage” or “marrying” will be construed as an opposite-sex marriage only.

For any will etc. made on or after 13 March 2014, “marriage”, or any marriage-related term, has a wider meaning than before, unless it states otherwise. Suppose the testator instructs you to draft a new will that includes a legacy to their son “contingent on him attaining 25 or marrying earlier” and also a discretionary trust of their residuary estate. The potential beneficiaries of the discretionary trust include not only their “children and grandchildren” but also their “husbands, wives, widows and widowers”. When advising the testator, remember these terms will be construed as encompassing same-sex marriage unless the will expressly provides otherwise. Clear instructions must be taken from the testator and the will drafted accordingly to ensure it reflects their wishes.

Following the introduction of opposite sex civil partnerships under the **Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019**, similar considerations need to be born in mind when using the terms “civil partnership” and “civil partner”.

7.3.5.1 Legitimate children

Prima facie, a gift to children (or other relations, as above) will be construed as including any legitimate children (or persons tracing relationship through legitimate links). Some clear indication to the contrary would be necessary to prevent such children taking.

7.3.5.2 Legitimated children

By virtue of the **Legitimacy Act 1976**, a legitimated child (i.e. **born outside marriage but then the parents marry**) is entitled in the same way as if born legitimate, subject to a contrary indication in the will. This is so whether the legitimation occurred before or after the testator's death. If the disposition under a will depends upon the date of birth, the rules of construction are similar to those discussed, as follows, in respect of adopted children.

7.3.5.3 Illegitimate children

(a) **Will/codicil made before 1970**. At common law, a gift by will to “children” (or other relations) is construed, *prima facie*, as embracing only legitimate children.

(b) **s1(1) Family Law Reform Act 1987 (FLRA 1987)**. This provision applies to any **will/codicil made on or after 4 April 1988**; a will is not made after 3 April 1988 simply because there is a codicil with a later date. References in any such will/codicil are to be construed without regard to: ***whether or not the father and mother of either*** [the beneficiary] ***or the father and mother of any person through whom the relationship is deduced have or had been married to each other at any time***. This means that a reference to “my children”, “X’s children”, etc. includes both legitimate and illegitimate offspring within the description. A gift “to my grandchildren” would include all the testator’s grandchildren, even the illegitimate child of an illegitimate child.

This rule must be applied subject to any contrary intention shown in the will.

(c) **s15 Family Law Reform Act 1969 (FLRA 1969)** applies to wills/codicils made after 1969 and before 4 April 1988. It contains provisions broadly the same as those in **FLRA 1987** and is again subject to a contrary intention shown by the testator.

7.3.5.4 Adopted children etc.

The position of adopted children is (in construing the will of a testator dying after 1975) governed by the **Adoption Act 1976** and the **Adoption and Children Act 2002**, which applies to adoption orders (whether made before or after the testator’s death) made by a court in the UK, Isle of Man or Channel Islands, and to certain foreign adoptions.

An adopted child is treated as the legitimate child of the married/civil partnered couple who adopt the child (or as the legitimate child of their adopter in any other case). Such an adopted child is treated as **not** being the child of anyone other than the adopter(s). So, a gift to “my brother’s children” includes a child the brother has adopted before the class closes. Conversely, if the brother had a natural child that had been adopted by someone else, that child is excluded.

If the disposition under a will depends on the date of birth (e.g. “to Amarjit’s eldest child”) then, in the absence of a contrary intention, the disposition is construed as if:

(a) the adopted child had been born at the date of adoption;

(b) two or more children adopted on the same date had been born on that date in the order of their actual births.

These rules do **not** affect any reference to the age of a child. So, if, for example, the gift is contingent on attaining the age of 18, the adopted child achieves a vested interest at age 18 (not 18 years after adoption).

These rules must be applied subject to any contrary intention. In ***Hardy v Hardy [2013]*** the court decided that on a true construction of T's will, A was entitled to a share of residue given to "*such of my children*". A was one of T's natural children but had previously been adopted by A's natural mother and T's brother. In the will, T had earlier described A as one of "*my sons*".



Harvey Specter died leaving his estate to his sister's (Jessica) three children, Louis (aged 13), Michael (aged 11) and Donna (aged eight) as joint tenants on trust to take in equal shares when they reach the age of 25.

1. Assuming all children live to at least 25, when will the class close?
2. Louise dies at the age of 24, leaving two children. What happens to his share?
3. When Louis reaches 21 his mother has a fourth child, Rachel. When Louis reaches 25, how many will benefit from Harvey's estate?
4. Would your answer to point (3) be different if Rachel was born after Louis turned 25?

CONTINUE

7.3.6 Gender recognition

The **Gender Recognition Act 2004 (GRA 2004)** provides that transsexuals, who have obtained a full gender recognition certificate (GRC), will have full legal recognition in their acquired gender. As regards a will, it applies to a will made after **GRA 2004** came into force on 4 April 2005. So, if a will, made after **GRA 2004** came into force, makes provision for "*my nieces*", then, for example, someone born as a nephew, will be eligible to benefit if they have a GRC showing a change of legal gender.

7.3.7 Surrogacy and fertilisation treatment

At common law, a child's legal parents are their genetic parents. However, to reflect the development of artificial insemination, as well as changing social attitudes towards the use of assisted reproduction and surrogacy, including in the case of same-sex couples, statute

has now intervened. The **Human Fertilisation and Embryology Acts 1990** and **2008** contain complex provisions to determine parentage in cases of assisted reproduction and the making of parental orders if a child is born into a surrogacy arrangement. These provisions are beyond the scope of this course.

Although a testator is free to exclude these provisions in a will, the best advice is probably not to do so. For example, if a testator made a gift *“to all my nephews”* and said that *any nephew born as a result of assisted reproduction or surrogacy was excluded from the class*, it would cause serious problems for the PRs. Before distribution, they would have to ascertain from the parents of each nephew whether any assisted reproduction had taken place because failure to do so might result in payment being made to someone who had been excluded by the testator.

CONTINUE

7.4 Failure of gifts

7.4.1 Lapse

If a beneficiary predeceases the testator, the gift to that beneficiary will lapse. Lapse **cannot** be prevented by a general declaration against lapse, but where there is a substitutional gift (a gift over), the property will pass to the beneficiary of the gift over. Republication of a will by subsequent codicil after the death of the beneficiary will **not** save the gift from lapse.

Although the use of the word “lapse” is best confined to situations where the beneficiary predeceases the testator, lawyers may also talk about a gift lapsing if the beneficiary is living at the deceased's death but has only a contingent entitlement to the property and dies before satisfying the contingency.

So, if T leaves £10,000 to X “*contingent on X reaching 18*” and X survives T but then dies aged 15, the legacy fails. The £10,000 would then fall into the residuary estate for distribution unless there was an effective substitutional gift in the will that said what was to happen to the legacy if X failed to reach 18.

Note that if there was no contingency attached to X's gift (or any other requirement that they had to survive for a certain period), then it would be a **vested** gift. As such, the death of X after T would not cause the gift to lapse. Instead, the £10,000 would be treated as an asset belonging to X and so would devolve, in his case if aged 15, as part of X's estate on intestacy.

CONTINUE

7.4.2 *Commorientes* rule

This statutory presumption deals with the situation where two or more persons leave property to one another, but the circumstances of their deaths are such as to indicate no evidence as to who died first. This rule is important in deciding whether lapse has occurred. At common law, the courts refused to speculate as to the order of deaths; therefore, as one could not prove that one survived over the other, the gifts failed. In ***Underwood v Wing [1855]*** the testator left property *“to X if my wife shall die in my lifetime”*. The testator and his wife died when they were both swept off the deck of a ship in a storm. As there was no evidence as to who died first, X could not benefit.

s184 Law of Property Act 1925 (LPA 1925) provides that where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting title to property, be presumed to have occurred **in order of seniority**, and accordingly the younger shall be deemed to have survived the elder.

The leading case on the meaning of “uncertain” is ***Hickman v Peacey [1945]*** in the House of Lords. Two brothers left property to each other. They died when a bomb hit the house where they were sheltering during the Second World War. Could one say that there was uncertainty when the deaths were, in lay terms, instantaneous? Yes, declared the House of Lords – the slightest degree of uncertainty is all that is required to invoke the presumption.



Per Lord Macmillan: *"Can you say for certain which of these two dead persons died first? If you cannot say for certain, then you must presume the older to have died first. It is immaterial that the reason for your inability to say for certain which died first is either because you think they died simultaneously or because you think they died consecutively but you do not know that sequence."* Any satisfactory evidence as to the actual order of deaths will exclude the operation of **s184**.

Re Scarle [2019] is a rare recent example of a *commorientes* case. Mr and Mrs Scarle were an elderly and frail couple who both died from hypothermia in their home at some point between 4 October 2016 and 9 October 2016. Mr Scarle was aged 79 years and Mrs Scarle was aged 69 years. The dispute was between Mr Scarle's daughter, representing his estate who inherited, and Mrs Scarle's daughter, representing her estate. The medical evidence relating to the times and dates of their deaths, based on rates of decomposition of the bodies and the temperatures of the rooms in which they were found, was unable to prove

which of the couple died first. Mr and Mrs Scarle's house and bank account were both in their joint names and the key issue was whether **s184 LPA 1925** would apply.

Mr Scarle's daughter was unable to establish that Mrs Scarle had died first on the balance of probabilities. The judge therefore held that **s184 LPA 1925** applied and the jointly owned assets passed to Mrs Scarle's daughter.

The doctrine of *commorientes* applies also where a person dies intestate. So, if a father and son died in the same accident and the father died intestate without leaving a surviving spouse, **s184** would apply to allow the son to inherit along with any surviving brothers and sisters. If the son left a will that left all his estate to a named charity, both his own assets and the assets that he inherited from his father would pass under his will.

s184 does **not** apply where spouses or civil partners die intestate in respect of their property passing under the intestacy rules. **s46(2A) AEA 1925** states that the surviving spouse or civil partner must survive for at least 28 days before being able to inherit under the intestacy rules. If the spouse or civil partner does not survive for at least this period, whether or not there is any uncertainty over which spouse/civil partner died first, the second spouse or civil partner to die is treated as having predeceased the intestate spouse or civil partner.

NB Where spouses or civil partners die intestate owning property as joint tenants, **s46(2A)** does **not** apply to the joint property. Instead, **s184** will apply and the joint property will pass to the estate of the younger spouse/civil partner by survivorship outside the intestacy rules.

CONTINUE

7.4.3 s33 Wills Act 1837

s33 WA 1837, as amended, provides an exception to the doctrine of lapse if property is left in a will by a testator to their children or remoter issue (i.e. grandchildren, or great-grandchildren). **s33(1)** states:

Where:

(a) a will contains a devise or bequest to a child or remoter descendant of the testator; and

(b) the intended beneficiary dies before the testator, leaving issue; and

(c) issue of the intended beneficiary are living at the testator's death,

then, unless a contrary intention appears in the will, the devise or bequest shall take effect as a devise or bequest to the issue living at the testator's death.

s33(4)(b) provides that the illegitimacy of any person is to be ignored, and so a legacy to an illegitimate child of the testator may be saved by **s33** and illegitimate issue of the beneficiary may save the gift from failure.

Living at the death will include unborn children (*en ventre sa mère*) at the death of the testator (**s33(4)(b)**).

An example of how **s33(1)** is applied is where the will states, "I give £10,000 to my son, Jacob". If Jacob predeceases the testator, leaving two children, Rebecca and Miriam, they will each receive £5,000. They will therefore inherit Jacob's legacy *per stirpes* (**s33(3)**).

s33(2) provides that, where a member of a class of children or remoter issue of the testator predeceases the testator, leaving issue living at the death of the testator, the gift takes effect as if the issue were included in the class.

An example of how **s33(2)** applies is where the will has left the residue “to such of my sons as shall survive me”. The testator, Noah, had three sons, Jacob, Reuben and Joseph, but Jacob has predeceased leaving his children, Rebecca and Miriam. Here, Rebecca and Miriam are treated as being included in the class gift with Reuben and Joseph and will receive one-sixth of the residue each while Reuben and Joseph receive a third each.

7.4.3.1 Contrary intention

In all cases, **s33** can be excluded by a contrary intention shown by the will. If the testator does not want issue to take the entitlement of a child that has predeceased the testator, they can make those wishes clear in the will, ideally by express words. Professional will-writers should always seek the testator’s instructions on whether issue should benefit or not and then word the will accordingly. It would be wrong for a lawyer to assume that the testator invariably wants issue to benefit. Even if the testator does want issue to take, it is better to say that expressly on the face of the will rather than rely on **s33**.

Sometimes the words used in the will might give rise to doubt as to whether **s33** has been excluded, as in *Rainbird v Smith [2012]*. The will had left the residue “upon trust for such of them, my daughters, R, J and S, as shall survive me, and if more than one, in equal shares absolutely”.

One of the daughters predeceased and the question was whether **s33** caused the bequest to the predeceased daughter to pass to her children, or whether instead the property was taken by the two surviving daughters. The trustees sought clarification and the court had no hesitation in finding that the language “such of them, my daughters, R, J and S, as shall survive me” combined with “and if more than one, in equal shares” made it plain that the testator’s intention was to leave the residue only to those daughters who actually survived, rather than that share devolving on the predeceased daughter’s own children. In particular, the words “**and if more than one, in equal shares**” showed that the amount each daughter would get was intended to increase if any of the other daughters predeceased the testator. Consequently, there could be no application of **s33** to allow the dead daughter’s share to pass by substitution to her children because there was clear evidence in the will that the testator wanted to leave residue only to those daughters living at his death.

Refer back to Noah's estate (at 7.4.3) illustrating a class gift where a child (Jacob) predeceases leaving two children, Rebecca and Miriam. That example says that **s33(2)** applies to allow Rebecca and Miriam to be included in the class gift. **Why is that different from *Rainbird v Smith* where it did not apply?** The earlier example is subtly different because it is a gift expressed in simpler terms by just saying "*to such of my sons as shall survive me*". Crucially, it does **not** include any additional words along the lines of "*and if more than one, in equal shares*", which were important to the finding of a contrary intention in ***Rainbird v Smith***.

Cases involving **s33 WA 1837** are rare. However, in ***Hives v Machin [2017]*** the testatrix made a will leaving the residue of her estate to such of her three sons, Peter, Eric and Christopher, "*who shall be living at the date of my death*" in equal shares.

Christopher and Eric died before their mother. Eric left a child, Joanna. Peter argued that the plain interpretation of the will is that, since only he was living at the date of his mother's death, he should take the entire estate, and that **s33** should not apply. Joanna argued that there was nothing in the will specifically excluding **s33**, and that it should therefore apply, with the result that she would take half of the estate.



The case turned on whether the wording in the will was sufficient to exclude **s33**. The court decided that it was not, but evidence was sought as to the testatrix's intentions, in the hope that this would clarify the matter. Unfortunately, the lawyer who drafted the will acknowledged that, when taking instructions, he had not explained the implications of **s33** to the testatrix. The court said that it was therefore impossible to infer that she had wanted **s33** to be excluded. The section applied, and Joanna took half of the estate.



Link to Practice

The case of *Hives v Machin [2017]* highlights an important issue when taking instructions for the preparation of wills. **Ask your client what they would like to happen should a child predecease**

them, and make a note of the response in case a question arises as to the client's wishes.

Precedents tend to include provision to exclude the operation of **s33 WA 1837**. This can be a useful trigger to remind the practitioner when reviewing the draft will to check with their client what they do want to happen if not covered at the initial meeting.

When drafting a will it is helpful to specifically record what will happen to the gift should a beneficiary predecease the testator. This will help to avoid potential disputes after the testator has died, and goes to the client's understanding.

While it may be argued that unless explained a client may not understand the effect of **s33 WA 1837**, if the provision clearly sets out in plain English what will happen it is more difficult to raise a dispute on interpretation and argue that the testator did not know and understand the effect of their will.

CONTINUE

7.4.4 Ademption

Where a **specific gift** is made, the gift will fail for ademption if the subject matter of the gift does **not** form part of the testator's estate at the date of death. Ademption may occur because the testator sells or gives away the subject matter of the gift or because the property is destroyed during the testator's lifetime.

For example: *"I give my shares in BT plc to my nephew George Andrews"*, if the testator has sold his BT shares before he died, that gift will adeem.

Where it is unclear whether the death of the testator or the destruction of the property occurred first, the property is deemed to have perished before the testator so that the gift is adeemed (***Durrant v Friend [1852]***). Suppose the testator dies in a fire at home leaving a specific gift of a piano by will. The gift will adeem as it will be assumed that the piano was destroyed before the testator died.

7.4.4.1 Change in nature of asset

Property may change in nature. In ***Re Slater [1907]*** the gift in question was one of stock (a form of share) in Lambeth Waterworks. Subsequent to the date of the will, the stock was taken over by the Metropolitan Water Board and Metropolitan stock was given in lieu. If the gift was specific, the will took effect from the death and the Metropolitan stock was so different in character that there was ademption. Sir Herbert Cozens-Hardy MR said that ademption would not occur if the subject matter of the gift had changed in form only, but remained substantially the same thing.

Change in the nature of the asset has proved a particular problem in relation to shares. These difficulties arise because companies frequently change the types of share owned by their shareholders. There are various technical reasons for such changes, including the need to raise more money to finance the capital of the company, but the effects are that a shareholder who owns a certain number of shares in a particular share category may have them replaced by a different number of shares in a different share category. This change might have been imposed on the shareholder without any opportunity to object.

In ***Re Clifford [1912]*** the will included a legacy of *"twenty-three of the shares belonging to me"* in X Co Ltd. At that time, the testator held 104 £80 shares in the company. Before the

testator died, the company changed its name and sub-divided each share into four £20 shares. It was held that this was a change in form and not a change in substance and so the beneficiary took the shares which represented those originally given – that is, 92 £20 shares.

In ***Re Leeming [1912]*** the testator left a legacy of “*My 10 shares*” in Y Ltd. Before his death, the company went into liquidation and formed itself into a new company with the same name. The testator was issued with 20 £5 ordinary shares and 20 £5 preference shares to replace those originally issued. Once again, it was held that ademption did not occur because the change was in form and not in substance. The securities were of the same kind and were in essentially the same company. A change from shares into debenture (loan) stock would be a change in substance, because a debenture holder is a creditor rather than an owner of the company.

7.4.4.2 Contract to sell the asset

A contract to sell the subject matter of a specific gift will cause a gift to fail for ademption even though the contract is not completed until after the testator’s death. The contract is legally binding on the PRs. This means that the beneficiary may enjoy the property until the contract is completed, but has no right to the proceeds of sale. This will not be the case where the testator made a contract to sell the subject matter of the gift before the will was executed. In this case, the beneficiary will be entitled to the proceeds of the sale (***Re Calow [1928]***).

The principle of ademption by subsequent contract also applies where the contract is conditional, the sale being uncompleted at the death, but completed later when the condition is met, such as when a satisfactory mortgage is obtained by the buyer.

In ***Re Sweeting (Deceased) [1988]*** the testator made two specific devises of a plot of land and of a yard, both of which adjoined his house. Shortly before his death, he exchanged two contracts of sale, one for the house and the other for the yard, but he died before either contract could be completed. The contract for the sale of the yard was conditional on the simultaneous completion of the contract for the sale of the house, which, in turn, was conditional on certain releases being obtained from the testator’s wife and the cancellation

of a land charge. The wife had given the necessary consents before the death and both contracts were completed after the death. The court concluded that the rule in **Lawes v Bennett [1785]** did apply, with the result that the specific devises were adeemed and the proceeds of sale fell into residue.

Nicholls J said: *"For my part I can see no rational basis for applying the rule in the case of an option but not applying it in the case of a contract of sale containing conditions such as those present in the yard contract and the house contract. If the rule applies where an option is not exercised until after the testator's death, with the consequence that conversion and ademption occurs at that time, why should the rule not apply equally (or, indeed, a fortiori [Latin meaning: all the more]) where a contract exists at the death but subject to such conditions which are subsequently fulfilled or waived?"*

7.4.4.3 Assets sold by a deputy or attorney

The Court of Protection has briefly considered the increasingly common issue of ademption, arising when a testator's property is managed before death by a person acting on his behalf because of his failing health and the item has been disposed of by the attorney rather than the testator. In **Public Guardian v JM [2014]** Senior Judge Lush said: *"The law regarding ademption caused by an attorney is a minefield and over the last twenty years there have been a number of conflicting judgments in several Common Law jurisdictions."* He observed, however, that problems can be resolved by making a statutory will during the testator's lifetime.

NB The Court of Protection has the power under the **Mental Capacity Act 2005** to make a statutory will on behalf of a person who has lost mental capacity.



Link to Practice

Problems arise when a financial affairs attorney or deputy deal with the property of a donor or patient without knowing the contents of their will. This is because property the subject of specific legacies can be sold in ignorance of the donor or patient's wishes.

The Solicitors Regulation Authority issued guidance (see: [Access to and disclosure of an incapacitated person's will](#)), confirming that while a solicitor will always act for their client and must act in their client's best interests, an Attorney or Deputy for Financial Affairs acts in the capacity of your client's agent. Subject to any restrictions on the enduring power of attorney or lasting power of attorney or order appointing the Deputy, a copy of the will can be released to the Attorney or Deputy. Notice of this should be given to the client.

CONTINUE

7.4.5 Forfeiture Act

7.4.5.1 Criminal law – murder/manslaughter distinction

The criminal law categorises homicide (killing a human being) into a number of different crimes. The most important of these are murder and manslaughter.

Murder is the most serious form of homicide and the prosecution must prove that the defendant intended to kill or cause serious harm. The judge will be **required** to impose a life sentence.

Manslaughter covers killing in a range of circumstances where the defendant is considered to be less blameworthy. These circumstances include a loss of control (previously provocation), diminished responsibility and gross negligence. The judge has a **discretion** in sentencing and, within certain guidelines, can impose a sentence which reflects the particular circumstances of the crime.

The common law has developed a series of principles based on public policy, denying benefit to a person who seeks to benefit from crime. These principles, known as forfeiture, extend to the perpetrator of the crime and to those claiming property through them. ***Gray v Barr [1971]*** set out the broad principle ***“that no man should be allowed to profit at another person's expense from his own conscious and deliberate crime”***.

This principle was applied to murder in ***Re Crippen [1910]*** and extended to manslaughter in ***In the Estate of Hall [1911–1913]***.

After his conviction for murder, he made a will leaving all of his estate to Ethel.

After his execution, Ethel claimed the estate of Mrs

The **Forfeiture Act 1982 (FA 1982)** gives the court a discretionary power to grant relief from forfeiture to those convicted of a homicide crime except in the case of persons found guilty of murder (**s2(1)**). In ***Dunbar v Plant [1997]*** it was held that the survivor of a two-person suicide pact would not be subject to forfeiture as **FA 1982** allowed the court to exercise discretion.

s2(5) FA 1982 provides that the court may make an order to modify the effect of the forfeiture rule. The interpretation placed on **s2(5)** by Vinelott J in ***Re K (Deceased) [1985]*** enabled the court in the case to grant total relief from the rule.

In ***Re K*** the deceased was shot by his wife on 30 September 1982, two weeks before **FA 1982** came into force (13 October). She was convicted of manslaughter on 4 May 1983.

The court was prepared to grant relief from the forfeiture rule on the basis that there was evidence that the defendant had been provoked into the killing. The court had power to dispense with the forfeiture rule altogether or to modify it in any way it thought fit under the circumstances.

In ***Re Land [2007]*** it was held that there is no discretion to extend the time limit for an application for relief from forfeiture and that the rule of public policy applied to all cases of unlawful killing except where there is a finding of criminal insanity. These two rulings are unexceptional, but the court also held that **s3** gave the court a discretion to mitigate the effect of the rule even where the will had made provision but the forfeiture rule had taken

this away. ***Re Royse [1985]*** held otherwise but the court observed that, at the relevant date, **s3** was not in force.

Application for relief under **FA 1982** must be brought within three months of conviction (**s2(3)**).

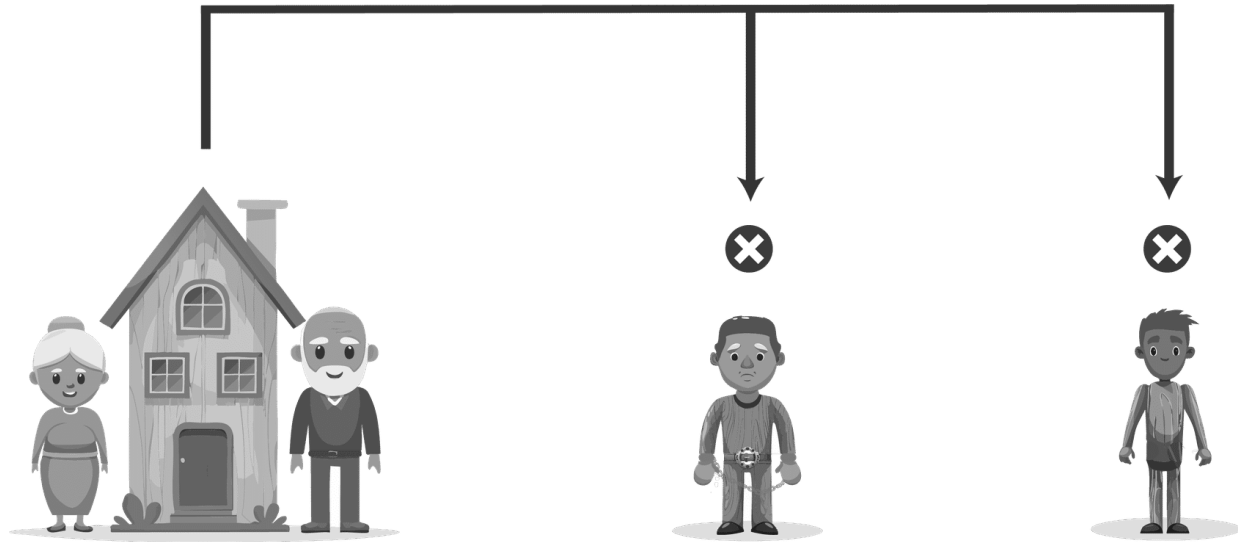
The statutory rules on forfeiture do not preclude a killer from applying for provision under the **Inheritance (Provision for Family and Dependants) Act 1975 (I(PFD)A 1975)** unless they have been convicted of murder (**s3** and **s5 FA 1982**).

7.4.5.2 Reform of the consequences of the law of forfeiture

In ***Re Jones [1998]*** the deceased left her estate by will to her son with substitutional gifts to nephews in the event of the son predeceasing his mother. The son was convicted of the manslaughter of his mother and so forfeited his right to inherit. It was decided that to construe the will as though the son had predeceased his mother, when in reality he had not, was incorrect. Therefore, the gifts in the will to the nephews could not take effect because the condition on which they were given had not happened. So the estate was dealt with on intestacy.

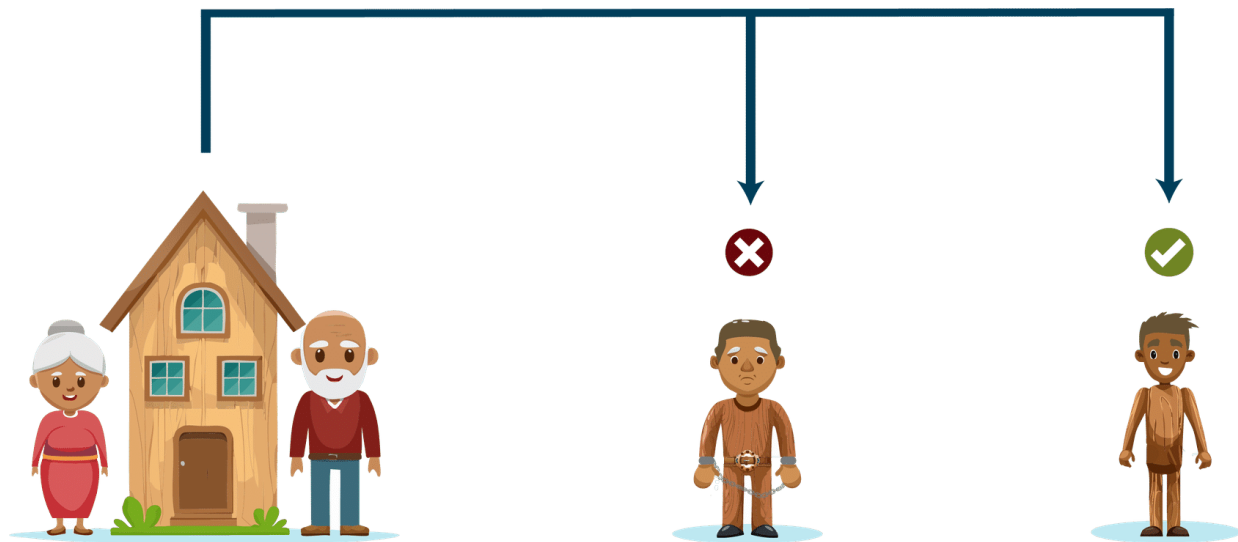
Forfeiture has also been considered in the context of the intestacy rules. In ***Re DWS (Deceased) [2001]*** the son murdered both his parents, both of whom died intestate. The public policy rule meant that he could not inherit, as there is no relief from forfeiture where the conviction is for murder (as opposed to manslaughter).

The son's son claimed to be entitled to the estates of his grandparents under **s47 AEA 1925**. It was held that, on a true construction of this section, the issue of the child of an intestate could inherit only if the child had actually predeceased the intestate. The wording could not be made to extend to a situation where the child failed to inherit for other reasons and had, as a matter of fact, survived the intestate. The grandfather's estate, therefore, passed as if he had had no issue and the grandson could not inherit.



In response to the perception of unfairness resulting from *Re Jones* and *Re DWS (Deceased)*, the **Estates of Deceased Persons (Forfeiture Rule and Succession Law) Act 2011 (EDP(FRLS)A 2011)** applies if the deceased dies on or after 1 February 2012. The Act is intended to preserve the inheritance rights of a person's descendants if that person disclaims an inheritance or is disqualified from receiving an inheritance as a result of the forfeiture rule.

s1 EDP(FRLS)A 2011 provides that if a person entitled on intestacy is so disqualified, then the property will devolve under the intestacy rules as if that person had died immediately before the intestate. So, if that person leaves issue capable of taking under the statutory trusts, they will do so. Otherwise, the entitlement will devolve as though the beneficiary had never existed. This means that if the intestates in *Re DWS (Deceased)* died today, **s1** would allow the child of the disqualified son to take under the statutory trusts.



s2 deals with the situation where the disqualified person is a beneficiary in a will. The outcome is exactly the same as the case where a beneficiary disclaims a gift (see **13.3**). It therefore clearly has implications for the application of **s33 WA 1837** and possibly also where the disqualified beneficiary is someone other than the testator's child or remoter issue.

EDP(FRLS)A 2011 preserves the power of the court to modify the effect of the forfeiture rule (except in the case of murder) if the justice of the case so requires it.



Link to Practice

Consider the three different circumstances, as follows, in which the court has considered and granted relief from forfeiture.

1. *Re Ninian (Deceased)* [2019]

In 2017, Mr Ninian who was diagnosed with an incurable disease, arranged to travel to an assisted suicide clinic in Switzerland to end his life. Mr

Ninian was deemed to have the requisite capacity to make decisions about his condition.

While his wife was against the idea, she decided to respect her husband's decision and helped with the travel arrangements and went with him. Mrs Ninian did not assist in any way with her husband's suicide.

Mrs Ninian reported the matter to the police on her return to the UK and an investigation was carried out.

While the Crown Prosecution Service (CPS) decided there was sufficient evidence to prosecute Mrs Ninian under the **Suicide Act 1961**, it decided that it would not be in the public interest to do so. A determining factor seems to be that the act was compassionate not malicious.

Mrs Ninian applied for relief under **FA 1982** so that she could inherit her husband's estate.

Because of the history to this matter (specifically, that: advice was taken before he committed suicide; the length of the marriage, (34 years); Mrs Ninian had tried to discourage her husband from going through with the assisted suicide; Mr Ninian had capacity and was of strong willed character) – the CPS did not prosecute. Mr Ninian's brothers, who would also inherit, supported Mrs Ninian's application too. The court granted relief.

2. Re Amos (Deceased) [2020]

This is a very sad case in which Mrs Amos (aged 74) had a road traffic accident in which her husband suffered multiple injuries from which he ultimately died. The accident was caused by Mrs Amis' failure to brake while approaching a roundabout at the end of the M4, causing her to collide with the vehicle in front.

She pleaded guilty to causing death by careless driving and was sentenced to 32 weeks' imprisonment suspended for 12 months. She was also disqualified from driving for 12 months.

While the legal texts suggested that the forfeiture rule would not apply in cases of causing death by dangerous driving, there was no reported cases supporting that position.

HHJ Jarman QC disagreed and decided that the forfeiture rule does apply and the appropriate course was to apply for relief under **FA 1982**.

Taking into account comments made during sentencing at the criminal court, and that Mrs Amos had a role in renovating the couple's home (the house being the main asset), the judge granted relief. Mrs Amos inherited her late husband's estate.

3. Challen v Challen [2020]

This case is a very good recent example in which the court will exercise its powers to grant relief after considering the facts.

The factual background is extremely important. Mrs Challon started a relationship with the deceased when she was aged 15 and he was aged 22. At the time of the incident they had been married for 40 years and had two children together.

Mrs Challen was, however, in an abusive marriage. Mr Challen's behaviour was controlling and violent towards Mrs Challen. His infidelity was a huge issue.

In 2010, Mrs Challen petitioned for divorce but reconciled with Mr Challen on condition that she entered into a post-nuptial agreement in which he would get the matrimonial home should they divorce.

On returning to the family home, Mrs Challen found out that Mr Chellan was still being unfaithful, which was the final straw – resulting in Mrs Challen beating her husband to death with a hammer while he was eating the dinner she made him.

Mrs Challen pleaded guilty and was convicted of murder in 2011. In February 2019, the Court of Appeal quashed her conviction for murder and remitted the matter for retrial.

In June 2019, the matter was heard and a guilty plea of manslaughter by reason of diminished responsibility was accepted. Mrs Challen was sentenced to the time she had served and was immediately released.

Mrs Challen applied for relief from **FA 1982**. A number of issues arose, the first was whether Mrs Challen had brought her claim in time.

It was found that the date started from the second conviction. She was therefore in time as the application was made within three months from the date of that decision. In any event, relief is not available for murder and so that was not a relevant conviction.

Mrs Challen's application was supported by her two sons who stood to inherit by operation of the law.

The court held that there was sufficient merit in the facts of the case taking into consideration the culpability of Mr Challen over the 40-year history of the relationship and granted relief from forfeiture.



Do you think it right that the court has power to modify the forfeiture rule under **EDP(FRLS)A 2011**?

7.4.6 Disclaimer

A beneficiary is not obliged to take the gift but can disclaim. For example, *"I leave my pet elephant, Oscar, to my brother Henry"* is a specific gift and Henry would be liable to house and feed Oscar from the date of death. The beneficiary cannot disclaim if, by his conduct or by deed, he has accepted (***Re Hodge [1940]***). A beneficiary cannot accept part of a gift and disclaim the rest where the gift is single and undivided (***Guthrie v Walrand [1882]***) but can disclaim one if they are separate legacies.

A disclaimer can be retracted (withdrawn) provided that no one has altered their position as a result of the disclaimer. It is not possible for a beneficiary to disclaim before the death of the testator. No question of retraction arises; the disclaimer is simply ineffective (***Smith v Smith [2001]***).

The effect of a disclaimer has always been that if a beneficiary under a will or intestacy disclaims, then the property passes as if the gift or entitlement had failed. The application of this seemingly straightforward rule has given rise to some uncertainties in the past and so, for deaths on or after 1 February 2012, it has been given statutory effect by **EDP(FRLS)A 2011**.

s1 EDP(FRLS)A 2011 provides for what happens if a person entitled on intestacy disclaims (see 7.4.5).

s2 EDP(FRLS)A 2011 deals with the situation where the disclaiming person is a beneficiary in a will. It says that if a person disclaims a benefit under a will, that person is treated as if they had died immediately before the testator. Subject to the discussion, as follows, the terms of the will should then be considered to determine who is entitled to the property by applying the usual rules of construction. So, for example, a non-residuary gift to the testator's brother will be treated as having lapsed and fall into residue unless the will

contains a substitution provision that can apply in the assumed circumstances, because it is worded to take effect if the brother *“dies before me”* (or there is similar wording).

However, this effect of **s2** is not entirely certain because it states that the fictional predeceasing of the disclaiming beneficiary is for the purpose of *this Act*, which is a reference to **WA 1837**. So, it is quite clear that if the person disclaiming is a child or issue of the testator, **s2** will have implications for the application of **s33 WA 1837** (see **7.4.3**). However, it is not so certain that the fiction will apply if the person disclaiming is someone else, because apart from **s33**, there are no other provisions in **WA 1837** that can affect the devolution of the gift. That being the case, the outcome of the disclaimer must be determined by applying the existing law.

Suppose T's will contains a gift to his brother, B, and there is a substitution provision saying *“if my brother dies before me, then this gift is to pass to his wife”*. After T dies, the brother disclaims the gift.

1. If **s2 EDP(FRLS)A 2011** does apply to the disclaimer, then the wife can claim the gift because the fictional predeceasing of B will activate the substitution in her favour.
2. However, if **s2** is held not to apply, then the gift falls into residue. The wife cannot claim because her substitution was expressed as taking effect if B died before T, which he had not done. She could claim only if the substitution was drafted in wider terms, for example, by saying *“if this gift fails for any reason”* rather than being limited to the brother predeceasing.

Since **s2** refers to a person who disclaims (as opposed to limiting it to a child or issue of the testator), it would appear that it was intended to apply regardless of the identity of the beneficiary (this view is consistent with the explanatory notes provided by the Law Commission when the Bill was published). However, to have that effect, **s2** should have been worded to say the fictional predeceasing of the disclaiming beneficiary was for the purpose of “the will” rather than *this Act* (or, alternatively, not prescribe any purpose at all). If so, **s2** would clearly apply, whether or not the person was a child or remoter issue of the testator.

7.4.7 s15 Wills Act 1837

An issue which can be overlooked if execution is not overseen by a professional who prepared the will, is that if an attesting witness is also a beneficiary or the spouse or civil partner of a beneficiary, the gift to that beneficiary will be void. The will however will remain valid.

*The critical time to test **s15** is the date of execution of the will. So, if a witness marries/forms a civil partnership with one of the beneficiaries after the will, the gift is not affected.*



Link to Practice

The risk of this happening may well increase as a result of wills being executed at home due to Covid-19 social-distancing restrictions. For that reason, it is important that the covering letter or will execution instructions (see the document below) highlights this issue.

Instructions for Execution of a Will or Codicil

The execution of a Will or Codicil involves three people: the person making it ("the testator") and two witnesses. All must be present throughout the process, so the witnesses should be there before it begins.

A person must **NOT** be a witness if he or she:

- is blind; or
- is a person who could benefit under the Will or Codicil (and this includes executors and trustees if they are to be paid for their work); or
- is the husband or wife of a person who could benefit.

It is desirable that witnesses should not be under 18 nor closely related to the testator.

Procedure

When the two witnesses and the testator are together, the following steps should be taken in sequence.

- (1) The testator should complete the date at the end of the Will or Codicil using words rather than figures (eg, "Fourteenth" rather than "14th"). The same date should be put at the top of the "cover", but here figures may be used.
- (2) The testator should then write his or her usual signature to the right of the attestation clause (the clause which begins, "Signed by:.....").
- (3) One witness should then write his or her usual signature underneath the attestation clause and should add his or her address and occupation or description.
- (4) The other witness should then do the same.

All three people MUST be present all the time. Please do NOT attach anything to the Will or Codicil, by pin or paperclip or in any other way.

The following diagram shows the way in which the signatures etc, should be placed:

Signed by:.....

(attestation clause)

Signature

(of TESTATOR/TESTATRIX)

Signature (of FIRST WITNESS)

PRINT NAME

ADDRESS

OCCUPATION OR DESCRIPTION

Signature (of SECOND WITNESS)

PRINT NAME

ADDRESS

OCCUPATION OR DESCRIPTION

Instructions for executions of a will or codicil.

CONTINUE

7.4.8 Uncertainty

A gift in a will cannot take effect if either the subject matter or the beneficiary cannot be ascertained with certainty after applying the usual rules of construction.

A good example of a gift failing for uncertainty of subject matter is ***Boyce v Boyce [1849]***.

The testator left his houses to trustees in trust for his wife for life, and after her death the trustees were to allow his daughter, Maria, to choose one of the houses. The remaining houses were to pass to his other daughter, Charlotte. Maria died in the testator's lifetime and Charlotte survived him. Since Maria was obviously unable to choose which house to have, it was impossible to know which houses Charlotte was entitled to receive and so the gift failed for uncertainty.



Gifts of “*some of my best table linen*” (***Peck v Halsey [1726]***) and “*of a handsome gratuity*” (***Jubber v Jubber [1839]***) have been declared void for uncertainty. However, now that it is possible to admit extrinsic evidence of a testator's intention under **s21 Administration of Justice Act (AJA 1982)**, it may be possible to establish what the testator intended.

A gift that allows a beneficiary to choose items – for example, “*Each of my nieces may select one book from my library*” – is not void for uncertainty as long as the subject matter from

which the choice is to be made is sufficiently identified. It is sensible if giving such a right to provide that, in the event of any dispute, the decision of the PRs is final.

There is an exception to the rule that a gift fails if the beneficiary is not sufficiently identified. In the case of gifts to charities, provided it is clear from the will that the gift was intended to be used for exclusively charitable purposes, it does not necessarily matter that the exact charity or charitable purpose cannot be ascertained from the terms of the will. In such cases, the court can direct a scheme to give effect to the testator's wishes, rather than allowing the gift to fail.

CONTINUE

7.4.9 Illegal, immoral or contrary to public policy

A testamentary gift cannot be conditional on a person committing an illegal or immoral act or contrary to public policy.

A testator cannot therefore make a gift conditional on the beneficiary killing someone or stealing etc.

A gift will also fail if it is conditional on a person getting divorced.

The courts will use contrary to public policy if it feels a gift should be void.

CONTINUE

7.5 Extrinsic evidence

7.5.1 s21 Administration of Justice Act 1982

s21 Administration of Justice Act 1982 (AJA 1982) has codified the rules concerning the admission of extrinsic evidence and renders many of the earlier cases on construction obsolete.

The section operates by setting out three alternative conditions prior to the admission of extrinsic evidence, including evidence of declaration as to the testator's intention.

1

s21(1)(a): *insofar as any part of the will is meaningless.*

This is a narrow linguistic concept. The lack of meaning must be apparent from the face of the will, such as where the testator has used a code.

2

s21(1)(b): *insofar as the language used in any part of it is ambiguous on the face of it.*

This represents a change in the law where the court is now permitted to admit extrinsic evidence to resolve a patent ambiguity (i.e. words which are clearly ambiguous just by reading them). This rule would permit evidence of the testator's intention to be admitted in cases such as ***Perrin v Morgan [1943]***, where such expressions as "my money" or "my effects" are used.

Re Williams [1985] was the first reported case to consider s21(1)(b), although the admission of extrinsic evidence did not help in this instance.

By her homemade will, the testatrix set out a list of 25 names in three groups. There was no common pattern among the groups; they were uneven and each contained next of kin, close relatives and organisations. There was nothing in the will to indicate the purpose of the list or proportions of benefit. The day before her death, the testatrix wrote to her solicitors asking them to give various legacies to the members of the groups. Since the will was ambiguous on the face, the letter could be admitted under **s21(1)(b)**, even though it was of no assistance and the court held that each group took in equal shares.

Nicholls J said that extrinsic evidence could be admitted under **s21(1)(b)** to show which of two or more possible meanings the testator attached to a particular word or phrase, as long as that meaning was one that the word or phrase as read in its context was capable of bearing. If the meaning was one that the word or phrase cannot bear, then the court cannot apply the provisions.

There have been other cases on the interpretation of **s21(1)(b)**.

In ***Tyrrell v Tyrrell [2002]*** the testator was elderly but there was no concern about his capacity to execute a will. He had a large number of relatives and friends whom he wanted to benefit under his will. Instructions for the will were taken by a legal clerk with a firm of solicitors.

The family were aware that the testator intended to leave his residuary estate to his four grandsons. After the testator's death, it was found that the residue had been left to two of the grandsons, the wife of one of the grandsons and a non-existent person whose name was similar to another family

member. There was evidence that the testator frequently became confused as to the names of family members. For this reason, the court held that the clause dealing with residue did not reflect the testator's intentions and would be amended so that the four grandsons inherited.

s21(1)(c): *insofar as evidence other than evidence of the testator's intention shows that the language used in any part of it is ambiguous in the light of the surrounding circumstances.*

This is in effect the old rule on latent ambiguity (it also accounts for the armchair rule), but it goes further, by providing that extrinsic evidence (apart from evidence of the testator's intention) can now be admitted to raise the possibility that such an ambiguity exists.

Note that evidence of the deceased's intention cannot be introduced to raise the ambiguity in the first place because only evidence of the surrounding circumstances is admissible at this stage. However, once the ambiguity has been identified, extrinsic evidence of the testator's intention is admissible to attempt to resolve it.

A good example of the admission of evidence in the case of a latent ambiguity is ***Re Jackson [1933]***. The testatrix left property to "my nephew Arthur Murphy". At the date of the will, there were three nephews, all called Arthur Murphy and known to the testatrix. Two were legitimate, the third illegitimate. Evidence of the surrounding circumstances had revealed the ambiguity and extrinsic evidence showed that the testatrix intended that the illegitimate nephew should take the property.

As the law stood at that time, evidence could not be adduced from outside the will in order to create the ambiguity. So, in ***Re Jackson***, if there had been only one legitimate Arthur Murphy, he would have taken, for the law as it then stood would not (in the absence of clear

evidence from the will) have recognised the illegitimate nephew. However, if the facts were repeated today, evidence that there was more than one Arthur Murphy would now be allowed, under **s21(1)(c) AJA 1982**, to show the ambiguity existed.

In ***Pinnel v Anison [2005]*** the applicant, P, the executor of the estate of the deceased (D) sought determination of a latent ambiguity in D's last will. D left his residuary estate to his brother, P, and sister, H, in equal shares. D had not had a lot of contact with his family in the last years of his life.

D put the address of H in the will correctly; however, H was not a relative of D but a friend. D had one surviving sister (X) who lived at a separate address. Looking at extrinsic evidence of D's relationship with X and H, the most logical explanation was that D had mistakenly put H into the will as residuary beneficiary instead of X. Briggs J held that, on the basis of the extrinsic evidence available, this was the case. The will would be amended accordingly.

Lord Neuberger in ***Marley v Rawlings [2014]*** referred to **s21(1) AJA 1982** as not only confirming his view that a will should be interpreted in the same way as a commercial contract, but that it goes further by allowing the admission of extrinsic evidence, including evidence of the testator's intention in certain circumstances.

"In my view, section 21(1) confirms that a will should be interpreted in the same way as a contract, a notice or a patent, . . . In particular, section 21(1)(c) shows that 'evidence' is admissible when construing a will, and that that includes the 'surrounding circumstances'. However, section 21(2) goes rather further. It indicates that, if one or more of the three requirements set out in section 21(1) is satisfied, then direct evidence of the testator's intention is admissible, in order to interpret the will in question."

7.5.2 Interpretation of a will

It is not always possible to say what the particular words used in a will actually mean. The testator may, for example, have used imprecise words (*"my relations"*), there may be uncertainty (*"my car to Henry"* when, at death, the testator owns two cars or there are two potential beneficiaries both called Henry), or there may be ambiguity of meaning (*"I give Henry my money"*).

There is also, inevitably, a degree of subjectivity, which can make it very hard to predict the outcome of any judicial decision on the meaning of an unclear provision.

The courts are guarded over their approach to the construction (interpretation) of wills because they do not want to be, in effect, writing the will for the testator. However, the cautious, narrow, linguistic approach that is sometimes adopted does not always reflect the testator's wishes. Inevitably, the problems tend to appear more often in homemade wills, where it can be seen what the testator meant to say but their objective is not necessarily achieved when the court applies the strict legal meaning of a particular word or phrase.

In this section, the general approach of the judiciary is explained and the main principles of the rules of construction are considered.

We will also consider the approach the courts have taken to interpreting particular words and phrases. The rules relating to extrinsic evidence (evidence from outside the will) and **s21 AJA 1982** are also reviewed. Problems in deciding whether a gift is absolute or limited are considered in the light of **s22 AJA 1982** and the obscure rule in *Lassence v Tierney* [1849], together with various subsidiary rules of construction. Finally, we will discuss certain rules affecting gifts by description to children and other relatives.

7.5.2.1 Two broad approaches

The traditional approach of the courts was best put by Viscount Simon LC in ***Perrin v Morgan [1943]***:

"The question is not, of course, what the testator meant to do when he made his will, but what the written words he used mean in the particular case . . . what are the 'expressed intentions' of the testator."

Following this approach, if the testator has failed to express themselves in clear and unambiguous terms, the court must undertake the task of interpretation in the light of the actual words used by the testator. It is not for the court to attribute to a testator an intention that cannot be fairly deduced from such wording. The court is not allowed to use guesswork as a substitute for construction.

By contrast, in ***Marley v Rawlings [2014]*** Lord Neuberger took a more liberal approach. His summary of the role of the court when interpreting a will argued that it was essentially the same as interpreting a commercial document.

"When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words,

(a) in the light of

(i) the natural and ordinary meaning of those words,

(ii) the overall purpose of the document,

(iii) any other provisions of the document,

(iv) the facts known or assumed by the parties at the time that the document was executed, and

(v) common sense,

but

(b) ignoring subjective evidence of any party's intentions."

He added:

"When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context."

Lord Neuberger's comments were obiter but are, nonetheless, very persuasive. In **Brooke v Purton [2014]** the High Court considered a will which had created a discretionary trust which was designed, in part, to save inheritance tax. The solicitor drafted a clear explanation of what the trust was intended to achieve in a letter to the testator but, unfortunately, used the wrong precedent clause in the will. David Donaldson QC held that the clause in question could be interpreted in order to achieve the result which the testator had clearly intended. He referred to Lord Neuberger's comments in **Marley v Rawlings [2014]** in which he stated that wills should be interpreted in the same way as other commercial documents.

7.5.2.2 The rules of construction

The rules of construction are numerous. The judge can usually find some form of construction to support their reasoning to arrive at what they consider a just result. When the judgment is delivered, it appears as a logical sequence starting with the principles when, in many cases, the judge has made up their mind at the outset and select the principles to support their reasoning.

The function of the court is to interpret the words used by the testator and not to make the will itself. The court looks at the will as a whole and not simply at the part in issue. In this

way, other provisions may make it easier to determine the intention of the testator. The testator may, for example, have given a definition of a word in a later clause.

The general principle is that the intention of the testator is deduced only from the will itself. To assist it, the court adopts rules of construction – rules of convenience to arrive at a solution to the meaning of the gift.

If the words in the will have a clear meaning, effect will be given to them even if this was not the intention of the testator.

In ***Scale v Rawlins [1892]*** the testator left three houses to his niece for life and, provided that she should die leaving no children, the houses were to pass to certain nephews. The niece died leaving children. Did they take the property? No, for, although this was probably the intention of the testator, the will did not say so and the houses passed on intestacy.

NB If it could be shown that there was a misunderstanding by the draftsman when presented with instructions, it could now be possible to invoke the limited powers of the court to rectify the will under **s20 AJA 1982**.



7.5.2.3 The meaning of words and phrases

1

Usual meaning

A word is first given its ordinary grammatical meaning. This is to safeguard against words becoming too general in expression. The meaning of the word is the meaning attributable at the date of the will, that is, the dictionary definition (*Perrin v Morgan [1943]*).

2

Secondary meanings

A secondary meaning may be indicated:

(a) by a definition clause in the will itself; or

(b) by the application of a statutory rule; or

(c) if, when the will is applied to the surrounding circumstances, it becomes clear that the testator has used a particular word in a secondary sense, as in **Re Davidson [1949]** where a residuary gift to *"my grandchildren"* was held to include the children of the stepson of the testatrix, for the will had described him as *"my son"* and one of his children as *"my granddaughter"*.

In **Re Smalley [1929]** the testator left his property to *"my wife Eliza Ann Smalley"*. His lawful wife was called Mary Smalley but he lived with a woman called Eliza Ann. The court held that the testator had used the word **"wife" in a secondary (non-legal) sense**, meaning *"common law wife"*.

The secondary meaning will often emerge from looking at the circumstances applying when the testator made the will. James LJ in **Boyes v Cook [1880]** described **the armchair rule** thus: ***"You place yourself so to speak in the testator's armchair and consider the circumstances by which he was surrounded when he made his will."***

One of the best examples of the application of the armchair rule is **Charter v Charter [1874]**. By his will, the testator left property to *"my son Forster Charter"*. The will in context at death showed that his son, Forster, had died some years before the will was executed. The testator was survived by two sons, William Forster Charter and Charles Charter. William claimed the property on the basis that his middle name was Forster, but application of the armchair rule revealed that William saw his father infrequently, whereas Charles lived with his father and the testator frequently referred to Charles as *"Forster"*.

It should be borne in mind that, if in each of the above cases effect could have been given to the words used, that would have been done, irrespective of the testator's intention. Also, all these situations are now covered by **s21 AJA 1982**, in that the wills were either meaningless as they stood or there was a latent ambiguity

(i.e. the words used appeared to be clear in themselves, but they could be given more than one interpretation on the facts).

Words with more than one meaning

In cases of ambiguity, the court will adopt the most probable meaning (**Lord Atkin in *Perrin v Morgan* [1943]**). This gives a wide discretion to the judge.

In ***Re Everett* [1944]** the expression “*stocks and shares*” was held to pass all the shares in limited companies but not redeemable debentures (debentures are an alternative form of investment by way of a loan to a company). Compare ***Re Purnchard's Will Trusts* [1948]** where the same expression was held to include all the testator's investments.

In construing the meaning of the word “**money**”, one considers the meaning at the date of the will and the effect of the rest of the will (***Perrin v Morgan***, where the word was held to pass all the residuary personalty), coupled with the meaning to that particular testator, given his level of education and standing in life.

Per Goulding J in ***Re Barnes* [1972]**: “[T]he use of a word like ‘money’ varies between persons of different classes, possibly between different parts of the country. Certainly in the mouth of one and the same individual under differing circumstances, and a judge would need to be more of a philologist than I am to feel confident in relying in all cases on his own knowledge of the contemporary use of the English language. Nonetheless it seems to me the House of Lords [in ***Perrin v Morgan***] has directed that a judge should apply his own knowledge of the

language in the light of such context and circumstances as may assist him.”

7.5.2.4 Technical words and phrases

This is a dangerous area, particularly for the testator who makes a homemade will and, thinking that legal pomposity is important, adds technical words or phrases when they know little or nothing of their meaning.

Where a testator uses a word or phrase that has acquired a technical (legal or scientific) meaning, there is a strong presumption that the words will carry the technical meaning; in ***Re Cook [1948]***, for example, “***all my personal estate whatsoever***” was held **not** to include the testator’s realty (land).

Distinguish, however, technical words and phrases which merely convey description.

- “***Male issue***” is a technical phrase meaning the male descendants in the male line, whereas
- “***Male descendants***” is not a term of art but a descriptive phrase meaning males descended through both the male and female line (***Re Drake’s Will Trust [1970]***).
- “***Next of kin***” is not a technical phrase; it is construed as the nearest blood relations.

If the will referred to the next of kin who would benefit on an intestacy, this would be construed as meaning the statutory next of kin.

“***Relations***” and “***family***” are both wide terms and could fail for uncertainty. Alternatively, the court could construe the terms as meaning those who would benefit on intestacy but sharing ***per capita*** rather than ***per stirpes***.

Perhaps the **most misused expression** is “***personal property***”. Particular problems were caused where land was held on trust for sale and, as a result, was regarded as being personal property. This situation, which was especially inappropriate in respect of the family

home, has been altered by **s3 Trusts of Land and Appointment of Trustees Act 1996**, which provides that land held on a trust of land is now to be regarded as real property, while personal property held on trust to acquire land is to be regarded as personal property, which reverses the old rule. Leasehold land still remains personal property.

7.5.2.5 Custom

Where the testator belonged to a special group of people and the word or phrase has a special meaning among that group, then the special meaning will be adopted.

In ***Shore v Wilson [1842]*** the testator was a member of a religious sect and the term “**godly preachers**” was given the meaning current among members of the sect.

7.5.2.6 Punctuation

The use of punctuation in a will is dangerous, for a **comma** or **colon** could place a meaning on a gift which the testator did not intend. The court will take account of punctuation, words in capitals and blanks, in seeking to identify subject matter and objects.

In ***Gauntlett v Carter [1853]*** the testator devised his estate “*Bullen Court, Strand and Maiden Lane*”. The property “*Bullen Court*” was off the Strand – was “Strand” part of the description of “*Bullen Court*” or did it indicate another property owned by the testator in the Strand? The court concluded that the testator meant another property, for there was a comma before “*Strand*”, thereby indicating a separate description.

7.5.2.7 Considering the document as a whole

The court exercises great caution over reading words into a will and does so only if it is clear from the will itself (“**from the four corners of the document**”) (***Re Whitrick [1957]***).

In ***Re Whitrick*** the testatrix left her entire estate to her husband and provided that “*in the event of my husband . . . and myself both dying at the same time*” her estate should be held

on trust for X, Y and Z equally. The testatrix's husband predeceased her. On a literal reading of the words in the will, the gift over to X, Y and Z failed and the property passed on her intestacy.



The Court of Appeal, however, said that it was clear from the will as a whole that the testatrix intended the gift over to take effect if her husband predeceased as well as their dying at the same time and therefore the court held that the property should pass under the gift over to X, Y and Z.

Compare this with ***Anthony v Donges [1998]***. In this case, the testator put a clause in his will stating that his widow should have *"such minimal part of the estate as she might be entitled to under English law"*. The court held that the clause was void for uncertainty and the widow should make an application under **I(PFD)A 1975**. Interestingly, the testator was a solicitor.

The power of the court to supply, omit or change words, as part of the process of construction, is very limited. It may be obvious from the will that an error has been made in its wording, but a court of construction cannot supply, omit or change words if the will

leaves the substance of the intended wording in doubt unless **s20 AJA 1982** applies, allowing the court to add wording to a will under its power of rectification.



Link to Practice

Re-using existing templates is a common reason why errors occur in wills. If it is the firm's practice to do this, always ensure you read through the will carefully before a draft is sent to the client for approval. Never assume that a will used for a previous similar instruction is exactly fit for purpose.

When taking client's instructions check that descriptions of family are accurate and send a draft so that the client can check names and descriptions before approving it.

Keep drafting simple. The more complicated the language the more difficult to spot errors and for the client to understand.

If you are unsure check with the client to clarify instructions and descriptions of beneficiaries and assets.





Law Explained: Rectification and admission of extrinsic evidence

This recording discusses the statutory power to rectify a will under **s20 AJA 1982** and the leading case ***Marley v Rawlings [2014]***. It also considers the rules about when extrinsic evidence (evidence of facts and circumstances which are not included in the will) will be admitted under **s21 AJA 1982**.



6:30

1x



Audio Transcript

Hello. In this recording I would like to talk to you about two very specific statutory provisions, one of which can be useful when a will is defective and needs amending in some way, and the other when it is not clear who the intended beneficiary or object of a gift in a will is, as it permits the court to take into account evidence in addition to the will itself. These provisions are both found in the **Administration of Justice Act 1982**, and they specifically relate to rectification, under section 20, and admission of extrinsic evidence under **section 21**.

Let us start by considering rectification under **section 20**. This section of the Act gives the court a limited power to rectify wills and codicils. The court must be satisfied that the will is so expressed that it fails to carry out the testator's intentions, either because of a clerical error or because of a failure to understand the client's instructions. This particular provision can be a saviour where the lawyer drafting the will has made a genuine error.

The leading case in this area was ***Marley v Rawlings*** in 2014, in which the court took the most unusual step of rectifying the will by removing all of the wording, apart from the testator's signature, and replacing it with the wording from the will actually executed by his wife. The error here was a simple one: the lawyer had drawn up mirror wills for a husband and wife, but had mistakenly given each to the wrong partner to sign. The error did not come to light until after the death of the second of them. If the will could not be rectified and was declared invalid, the disposition of the deceased's estate under the intestacy rules would be different from that he had envisaged under his will, so the court had to decide whether it could use section 20 to give effect to the deceased's wishes. In the end, it decided that a generous interpretation of the section was the most appropriate to ensure testamentary justice. Remember, though, that in order to rely on section 20 you must show either a clerical error or failure to understand the testator's instructions.

Turning now to **section 21**, generally speaking the court construes, and quite narrowly, only the words that are written in the will. There has always been a reluctance to admit other evidence, no doubt as a defence against possible fraud after the deceased's death. Section 21 was introduced in order to permit the admission of extrinsic evidence in three fairly limited circumstances: where the will or any part of it is meaningless on its face, where there is latent ambiguity, or in the case of patent ambiguity.

The section operates by providing three alternative situations in which the admission of extrinsic evidence would be possible, including evidence of the testator's intention.

The first, under **section 21(1)(a)**, deals with the case where any part of the will is meaningless. This would include, for example, where the will is written in code, or where the testator has used pet language which is known only to them, or (hopefully!) to them and a limited circle of friends or relatives. So, if Alex makes a will leaving 500 yambuts to his friend Sue, the court may allow extrinsic evidence to be produced to show that Alex regularly used that word to mean "pounds" – so Sue would be entitled to £500 pounds.

Section 21(1)(b) covers situations where the words used make sense in English, but do not make sense in the context used in the will – in other words, where there is a patent ambiguity. An example of this would be where the testator had used a term such as "green ones" to mean "pounds". Both the word "green" and the word "ones" are perfectly comprehensible, but they do not provide any guidance to the executors as to what the testator intended. Again, extrinsic evidence could be produced to help the court determine what the testator meant.

Finally **section 21(1)(c)** provides assistance to the court in cases of latent ambiguity. These are situations where the words used appear to make perfect sense until you put them in context. For example, if the testator included a gift in their will to "my cousin James Brown", this would seem on the face of it a perfectly rational gift, and one which the executors would have no trouble distributing. However, if in fact the testator did not have a cousin called James Brown, but had a nephew called James Brown and a cousin called John Brown, **section 21(1)(c)** would permit extrinsic evidence, though not evidence of the testator's intention, to be produced in order to show that there was an ambiguity. Once the court had accepted the existence of the ambiguity, evidence of the testator's intention could then be admitted.

In any of these situations, there are many different types of evidence that could be adduced, from notes written by the testator to things like birthday cards given to a named individual (where the ambiguity is about identity), to oral evidence provided by those close to the testator.

Section 21 is therefore a useful provision designed to ensure that the testator's intentions can be followed where the words used create some form of ambiguity. Hopefully, though, it would not be needed where the will has been professionally drafted.



Law in Context: Mutual wills – reform

Mutual wills have been criticised because of their uncertainty and the problems which may arise for the survivor. The Law Commission has considered these criticisms but is not recommending that mutual wills be abolished as it considers that they remain useful for some testators. It also considers that abolition would restrict testamentary and contractual freedom.

Read the discussion of possible reform in the [Law Commission's 2017 Consultation Paper \(Chapter 12\)](#).

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 7 questions in this knowledge check.

Question 1 of 7

In which of the following situations will **s33 WA 1837** apply?

(Select 3 correct answers)

- ☐ Alex's will left a legacy of £10,000 to his son Bryn. Bryn has predeceased Alex. Bryn has no children but does have a stepdaughter, Cheryl, to whom he is very close.
- ☐ Davina's will left a legacy of £20,000 to her daughter Emily. Emily has predeceased Davina. Emily had one son, Francis, who died last year leaving two children, Gregory and Harriet.
- ☐ Ikram's will left a legacy of £15,000 to his son Jahmal. Jahmal has predeceased Ikram, leaving one natural child, Kadirah, and one adopted child, Latifah.
- ☐ Malcolm's will left a legacy of £100,000 to his brother Niall. Niall has predeceased Malcolm. Niall left one daughter, Orla.
- ☐ Padraig's will left a legacy of £60,000 to his son Quinn. Quinn has predeceased Padraig. Quinn's wife is pregnant with their first child.

SUBMIT



Complete the question above before moving on.

Question 2 of 7

Which of the following statements about forfeiture are correct?

(Select 2 correct answers)

☐

The **Forfeiture Act 1982** gives the court a discretionary power to grant relief from forfeiture to those convicted of a homicide offence which is not murder.

☐

The **Forfeiture Act 1982** gives the court a discretionary power to grant relief from forfeiture to those convicted of a homicide offence.

☐

A murderer is able to apply for provision from their victim's estate under the **Inheritance (Provision for Family and Dependants) Act 1975**.

☐

The child of a murderer is able to inherit under the intestacy rules from the estate of their parent's victim.

SUBMIT



Complete the question above before moving on.

Question 3 of 7

Consider the following statement regarding gifts in Xander's will, and decide whether it is correct:

£500 to Betty. Betty died the day before Xander. The gift would pass to Betty's estate.



Correct



Incorrect

SUBMIT



Complete the question above before moving on.

Question 4 of 7

Consider the following statement regarding gifts in Xander's will, and decide whether it is correct:

£10,000 to Raoul contingent on Raoul reaching the age of 18. Raoul survived Xander but died aged 15. The gift would pass to Raoul's estate.

- ☐ Correct
- ☐ Incorrect

SUBMIT



Complete the question above before moving on.

Question 5 of 7

Consider the following statement regarding gifts in Xander's will, and decide whether it is correct:

£1,000 to Janey. Janey is aged 12 at the date of Xander's death but dies a few weeks later. The gift would lapse and pass to Xander's estate.

- ☐ Correct
- ☐ Incorrect

SUBMIT



Complete the question above before moving on.

Question 6 of 7

Consider the following statement regarding gifts in Xander's will, and decide whether it is correct:

£100,000 to his wife Laura. Xander and Laura died in an accident. It was impossible to tell who died first. He was six months older than her. The gift would be pass to Laura's estate.



Correct



Incorrect

SUBMIT



Complete the question above before moving on.

Question 7 of 7

Consider the following statement regarding gifts in Xander's will, and decide whether it is correct:

£4,000 to Brigitte contingent on her reaching the age of 18. Brigitte died six months ago at the age of twenty. The gift would pass to Brigitte's estate.

☐

Correct

☐

Incorrect

SUBMIT



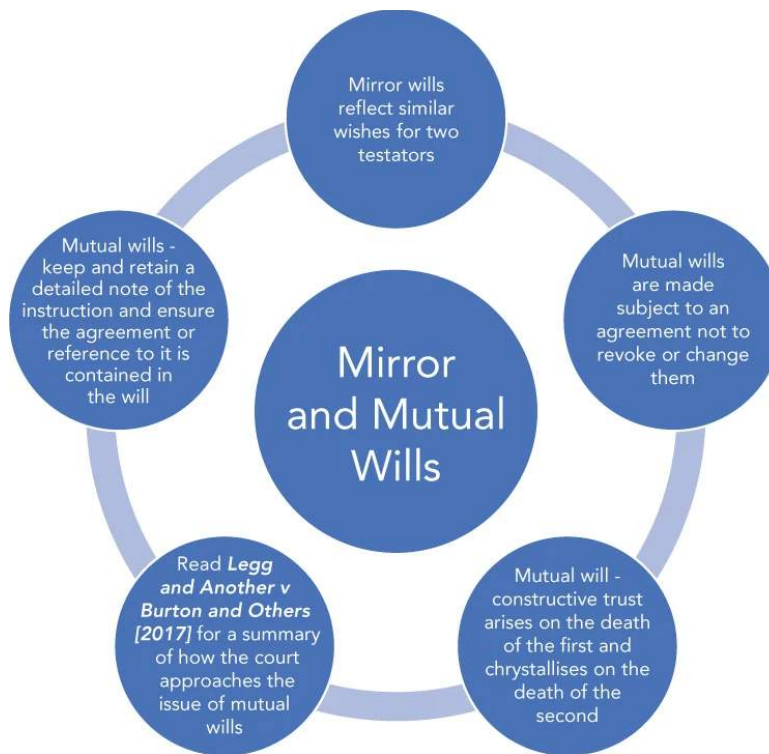
Complete the question above before moving on.

7.6 Summary

Mirror and mutual wills

- Mirror wills reflect similar wishes for two testators
- Mutual wills are made subject to an agreement not to revoke or change them
- Mutual will – constructive trust arises on the death of the first and crystallises on the death of the second
- Read ***Legg and Another v Burton and Others [2017]*** for a summary of how the court approaches the issue of mutual wills
- Mutual wills – keep and retain a detailed note of the instruction and ensure the agreement or reference to it is contained in the will

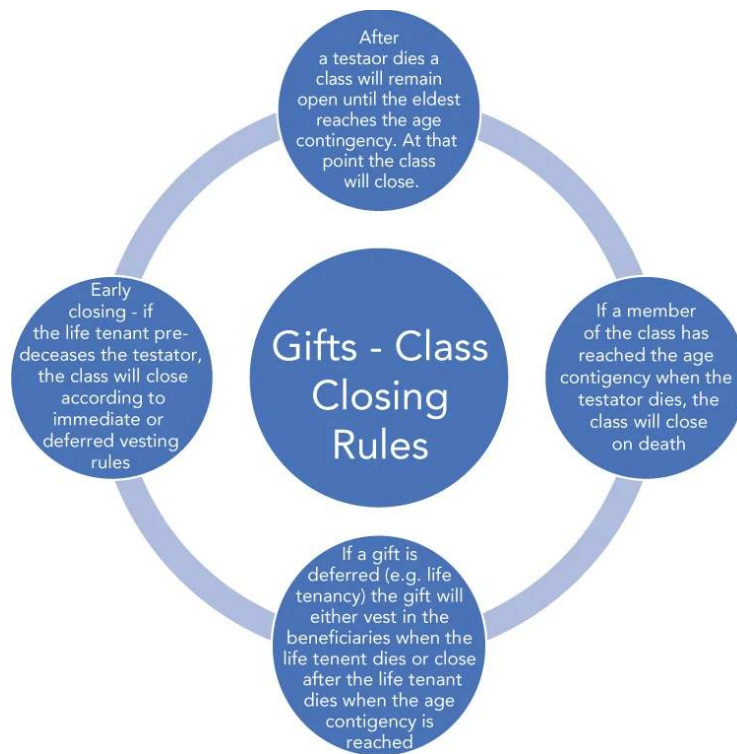
Figure 7.6a



Gifts – Class closing rules

- After a testator dies, a class will remain open until the eldest reaches the age contingency. At that point, the class will close
- If a member of the class has reached the age contingency when the testator dies, the class will close on death
- If a gift is deferred (e.g. life tenancy), the gift will either vest in the beneficiaries when the life tenant dies or close after the life tenant dies when the age contingency is reached
- Early closing – if the life tenant predeceases the testator, the class will close according to immediate or deferred vesting rules

Figure 7.6b



Gifts to children

- Gifts to “children” will include all legitimate children unless there is a contrary intention expressed
- Gifts to children born out of marriage – where their parents later marry, they are legitimated under the Legitimacy Act 1976 and treated in the same way as legitimate children
- s1(1) FLRA 1987 – for wills made after 4 April 1988, references to “my children” include legitimate and illegitimate children
- s15 FLRA 1969 – wills made between 1969 and 4 April 1988, the rules are roughly the same as s1(1) FLRA 1987
- Adopted child is treated as the legitimate child of the adopter. Governed by the Adoption Act 1976 and the Adoption and Children Act 2002

Figure 7.6c



Failure of gifts

- Lapse – beneficiary predeceases the testator with no contingency in place
- *Commorientes* rule – when two people who leave their estates to each other die at the same time and it is impossible to determine who died first; statutory presumption that younger survived the older
- s33 Wills Act 1837 – gifts to children or remoter descendant gift will automatically pass to the children of the beneficiary if the beneficiary dies before the testator
- s33 WA 1837 – can be excluded by a contrary intention expressed in the will
- Ademption – a specific gift will fail if the subject matter of the gift does not form part of the testator's estate at the date of death
- Forfeiture rule – a person will not benefit from the estate of a person they murder. If manslaughter, the court has the power to grant relief from the rule

- Disclaimer – If a beneficiary disclaims a gift, property passes as if gift had failed
- s15 WA 1837 – a gift to a beneficiary who witnesses a will will be void – unless this can be saved by more than 2 witnesses
- Uncertainty – a gift will fail if it or the beneficiary cannot be ascertained

Figure 7.6d



You have completed Chapter 7.

EXIT