



Chapter 3: Risk Management in Wills and Probate



3.1 Introduction



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3.1 Introduction

Managing risk is an integral (and often overlooked) part of both will preparation and the administration of estates.

In this chapter we identify issues that arise in these areas and how to reduce or manage risk, and therefore the impact on you and the firm.

It is important to understand that every time an instruction is accepted duties are imposed on the firm to ensure you are acting in your client's best interests. You must also ensure that your client has capacity to give instructions, is free from outside influence and coercion, understands the advice given, and the impact of any documentation prepared on those instructions, and that there is no conflict in accepting the instruction.

The above applies in every case. When the instruction is in the preparation of a will, there are additional obligations on a firm, and we will look at those in more detail in this chapter.

CONTINUE

3.2 Key risks

3.2.1 Taking instructions from your client

A will instruction meeting is often understated as to its importance and the time required to carry it out properly.

You will need to spend time with your client to obtain information necessary to fully understand their wishes so that you can properly advise on the options available and prepare a will that fully reflects those wishes.

Use of a client questionnaire can be helpful. If the client is asked to complete one in advance you can use the information provided in the form to check information given during the initial meeting. It can also serve as a useful document to write additional notes during the will instruction meeting. This can save time and reduce the risk of omitting to address an issue at that initial meeting.



It is not uncommon for a third party to make arrangements for a new will to be prepared, quite often with the best of intentions. It is however essential that you understand that it is the testator that is your client and that you take instructions from your client and not from someone on their behalf.

When taking instructions, it is important to ascertain the following from your client:

- personal details, including age, marital status, residence and domicile;
- family and dependants;
- current circumstances, including anything suggesting urgency in making the will, for example, a planned holiday, poor health, business commitments, etc.;
- any previous wills and/or lifetime gifts;
- their assets, including those held jointly; and other assets that cannot be disposed of by will such as certain interests under a trust;
- any overseas assets;
- their initial thoughts on gifts, executors, funeral wishes, etc.

The above information will not only assist in determining the parameters in which your client's wishes can be achieved (e.g. the ability to gift money held in a joint account), it will also help you to identify any areas of concern (e.g. information provided that is inconsistent

with previous wills), or wishing to exclude close family (e.g. spouse/civil partner, or children). It will also help you to advise on the structure and tax issues that may arise (e.g. issues of foreign domicile, or overseas assets may well be relevant to this). Finally, it will assist with some of the administrative provisions of the will (e.g. appointment of executors and funeral arrangements).

3.2.1.1 Instructions taken off premises

It is very common to travel to a client's home to take instructions for the preparation of their will. Consider the following in line with the duty of care in ***White v Jones [1995]*** which we will look at in more detail later in this chapter.

Under the **Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013**, consumers who enter into contracts off premises have a statutory right to cancel them without giving any reason. So, this applies if a practitioner goes out of the office to visit a client to make a will. "**Off premises**" means not at the practitioner's place of business and so includes the client's home, a care home or hospital.

The practitioner must, at the time the contract is made (usually when instructions are taken), give the client a written notice explaining the right to cancel **within 14 days** by sending the practitioner a cancellation notice. If the client cancels the contract within that period, they are under no further obligation to pay for the practitioner's services, notwithstanding any work that might have been carried out.

Of course, the 14-day cooling-off period might be beneficial to a customer who has just been pressurised into buying expensive double glazing by an eager doorstep salesman, but it is unlikely to benefit a client who wants, or needs, a will made urgently. Nor does it help their lawyer, who must act promptly if the client's health is deteriorating, but in the knowledge that they may not be entitled to payment. Fortunately, if the matter is urgent, **reg 36** allows the practitioner to ask the client to authorise the work in writing immediately. The client still has the right to cancel within the 14-day period but now the practitioner can charge for their services from the time they receive the express authorisation up to the time of any later cancellation.



Link to Practice

As a result of your duty to carry out a will instruction without delay, it will be necessary to take a form of authority allowing you to start work immediately with you to the initial meeting with your client.

CONTINUE

3.2.2 Duress and undue influence



Alarm

While instructions from third parties can be innocent, it should also raise a red flag in terms of identifying possible undue influence over

the client. As it is quite often impossible to know for certain which is the case, be cautious.

It would be a mistake to consider duress and undue influence in light of what a claimant in such an action must show to succeed. It is far better to look at what you as a practitioner can demonstrate you did to satisfy yourself that this was not an issue.

Undue influence is something that overpowers the free will of the testator but does not change their wishes. It can be difficult to distinguish this from powerful persuasion. A person who is weak, mentally or physically, is more likely to be considered by the court to have been subject to undue influence.

In ***Hall v Hall [1868]*** Sir J P Wild distinguished

“persuasion” which *“appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution”*

from

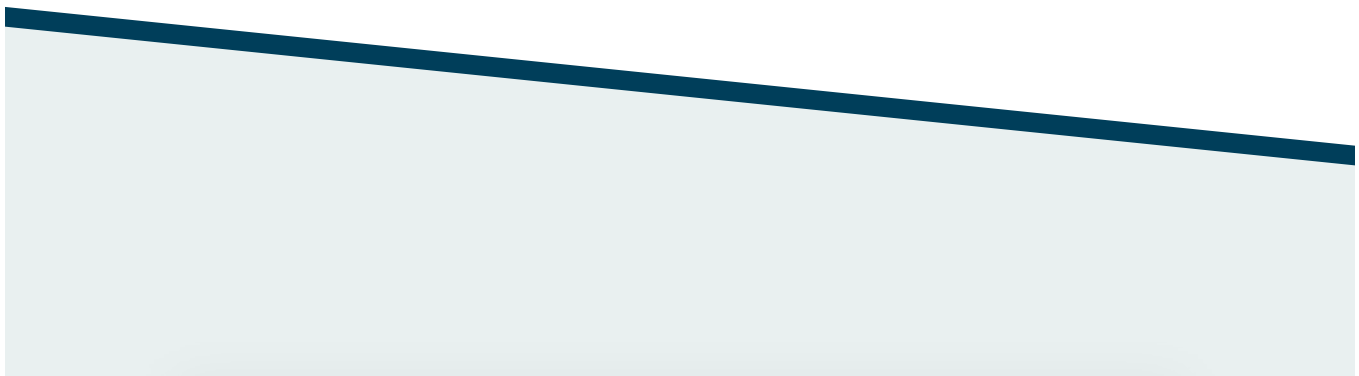
“pressure” which *“if so exerted as to overcome the volition without convincing the judgment, is a species of restraint under which no valid will can be made”*.

Where gifts are made by a vulnerable person during their lifetime to another person with whom they have a relationship of trust – for example, a patient making gifts to their doctor or a client making gifts to their solicitor – the courts will apply a presumption that there has been undue influence. **No such presumption is applied by the courts in relation to gifts in wills.** In *Parfitt v Lawless [1872]* it was held that there needed to be actual evidence of undue influence before probate could be refused.

In *Carpeto v Good [2002]* a claim of undue influence was considered in respect of the will of an elderly testatrix who left her property to her carer and her carer's husband. Although the testatrix was vulnerable, the court held that she had known that she was making a very generous gift to her carers and understood what she was doing. The unsuccessful claimants had to pay the beneficiaries' legal costs on the grounds that the beneficiaries should not have to pay to clear their names.

Undue influence was considered more widely in *Royal Bank of Scotland v Etridge [2001]*, which dealt with the issue of undue influence inducing a spouse to agree to mortgage her share of the family home. The court held that the person who may be the subject of undue influence must receive independent advice not in the presence of the person applying the pressure. If independent advice is not given, the solicitor should refuse to act.

Killick v Pountney and Another [1999] is an example of a successful claim of undue influence. The court emphasised the importance of a lawyer taking instructions for a will in the absence of any potential beneficiaries.



Key Case

The facts of ***Gill v Woodall and Others [2010]*** provide a good example of how the courts consider the issue of knowledge and approval as well as providing a situation where undue influence was also a relevant factor.

Mr and Mrs Gill were a Yorkshire farming couple who made mirror wills in 1993 leaving residue to each other, with a default provision if this gift failed to the RSPCA (a charity). Mr Gill died first, so when Mrs Gill died subsequently, the RSPCA stood to benefit. Nothing had been left in either will to the couple's only daughter, Dr Christine Gill, who therefore challenged her mother's will.

Mrs Gill's mental capacity was not in doubt. Instead, Dr Gill first claimed that her mother lacked knowledge and approval of the will's terms. Since the court accepted that it was suspicious that Mrs Gill had disinherited her only child in favour of a charity there could be no presumption of knowledge and approval. Therefore, the burden of proof fell on the RSPCA to establish that she did, in fact, know and approve the contents of her will.

At first instance, the evidence presented was enough to dispel the court's initial suspicion for a number of reasons, including the fact that the correct procedure for the will's preparation had apparently been followed by her solicitor and the will was short and clearly worded. So, the judge found Dr Gill's challenge on this ground failed because Mrs Gill had known and approved the contents of her will by properly understanding its terms.

However, Dr Gill had also challenged the will by alleging undue influence. For her claim to succeed, she would have to show something more than that her mother was advised or persuaded to make the will that she did. Instead, she had to show that her mother had been coerced into making a will that she did not really want to make. Here, the court held that Mr Gill had exerted such pressure on Mrs Gill into making a will that disinherited their only child in favour of the RSPCA that it amounted to coercion on his part. The court based its finding on a number of facts, including the following.

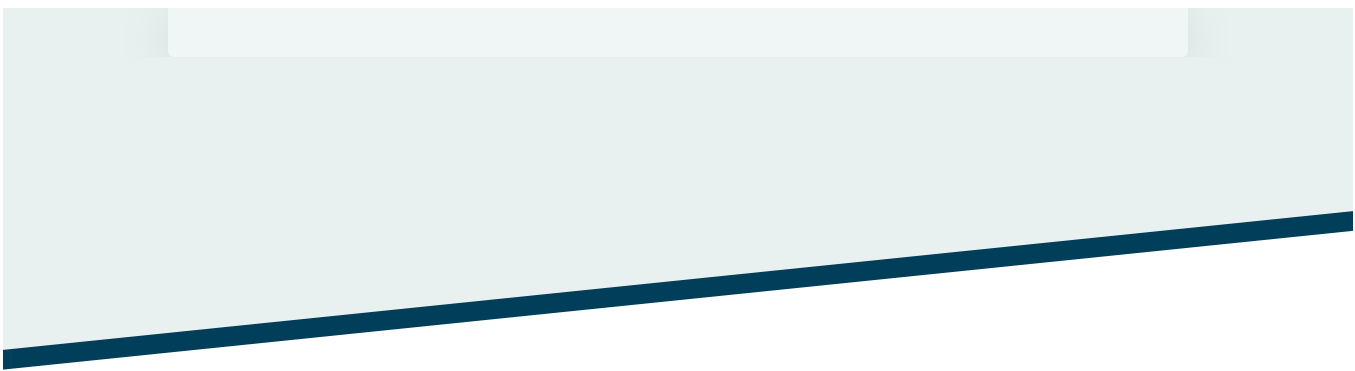
- Mrs Gill was a shy and timid lady who suffered from agoraphobia and anxiety disorder, leading to symptoms of extreme anxiety when taken outside her comfort zone (either her home or her car). This disorder meant that she would have actively done whatever she could to bring the meeting at the solicitor's office to an end as quickly as possible, including executing a will that she did not agree with, in order to return home and feel safe
- Mr and Mrs Gill's relationship was as a "traditional Yorkshire farming couple", where the wife would tend to defer to the husband who, in this case, was said to have had a domineering, bullying personality coupled with outbursts of fury.
- Mrs Gill was unusually highly dependent on Mr Gill for support and protection, and was afraid of Mr Gill withdrawing that support.

Accordingly, the court at first instance set aside Mrs Gill's will on the ground of undue influence, amounting to coercion by her husband, notwithstanding that she did not change her will in the 13 years between 1993 and her death in 2006 (not even after her husband died in 1999).

However, the RSPCA disagreed with the court's decision and so the matter was reconsidered by the Court of Appeal. Once again, the will was found to be invalid in favour of Dr Gill, but the Court of Appeal reached its conclusion on different grounds.

In the leading judgment, Lord Neuberger MR stressed that the facts of the case were exceptional (arising from Mrs Gill's unusual mental condition) and that the appeal judges were differing from the first instance decision on an unusual basis. The Court of Appeal agreed that the will was, indeed, invalid but its finding was that Mrs Gill had simply lacked both knowledge and approval when she executed her will. Contrary to the views of the trial judge, the Court of Appeal said that the available evidence could not justify his determination that Mrs Gill had the necessary testamentary intention. While the trial judge had been right to say that a *prima facie* case for knowledge and approval had been made out, he was wrong in concluding that the RSPCA had established it on the balance of probabilities, having regard to the nature and weight of the evidence.

Since the will failed because knowledge and approval had not been established, there was no need for the Court of Appeal to further consider the question of undue influence.



In ***Schrader v Schrader [2013]***, Bill, one of the testator's sons failed to have his mother's will declared invalid for lack of capacity and in alleging lack of knowledge and approval. His claim also cited undue influence, and here the court did find in his favour. The judge set out a number of reasons why he thought the mother had made the will while subject to undue influence, including:

- her vulnerability;
- her dependence on Nick, the other son of the testator;
- the engagement of a will-writer with no prior contact with the family;
- the reason given to the will-writer for giving the house to Nick had been inaccurate, and its source was likely to have been Nick;
- there was no other reason why the mother would, entirely of her own volition, have wished to change her will in respect of the house;
- Nick's forceful personality;
- Nick's keenly felt view that his parents had not treated him equally with Bill;
- Nick had participated in considering the will but had sought to distance himself from that when giving evidence;
- Nick had not disclosed the latest 2006 will until steps were taken to prove the earlier 1990 will, indicating that he had been aware of, and had misgivings about, the circumstances in which it had been drawn.

"In all those circumstances I find that undue influence has been proved. I think that they require the inference that Nick was instrumental in sowing in his mother's mind the desirability of his having the house, and in doing so he took advantage of her vulnerability. It is not possible to determine any more than that the precise form of the pressure, or its occasion or occasions, but it is not necessary to do so. I am satisfied that this will results from some form of undue influence."



Link to Practice

It is not enough to simply state that as a private client lawyer, or trainee you would not have accepted an instruction in circumstances in which you felt the client was subject to undue influence. Better to state how and why you came to that conclusion, demonstrate what questions you asked and what were the client's answers that led you to your conclusion. An awareness of the possibility of outside influences, the vulnerability of the client, and measures taken to ensure instructions given were free of coercion will assist the court in coming to a determination and may also save the firm from adverse comments made at trial. It will also make your life a lot easier if called to give evidence.

Key Case

Re Ho Chau Ying Chin [2019] is a recent example of a will and lifetime gifts being set aside by the court on the grounds of undue influence. The will was also set aside on the grounds of knowledge and approval. This case highlights difficulties that can be encountered when dealing with clients who speak foreign languages.

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3.2.3 Assessment of capacity

A solicitor must ensure that the client is both competent to give instructions and has the necessary mental capacity to make the will. Of course, in the majority of cases, the age and general health of the client will be such that it is obvious to all that there is no problem on either count. In cases where there might be some doubt about capacity or a suspicion that this might be challenged in the future, certain precautions should be taken. Such a case may be one where the testator is elderly and suffering from some sort of mental illness, particularly if their instructions are likely to be controversial, for instance, if they want to disinherit someone who might have expected to benefit.



The risk that such a will might be challenged, with all the unwanted repercussions of court proceedings, should be explained to the client but with the advice that a challenge may be less likely if the file contains a medical report confirming the client had capacity to make the

will. Such an opinion is likely to involve a fee, so you must obtain the client's consent to proceed.

CONTINUE

3.2.4 The “golden rule”

The courts often refer to a “golden rule”, a phrase first used by Templeman J in ***Kenward v Adams [1975]*** when referring to the duties of practitioners in doubtful capacity cases. In addition to obtaining medical approval, those preparing a will for a client should ensure they:

- discuss any previous will with the client and the reasons for wanting to change it; and
- take instructions in the absence of anyone who stands to benefit or who may have some influence over the testator.

In ***Wharton v Bancroft [2011]*** the High Court acknowledged the practical difficulties for practitioners when trying to follow the “golden rule”. In making the will of a 78-year-old man, who had only days to live, the solicitor did not arrange for a medical practitioner to satisfy himself of the testator's capacity and understanding. Norris J considered that in this particular case, the solicitor had acted correctly in making his own assessment of his client's testamentary capacity and then proceeding to make the will.



He said:

“I consider the criticism of [the solicitor] for a failure to follow ‘the golden rule’ to be misplaced. His job was to take the will of a

dying man. A solicitor so placed cannot simply conjure up a medical attendant. He must obtain his client's consent to the attendance of and examination by a doctor. He must procure the attendance of a doctor (preferably the testator's own) who is willing to accept the instruction. He must make arrangement for any relevant payment (securing his client's agreement). I do not think [the solicitor] is to be criticised for deciding to make his own assessment (accepted as correct) and to get on with the job of drawing a will in contemplation of marriage so that Mr Wharton could marry. I certainly do not think that 'the golden rule' has in the present case anything to do with the ease with which I may infer coercion."

It is important to remember that complying with the "golden rule" simply represents best practice rather than a rule of law if the validity of a will is disputed. Complying with the rule does **not** guarantee that the will is going to be accepted as valid, any more than non-compliance means that the will is going to be found invalid.

In ***James v James [2018]*** the will of the elderly testator was challenged by his son, on the grounds of lack of capacity. It was clear that the testator's faculties had deteriorated over time, and there was no medical evidence as to his capacity on or around the date of execution of the will. The court had to determine the issue based on evidence of what had actually happened on the date of execution.

The so-called “golden rule” was helpful in cases where capacity was an issue, but it was not a rule of law such that: (i) if it was not followed, the will would not be valid; and (ii) if it was followed, the will would be valid. Instead it was a rule of practice.



Link to Practice

An ironic twist to the question of whether the golden rule should have been applied arose in the case of ***Goss-Custard v Templeman and Others [2020]***. In this case the solicitor that prepared a final will for Lord Templeman (the same whose phrase is remembered in ***Kenward v Adams [1975]***) had not followed the golden rule. The validity of Lord Templeman’s will was subsequently challenged on the grounds of testamentary capacity. Notwithstanding questions raised about Lord Templeman’s capacity at the time the will was prepared and executed, it was found to be valid.



Activity

Read the case of ***Goss-Custard v Templeman and Others [2020]***.

This case will take you through the law relating to testamentary capacity and the golden rule.

CONTINUE

3.2.5 Will draftsman's capabilities

Will writing is unregulated. This means that any person, regardless of qualification can prepare wills for others.

A question therefore has arisen as to whether every person, regardless of qualification, who prepares a will should be held to the same standard.

The was answered in the case of ***Esterhuizen v Allied Dunbar [1998]***, where it was said that whether wills are prepared by a solicitor, accountant, someone with a will-writing qualification or even an unqualified person, a client is entitled to a competent service – in other words, the same standard of service is expected from all those preparing wills for gain.



Link to Practice

Regardless of qualification a client is entitled to a will as if drafted to the standard of a competent lawyer.

The Chartered Institute of Legal Executives regulates its members and firms on a competency basis. The Solicitors Regulation Authority requires

its members not to accept work unless the solicitor is competent to carry it out.



Do you consider that keeping will writing unregulated strikes the right balance for consumers to access will writing services and the risk that a badly drafted will is prepared by someone who may not have the insurance to pay to remedy damages caused as a result of their negligence?

CONTINUE

3.2.6 Duty of care

It is expected that lawyers owe a duty of care to their clients. The problem with will drafting is that when the will comes to light, the client is normally dead, and until 1979, it was unclear to what extent the duty of care applied to anyone other than the client, for example, disappointed beneficiaries who failed to inherit as a result of a mistake that caused a will to become invalid.

The position in relation to disappointed beneficiaries was considered in ***Ross v Caunters [1979]***. In this case the judge pointed out that if solicitors (and other lawyers) cannot be held liable to disappointed beneficiaries, then: *“the only person who has a valid claim (i.e. the testator) has suffered no loss and the only person who has suffered a loss (i.e. the disappointed beneficiary) has no claim”*. Accordingly, the decision reached in that case was

to extend the scope of the solicitor's duty of care so that a disappointed beneficiary could claim in tort. In ***White v Jones [1995]*** the House of Lords confirmed that ***Ross v Caunters*** remains good law.

Prior to 1995, it was not uncommon for a will to be prepared as and when the will draftsman got to it. There was no sense of urgency in completing the instruction. This was considered in ***White v Jones***.

In ***White v Jones [1995]*** a solicitor was held to owe a duty of care in negligence where he delayed unreasonably in drafting a will and the testator died before his wishes could be carried out. The testator quarrelled with his two daughters and made a will dated 4 March 1986 leaving them nothing. In June 1986, he was reconciled with them and, on 17 July 1986, gave his solicitors instructions to prepare a fresh will leaving them £9,000 each. The firm did nothing for a month. The managing clerk made three appointments to visit the testator in order to clarify the instructions, however, he (the managing clerk) did not keep any of them. On 16 August, the managing clerk instructed the firm's probate department to prepare a draft will and then went on holiday. He did not return until 1 September. By this time, the testator had gone on holiday, so an appointment was made for 17 September, the first available date after his return. The testator died whilst on holiday. The March 1986 will was admitted to probate. The letter of instructions of July 1986 was not admitted to probate as it did not amount to a testamentary document. The family could not agree amongst themselves what provision should be made for the daughters, so they decided to sue the solicitors in negligence. The case went to the House of Lords, where it was held that the solicitors were liable.

Does the duty of care extend in circumstances in which the instruction has been acted on in time, and a draft will sent to the client for approval, but the client fails to respond?

In ***Atkins v Dunn Baker [2004]*** the Court of Appeal said that a solicitor's retainer in relation to a will normally extends to the preparation and submission of a draft to the client. Provided that this is done promptly and in accordance with the instructions, the solicitor has completed the task that they had been asked to perform. There is no obligation to send a reminder and even if there was, there is no certainty that the client would respond. However, sending a reminder is good practice.



Link to Practice

It is surprising how common the scenario in ***Atkins*** arises. The client may have changed their mind. However, it is more likely that life has intervened and the draft has been put somewhere “safe” to review later and simply forgotten about. Sending a reminder is not only good practice, it is essential if the firm wants to get paid for the work it has carried out, even if the retainer is later terminated due to a change of mind.

Contrast ***Atkins v Dunn Baker*** with the following case.

In ***Feltham v Bouskell [2013]*** a solicitor was liable for failing to make the will of a 90-year-old testatrix (T) within a reasonable time of receiving instructions. On 26 January, he was asked by T to make a new will benefiting T’s step-granddaughter and so disinherit two cousins benefiting under an earlier will. That same day, he instructed a doctor to report on T’s capacity. The doctor visited T on 3 February and decided she had capacity, but did not provide the solicitor with a report until 2 March.



The solicitor was concerned the step-granddaughter was taking advantage of T so he decided to do nothing further unless T herself raised the matter again. On 13 March, the solicitor having done nothing, T asked the step-granddaughter to prepare the new will. T signed the new will on 24 March and died on 1 April. The two cousins challenged the new will and although the matter was settled by agreement with the step-granddaughter, the latter sued the solicitor for what she had lost in having to compromise the cousin's claim. She argued that if the solicitor had made the will as instructed, it was unlikely the cousins would have challenged it, so she would not have suffered a loss.

The court said the solicitor's concern that the step-granddaughter might be taking advantage of T was genuine and understandable, and the circumstances justified him satisfying himself that she knew what she was doing. However, he had not done that, choosing instead to do nothing unless prompted by T. That was an entirely inadequate course of action because it was not for the solicitor to decide whether it was a good idea for T to change her will.

By instructing the doctor directly, the solicitor took on the responsibility of satisfying himself on the capacity issue and it was part of his obligation to resolve the issue with reasonable expedition. He should have chased up the medical report within the first 10 days and should have arranged for another doctor to be instructed, in the event that the first could not report expeditiously. On receipt of the report, he should have visited T to discuss her instructions. Further, although the step-granddaughter was not the solicitor's client, she fell within the

White v Jones principle: she was the intended beneficiary under the proposed will and it was reasonably foreseeable that she would sustain loss if the solicitor failed to carry out his instructions.



1. An appointment has been booked for you to see Mr and Mrs Kardashian at 3.00 pm. Mr Kardashian arrives on time but alone. He explains that he has had an argument with his wife, and she isn't coming. He wants to make a new will excluding his wife entirely from his estate, and wants to leave everything to the Fox and Hounds, a pub he has spent most of the day in since leaving home. He smells of alcohol and every now and then he slurs his speech.
2. An appointment has been booked for you to see Mrs Pilkington, an elderly widow. She arrives on time and well presented. For the first 10 minutes of the meeting she talks about historic matters involving friends she once knew.

She explains that she is widowed, her husband Steven was a good man, and she has two adult children Mark and Keith, and she wants to exclude Keith, and leave her entire estate to Mark. Mark has told her that Keith was telling her friends things that were untrue and that is why her friends do not want to see her anymore. She lives in a large four-storey town house in Hampstead Heath, London and states that it's worth around £200,000, with no mortgage on it. Her other assets comprise cash in the bank and some savings amounting to £10,000.

Her wishes are very simple and she would like you to draft her will based on this information as she has to get home because Steven is waiting for her.

Set out in bullet points issues that the above two scenarios raise and might require further investigation.

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3.2.7 Conflicts of interest

CILEX lawyers and solicitors need to ensure that there is **no** conflict of interest (see **para 7.1 CILEX Code of Conduct** and **paras 6.1 and 6.2 SRA Code of Conduct for Solicitors**).

Remember also that the terms of the will are confidential and can only be made known to others if your client, the testator, consents. To make an unauthorised disclosure, for example, to members of the testator's family, would be a breach of **para 5.12 CILEX Code of Conduct** and the **SRA Code of Conduct for Solicitors dealing with confidentiality** (see **para 6.3–6.5**) and so could give rise to disciplinary proceedings.

Once the testator has died, the duty of confidentiality continues; the right to confidentiality passes to the personal representatives (PRs). Consequently, you must not disclose the contents of a will, even after the testator has died, other than to, or with the consent of, the executors. However, once probate has been obtained, the contents of the will become a matter of public record.

THE WILL-MAKER AS A WITNESS – LARKE V NUGUS [2000] REQUESTS

In December 2019 the Law Society issued an updated practice note dealing with the situation where a practitioner who has prepared a will is asked after the testator's death to disclose information about the circumstances surrounding its preparation or execution. Previous Law Society advice was affirmed by the Court of Appeal in **Larke v Nugus [2000]**, and the practice note updates that earlier advice with supplementary information on disclosure and the potential liability for costs for failure to do so. The guidance points out that a practitioner who has taken instructions for a will is a material witness as to the circumstances surrounding its preparation and execution, so they should provide the information in advance and make available any documents in their possession that are relevant to any potential proceedings. Doing so will avoid the cost of unnecessary applications to court and limit the costs of a full hearing. Since the court has power to order attendance under **s122 Senior Courts Act 1981** and pre-action disclosure under the **Civil Procedure Rules 1998 (CPR) r31.16**, failure to provide information promptly may result in costly litigation with the practitioner held liable in costs.

The practice note may be viewed at: [Disputed wills: guidance for practitioners | The Law Society](#)

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3.2.8 Clients speaking foreign languages

Example

An appointment has been made for Mrs Escu who is a 55-year-old widow, and a new client, to attend because she wants to make a new will.

She arrives with her daughter Andreea who has driven her there.

On arrival you introduce yourself as an Associate Chartered Legal Executive.

You invite Mrs Escu into the conference room and ask Andreea to wait in reception while you discuss her mother's wishes with her in private. Andreea explains that her mother moved to England five years ago from Romania and does not speak English very well, and that she (Andreea) is fluent in both Romanian and English and is here to translate for her mother.



After a few minutes it becomes apparent that Mrs Escu wants to leave her entire estate to Andreea. She does have a son who is married but she disapproves of his wife and does not wish him to benefit from her estate.

- **How do you deal with this situation?**
- **How do you assess risk?**
- **Would your answer be the same if Mrs Escu wanted to leave everything to her two children in equal shares?**

Situations like this require a practical approach to assessing risk. Not only to the firm you work for, but also to your client.

If Mrs Escu's instructions were to leave everything to her two children in equal shares, you may take the view that provided you are given accurate information (e.g. there is not a third child who you have not been told about) then if the intestacy provisions will give the same result, you may feel the risk is low and the will is a vehicle for Mrs Escu to select her executors, and other administrative provisions.

You could also test the information that you are being given by explaining you will treat children generically rather than naming them. If there is an adverse reaction you may want to reconsider accepting the instruction.

If however the wishes are likely to cause questions raised about whether the testator truly intended the instructions that were given or could know and understand the content of her will, you may decide to explain to Mrs Escu that you cannot take instructions from an interpreter who is also a beneficiary under the will. If the firm was to accept the instruction a new date would have to be made from Mrs Escu to attend with an independent interpreter (ideally arranged by the firm). It would add to the costs; however, without this arrangement in place and agreed you would not be able to accept the instruction.

In addition to knowledge and approval how will you assess capacity and whether your client is being coerced if you do not have direct responses from an independent source?

Consider the case of ***Re Ho Chau Ying Chin [2019]*** (see 3.2.2)

CONTINUE

3.2.9 Urgent and “death bed” wills

It is quite natural for us to put off making a will until a later date. It is human nature to avoid discussing our mortality or to consider arrangements for after we die. Also, when people face their mortality it can have the effect that whatever arrangements are in place should change.

For these reasons and many more, instructions to prepare a will at the bedside of someone who is close to dying, at home, in a care home or in a hospital is fairly common.



Because of the urgency of these situations, it may not be possible to have prepared as fully as you may like, for example, obtaining copies of any previous will(s) and arranging a medical assessment on capacity.

Before accepting an instruction of this nature check with your firm's risk and compliance manual. Some firm's will not accept this type of instruction as a matter of policy, because the risk is felt to be too high.

There may also be issues as to how long you can talk to your client before they become too tired to discuss matters further.

It is therefore essential that you are experienced in will writing before undertaking such an instruction.



Some practical questions to consider if an instruction like this is accepted include:

- How are you going to prepare the will? Do you have a laptop and portable printer? If not, bring pens and plenty of paper. You may have to prepare the will there and then.
- Is there a better time of the day to visit? Consider when the client is most alert, and when are they required to sleep or take medication.
- When is lunch? You do not want to start only to be interrupted for the client's meal time.
- Should you bring a second witness? It is quite often a term of a care worker's contract that they cannot act as witness to a will. While this may seem harsh, their job is at the place of work caring for others, not spending time at solicitors to give witness evidence or attending court to give evidence.

Other practical matters to consider:

- Factor in short breaks for your client to take so that they remain alert throughout the process.
- Try to interview the client alone, ask family to leave until you have finished.
- If possible, try and find out what medication the testator is on and whether that will affect their ability to understand and communicate information. Also find out if the medication can cause delusions!
- If you do not have access to your resources remotely, bring precedents that will assist you in the drafting. It may be possible to bring a standard precedent and adapt that on the day.

- Try to get the will completed and executed at that visit. There may be no guarantee you will get another opportunity and do not want to fall foul of ***White v Jones [1995]***.



CONTINUE

3.2.10 Will signing

The proper execution of a will is governed by **s9 Wills Act 1837** (as amended by **s17 Administration of Justice Act 1982**) which provides that:

which provides that no will is valid unless:

- (a) it is in writing, signed by the testator or by some other person in their presence and by their direction; and
- (b) it appears that the testator intended by their signature to give effect to the will; and
- (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
- (d) each witness either attests and signs the will or acknowledges their signature in the presence of the testator but not necessarily of any other witness.

These requirements do not apply to privileged wills, nor to statutory wills made by the court under the powers in the Mental Capacity Act 2005 on behalf of an adult person who lacks capacity.



Link to Practice

As you will be aware, the UK went into a national lockdown on 23 March 2020 due to the impact of the coronavirus (Covid-19) pandemic. While private client lawyers were still able to carry out their work, the ability to speak to clients face to face and attend the witnessing of wills was severely impacted for a number of reasons. Clients were either unable or unwilling to travel, and many offices around the country closed with staff working from home. In addition, elderly clients and those seen as most vulnerable to Covid-19 were encouraged to shield themselves from others.

Finding independent witnesses while observing social distancing, and observing the “stay at home” order became challenging.

Many more wills were therefore sent to clients with detailed instructions on how to execute. See **Document 1** of the **Appendix** for an example of an instruction sent to a client to ensure **s9 Wills Act 1837 (WA 1937)** *is observed*.

Video-witnessing of wills

In addition to the above issues that arose with regards to execution, a very sad situation arose in which for some in Covid-19 wards and care homes, it became almost impossible to find witnesses. This is because the residents were isolated and to reduce risk of spreading the virus they were not allowed visitors under any circumstances, and the staff will not act as witnesses.

As a temporary measure as a result of the Covid-19 pandemic on 7 September 2020 the **Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020** was introduced.

The legislation applies to wills made on or after 31 January 2020 and on or before 31 January 2022.

Both the Law Society and the Society of Trust and Estate Practitioners (STEP) have produced guidance on this legislation.

NB The period for the new legislations was extended to 31 January 2024 and on 1 February 2024 the Justice Department announced that it would not be extending this temporary legislation which would end at midnight on 31 January 2024. Practitioners may still come across wills that were executed using video-witnessing and should be aware of the process which is set out at 6.3.1.2 below.

Whenever possible, execution of the will should take place under the supervision of a lawyer or a responsible member of staff conversant with the requirements. This should be the aim even if it requires attendance on the client away from the office. Sometimes, this is not possible, perhaps because the client is too busy and asks you to send the will to them for execution. You must then take extra precautions. Further precautions are also called for where there might be an issue about the testator's capacity or ability to read and sign the will for themselves.

If the will is sent to the client for execution, very carefully drafted and clear instructions should be included, both as to the requirements of **s9 WA 1837** (see 6.3.1) and the effect of **s15 WA 1837** (see 7.4.7). The client should be required to return the will for checking after execution.

Guidance on best practice was given in ***Esterhuizen v Allied Dunbar [1998]***: *"A prudent solicitor will either invite the client to his office so that the will can be executed there or visit him with a member of staff to execute the will at the client's house."* This case establishes that simply giving a testator written instructions on how to execute the will may no longer be sufficient.

In ***Gray v Richards Butler (Supervision of Execution of a Will) [2000]***, however, the court appeared to make a distinction between testators who are well informed and those who are not. In that case, T was a lively and intelligent lady. The solicitor gave her clear written instructions on how to execute her will. Unfortunately, these were not followed and after her death the will was set aside. The solicitor was found not to have been negligent on the facts.

In ***Humblestone v Martin Tolhurst [2004]*** it was held that the solicitors were negligent. The will was sent to the testator for execution at home. The testator returned the will, and on receipt the will was pronounced to be in order. After the testator's death, it was discovered that the testator had not signed the will. The court held that, knowing that the will was to be executed outside their supervision, the solicitors still had a duty to ensure that the will was ostensibly validly executed and referred to the decision in ***Esterhuizen***. The testator in ***Esterhuizen*** was reported as being withdrawn and not well educated.

A draft copy of the will should be made up to show details of the execution (or a photocopy made) and carefully preserved in case the original is lost, when it may be possible to prove the copy. This will be especially important where the original is being kept by the client or deposited for safekeeping elsewhere (e.g. in the client's bank).



Link to Practice

As a matter of practice, overseeing execution not only assists in ensuring the will is executed (completed and not left to one side) and in accordance with **s9 WA 1837**. It also provides another opportunity to satisfy yourself that:

- all is in order, that your client fully understands and approves the content, and if they want to make any changes you can deal with those straight away; and
- the client still has the capacity to make the will as the time for assessment is at the date of execution; and
- the client is not being subjected to undue influence;
- in addition to providing the service to your client and reducing risk for the firm.

3.2.11 Notice of severance

Example

You have a will preparation meeting with Sheila Constance and Claire Campbell who are civil partners. Both Sheila and Claire have children from previous relationships. They purchased a property (1 Bridge Street, Bradford BD1 1HZ) together about two years ago. The conveyancer had explained how they would own it, but it is not something either of them were interested in at the time. Both Sheila and Claire would like the survivor of them to benefit wholly from the property, but on the death of the survivor, their respective share is to pass to their respective natural children in equal shares.

You explain the difference between beneficial joint tenants and tenants in common. All the clients can tell you is that they purchased the property putting up the same amount each and there is no mortgage.

You also advise Sheila and Claire that you can check at the Land Registry to establish how the property is held and to ensure it is held in their joint names.

You explain that you can do that for them now, and that it will only take a few minutes to download the register entries to their property. They both authorise you to proceed and after five minutes you return with printed copies of the Land Registry entries. You explain that as they both thought they are both named as registered proprietors and as there is no Form A restriction, it indicates that they hold the property as beneficial joint tenants. It would be sensible to also order a copy of the transfer for them, which ought to show the declaration made at the time of purchase.

Consider the effect of the will had this check at the Land Registry not been carried out.

A fundamental duty is to ensure the will reflects the client's wishes and will at the time of execution give effect to those wishes. It is therefore essential to understand that specific gifts are capable of being given.

It is not uncommon for a client to want to give a share in a property to a specific beneficiary. Alternatively, the client may want that share to pass into a trust for the life of a spouse or civil partner, and when that person dies, to ultimately pass to nominated beneficiaries, as in Sheila and Claire's case.

It is therefore essential to understand how joint owners hold property. You must ensure that your client has an interest in the property. If it transpires they do not have an interest in that property further investigation will be required as there may have been an historic error on the purchase of the property, or this may be a strong indication as to lack of testamentary capacity (know the nature and extent of their estate).

In Sheila and Claire's case if one were to die the property would pass to the other absolutely by survivorship and the terms of the wills would not be capable of being carried out.

In order to achieve Sheila and Claire's wishes in their circumstances, you will need to sever the joint tenancy. You can do this by preparing a notice of severance (see example below) and getting one client to sign it and serve on the other.

Notice of Severance of Joint Tenancy

To: Claire Campbell

I give you notice to sever the joint tenancy in equity of the property known as 1 Bridge Street, Bradford BD1 1HZ which we have previously owned as beneficial joint tenants at law and in equity.

Dated

2021

.....

Sheila Constance

RECEIVED this Notice on

2021

.....

Claire Campbell

An example of a notice of severance of joint tenancy.

Ideally you will arrange service so that you can evidence this at a later date if necessary. It is good practice to include a duplicate so that the recipient can sign and return the copy notice as absolute proof of service.

In Sheila and Claire's case the process should be straightforward as they will both understand the reasons behind the severance.

There are cases in which this is a hostile act because a relationship has broken down.

For service to be effective, it is not necessary for the recipient to have actually received the notice, nor for them to have the capacity to understand it.

To finalise the process you will need to arrange to register a Form A restriction with the Land Registry, which will alert others to the fact the property is now held as tenants in common, and to prevent the property from passing to the survivor automatically on the death of the first.



Link to Practice

To understand from the Land Registry entries if joint owners own as beneficial joint tenants or tenants in common you will look for the following wording in the proprietorship register. It is also good practice to order a copy of the transfer as it ought to show the declaration as to ownership given at the time of purchase.

“No disposition by a sole proprietor of the registered estate (except a trust corporation) under which capital money arises is to be registered unless authorised by an order of the court.”

Consider the following case:



Key Case

In ***Carr-Glynn v Frearsons [1998]*** solicitors were held liable to a disappointed beneficiary, applying and extending the principles laid down in ***White v Jones [1995]***.

The testatrix owned property as a joint tenant with her nephew but was uncertain if it was held as beneficial joint tenants or as tenants in common. In fact, it was a beneficial joint tenancy. She wanted to leave a half share to her niece, the claimant. The will was made in accordance with her instructions, but the joint tenancy was not severed so the interest passed to the nephew by survivorship.

The Court of Appeal extended the principles in ***White v Jones*** and held that the niece had a claim against the solicitor. Although the solicitor has correctly told the testatrix that the gift would not take effect if the property was held as joint tenants, the solicitor was still at fault in not fully explaining to the testatrix how a notice of severance could and should be served to ensure a tenancy in common existed when the will took effect on her death. The court was effectively saying that the solicitor's duty extended beyond the mere preparation of the will to steps necessary to give effect to the testator's intentions.



Do you think it right that a joint tenancy can be severed by a notice which need only be served and not actually received by the other party? Is it also right that it can be served on someone who does not have capacity to understand the effect of such a notice?

CONTINUE

3.3 Mitigating risk

3.3.1 Client meetings

The client meeting is as important to the process as the drafting of the will.

It is important to obtain information on your client's assets and liabilities, make an assessment on capacity and whether there are any signs of undue influence, and fully understand your client's wishes so that you can prepare a will that reflects those.

We will look at the information gathering stages in more detail below.



Link to Practice

An issue that has arisen as a result of Covid-19 is that clients are not necessarily able to attend your office or if shielding (or someone else at home is shielding) not able to arrange for you to arrange a home visit. It has therefore been necessary to adopt available technology to assist in taking will instructions. Video technology has become widely used.

While it can be difficult to properly assess capacity and undue influence (there may be someone

present off camera), with many video conferencing products you do have the ability to record the client meeting and that may well assist if a challenge is raised in the future.

1

Previous will

It is important to ascertain whether the client has made any previous wills and whether they (and any codicils) have been revoked. Consideration should also be given to the extent to which the client's present instructions will vary the terms of any existing, unrevoked will; minor alterations might best be effected by a codicil.



Link to Practice

If there are previous wills, it is important to read those in advance of preparing a new will (if time permits). Previous wills are a window into the client's assets, family and wishes at a particular time in their past.

If current wishes materially change previous wishes, you must understand why.

- If it is because a beneficiary has died, that is a perfectly rational reason to change a will.

- If, however, you have not been informed about a child who is still living, that should raise an immediate flag and it will be necessary to carry out further investigations to satisfy yourself as to capacity and undue influence.

You may also want to consider the implications of excluding children so that you can advise your client on potential claims against the estate under the **Inheritance (Provision for Family and Dependents) Act 1975 (I(PFD)A 1975)**.

2

Testator's family and dependants

Full details of the testator's immediate family and any other dependants should be established. It is important to bear in mind the possibility of claims under **I(PFD)A 1975** (and, in appropriate cases, take action to secure a suitable statement from the testator).

If any relatives who might have expected to benefit are to be excluded, the testator's reasons for doing so should be recorded either **on the will file** or **in a letter from the testator**, to be stored with the will. Such evidence may be valuable in defending a claim in the future. Bearing in mind that the will becomes a public document once probate is granted, it is generally not prudent to include such explanations in the will itself.



Link to Practice

It can be helpful to have the client prepare a note or letter in their own words setting out their reasons for excluding a close relative (i.e. adult child). It demonstrates that you have satisfied yourself that their wishes are their own and they have capacity to make those decisions, and that you have done everything you can for the client to achieve their wishes.

3

Size and nature of the estate

Some idea of the present nature and value of the testator's estate must be obtained, to enable appropriate advice to be given generally, and in relation to the drafting of the will. The sort of will that might be recommended for a client with a modest estate is likely to be somewhat different from one suitable to the client who is a millionaire. Clearly, there may be significant changes between the date of the will and the testator's death but, at least, it will be possible to obtain an idea of the potential impact of inheritance tax (IHT) and whether there is scope for mitigation, for example, by lifetime gifts etc.

It is important to identify if the testator has any property abroad as it may be important that they make a separate will dealing with that property. Similarly, it will be important to identify if the testator is not domiciled in England and Wales.

Account should be taken of any expectations (e.g. the client may stand to inherit a considerable sum which will radically alter the present position). It is also important to identify if any property will pass independently of the will. This is particularly true of jointly held property.

If there is doubt as to how co-owned property is held, ask to see the title documents or Land Registry official copies. Following ***Carr-Glynn v Frearsons [1998]*** (see 3.2.11), a solicitor may be negligent if they fail to ascertain properly the nature of the beneficial ownership before advising on the terms of the will. The same is true of trust entitlements; the trust document should be looked at to verify the nature of the interest and how it devolves. If the testator is married or in a civil partnership, an assessment of the nature and extent of the spouse's/civil partner's estate (and expectations) should also be made. If the spouse/civil partner is already well provided for, the testator will have greater scope to make provision for other beneficiaries. The spouse/civil partner should be encouraged to make a will also.

4

Lifetime transfers

Ask whether or not your client has made any gifts in the last seven years, this will help when advising on IHT. The making of a will is a suitable occasion for the consideration of future financial planning generally. The possibility of future lifetime transfers (if your client can afford to make them without prejudicing the current needs of themselves and their family) should be discussed and (if appropriate) taken into account in the planning of the will.

5

Client's wishes

Discuss what your client is looking to achieve with their will in round terms. This can be more helpful than asking your client to document line by line who is to get what. This will help you to get a full picture of what assets should go where and why. You can use this information to advise on what is and is not possible to achieve and explain the options open to your client. It may well be your client was unaware of certain options and instructions may change when a more informed decision can be made.



Link to Practice

Keep it simple

Talk to your client in layman's terms, do not use technical or legal language. If your client does not understand they may not say for fear of looking ignorant. If confused, your client may give instructions that do not truly achieve their wishes.

Understanding legal principles in the preparation of wills means that you should be able to break the component parts down into everyday language so that anyone listening will understand or at least not be too afraid to ask questions.

The same applies to the language in wills. If a dispute arises as to the validity of a will, one issue that will be looked at is how complicated it is to understand. The capacity to understand may well change depending on how clearly a will has been written. It is also relevant in respect of knowledge and approval. How can a client truly understand and approve the contents of a will if it has been

written using archaic language that very few truly understand.

An example of how will writing has changed and developed over the years:

From – *"I devise and bequeath all my property whatsoever and wheresoever held to..."*

To – ***"I give all my property to ..."***

CONTINUE

3.3.2 Attendance notes

In the preparation of wills your attendance note is more than a record of time spent for billing purposes. It is a fundamental piece of contemporaneous evidence the court will look at when determining the validity of a will and/or whether you were negligent should a claim be issued against your firm by a disappointed beneficiary.

Your attendance note should be used to document everything that took place in the meeting.

This will include:

Date and time the meeting started and ended —

This may sound straightforward but in a case in which the validity of a will is challenged due to capacity, one question the judge will invariably ask is *"how long did the will writer spend with the testator?"*

This will also support the date the instructions were taken and the will was executed, which could also be important in a will validity claim.

Client's demeanour —

It is worth recording how well your client presented themselves to you. If it is suggested at a later date that the testator was always drunk, your note can support your view that at the time the instructions were given, there were no indications of that.

Who was present? —

If a claim is raised on the grounds of undue influence and the person accused of coercing your client attended with your client, record whether that person was asked to wait in reception or left to go shopping and would come back in an hour or when called.

If anyone other than your client joined you, your attendance note should state who and why. You do not want to be subject to cross-examination on why you recall events your attendance note is silent on.

Capacity —

It is **not** enough to state *"I was satisfied as to my client's capacity"*. Your note should set out **why** you were satisfied. What questions were asked and what responses were given?

It would not hurt to mention ***Banks v Goodfellow [1870]*** and go through the stages covered during your interview in your note. One of the questions you will be asked if giving evidence is *"what is the test for capacity?"*

Undue influence —

As with capacity your note should record why you were satisfied undue influence was not a concern

by detailing questions asked and answers given.

Knowledge and approval —

At a will execution meeting set out whether you read the will back to your client or they read it back themselves. Either way, summarise the terms and effect of the will and ensure your client fully understands and approves this.

Record comments made and questions asked by the client to emphasise your client fully understood the effect of their will. If the client spots an error, it is worth recording that to demonstrate the level of detail demonstrated by the client when going through their will.

Client's wishes —

After the initial interview you will be expected to prepare a draft will fairly quickly. Make sure you have made a detailed note of your client's wishes, together with names and addresses. This will also assist if after your client's death there is a suggestion that the will was not prepared in line with the client's instructions (e.g. a beneficiary has been accidentally omitted).

Advice given to your client —

While this is a standard use of an attendance note, it is worth repeating. Always record advice given and instructions in response to that advice. Advice and instructions should also be repeated in correspondence to the client.

CONTINUE

3.3.3 Capacity report

As already discussed, you must ensure that the client is both competent to give instructions and has the necessary mental capacity to make the will. Of course, in the majority of cases, the age and general health of the client will be such that it is obvious to all that there is no problem on either count. In cases where there might be some doubt about capacity or a suspicion that this might be challenged in the future, certain precautions should be taken. This can arise if the testator is elderly and/or suffering from some sort of mental illness, particularly if their instructions are likely to be controversial, for instance, if they want to exclude someone who might have expected to benefit (e.g. partner or child).



The possibility that a will in these circumstances may be challenged by the excluded person, with all the unwanted repercussions of court proceedings, should be explained to the client with advice that a challenge may be less likely if the file contains a medical report confirming the client had capacity to make the will. Such an opinion is likely to involve a fee, so you must obtain the client's consent to proceed.

CONTINUE

3.3.4 Checklists

It is common for firms to have standard will questionnaires and checklists for you to go through when taking instructions from your client.

If your checklist also has space for you to make comments, it can double up as part of your attendance note.

The advantage of using a checklist is that it can help with focusing minds when in a will instruction interview and if the conversation gets off topic, to bring it back to where you were. A checklist can be particularly useful to ensure all areas are covered for taking instructions.



Checklists are a great way to deal with side issues that can be discussed during an interview. For example, shares in a family business can raise the question of business property relief.

Ultimately, a checklist can serve to reduce risk in demonstrating that all issues were considered and ensuring nothing was left out when taking instructions.

Evidentially they are a good way to demonstrate standard practice, if necessary, and that a proper approach was taken at the meeting.

It will also help if the client can be asked to complete a will questionnaire before the meeting; that will give you the opportunity to review testamentary wishes, assets and liabilities.

CONTINUE

3.3.5 Deadlines

We have looked at your duty of care to complete your client's will promptly and in certain circumstances immediately.

Where a deadline must be met, for example, if a client is terminally ill, you must ensure you have the capacity to accept and complete the instruction without any delay.

You can see from cases like ***White v Jones [1995]*** and ***Feltham v Bouskell [2013]*** that failing to recognise time-sensitive instructions can lead to claims against the firm.

As soon as a new instruction is accepted, it is important to diarise dates by which the instruction must be completed.

If there is any concern that an instruction will not be completed on time, either the instruction should be rejected at the outset, or alternative arrangements made within the firm to prioritise the instruction.

CONTINUE

3.4 Beneficiaries

3.4.1 Rights

Prior to distribution, the PRs hold the assets on a limited trust. In ***Commissioner for Stamp Duties (Queensland) v Livingston [1965]*** Viscount Radcliffe said:

"[W]hatever property came to the executor by virtue of his office came to him in full ownership, without distinction between legal and equitable interests ... He held it for the purposes of carrying out the functions and duties of administration, not for his own benefit ... Certainly, therefore, he was in a fiduciary position with regard to the assets that came to him in the right of his office, and for certain purposes and in some aspects he was treated by the court as a trustee."

- Viscount Radcliffe

The trust is limited in scope. It does **not**, as a general rule, give the beneficiaries an equitable interest in their entitlement in the same way as a beneficiary under an express trust has an equitable interest.

As Viscount Radcliffe pointed out in his judgment:

“The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realised for the purposes of administration or of what the residue, when ascertained, would consist or what its value would be.”

- Viscount Radcliffe

What is the nature of the beneficiary's interest? Pending distribution, the beneficiary has a chose in action to ensure that the estate is properly administered. A chose in action is the right to bring an action legal claim to compel the due administration of the estate. The chose is assignable by the beneficiary in the same way as any other chose in action (***Re Leigh's Will Trusts [1970]***).

Re Hemming, Saul & Co [2008] confirmed that the right of a beneficiary pending distribution is a chose in action. In this case, the effect of this rule was to vest the chose in action in the trustee in bankruptcy of the insolvent beneficiary. It is a common practice for probate practitioners to carry out bankruptcy searches against the names of beneficiaries in order to identify whether or not payment should be made to a trustee in bankruptcy.

While a beneficiary's rights are limited, a beneficiary who has an interest in possession is entitled to know of the existence of the trust and the entitlement under it.

Beneficiaries with contingent interests should be informed about their future interest as a matter of good practice. This extends to potential beneficiaries under a discretionary trust

(*Chaine-Nickson v Bank of Ireland [1976]*).

CONTINUE

3.4.2 Powers

A beneficiary has the power to request information about the nature and extent of an estate or trust from the trustees, and to see a copy of the trust documentation and trust accounts (*Schmidt v Rosewood Trust Ltd [2003]*). This extends to costs incurred in connection with the administration of the estate and/or trust.

While there is no automatic entitlement to disclosure of documents, a trustee must exercise their discretion to refuse to disclose information with care or the court may be invited to step in and order disclosure of certain documents (*Schmidt v Rosewood Trust Ltd*). It is worth noting that *Schmidt* concerned a discretionary trust and the decision makes it clear that a beneficiary who has no entitlement as of right can still expect to see and request trust documentation.



Do you think the decision in *Schmidt v Rosewood Trust Ltd* strikes the right balance when looking at duties to disclose information and documentation between trustee and beneficiary? What issues may arise if beneficiaries were not given the right to access certain information and documentation?

3.4.3 Remedies

If a beneficiary feels that a request for information, disclosure or accounts is unreasonably refused, that beneficiary has the right to apply to the court for an order to either disclose the information or produce an account.

Remember that when a PR applies for a grant, the PR will give a statement of truth in which they agree to be bound by their duties under **s25 Administration of Estates Act 1925** to:

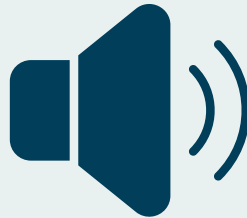
when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court.

Trustees must consider any request carefully as in this case if the court feels the refusal is unjustified, the trustees could face a personal costs liability (***Schmidt v Rosewood Trust Ltd [2003]***).



Link to Practice

A residuary beneficiary has the right to make a complaint to the Legal Ombudsman about a firm's conduct in the administration. This means that while you have a duty to the PRs as clients, you also have a fiduciary duty to the beneficiaries in the administration and also the costs of the work.



Law Explained: Professional ethics

The **CILEX Code of Conduct** and the **SRA Code of Conduct** set out a framework for professional ethics for chartered legal executives and solicitors and their staff.

This recording discussing how the **CILEX Code of Conduct** relates to some typical professional ethics scenarios for private client lawyers.



7:06

1x



Audio Transcript

Hello. Welcome to this recording for Chapter 3. In this recording I am going to look at the principles which are laid down by the Solicitors Regulation Authority and by CILEX Regulation, both of which govern the way in which lawyers are supposed to behave in relation to their clients.

What I aim to do in this recording is to examine each set of principles and try to relate them to the attitudes, behaviours and outcomes that should be expected from regulated lawyers in relation to wills

and probate.

Both professional bodies revised their regulatory requirements in 2019. The approach taken by CILEX Regulation sets out nine core principles which are then underpinned by a Code of Conduct, which provides specific examples of the sort of behaviours required under each principle. The SRA takes a slightly different approach, in that its core principles, seven in total, are set out in a separate document. It has also been suggested that the SRA code is more outcomes-focused, and some critics have suggested that this provides a less definitive framework on which lawyers can pin their behaviour.

The CILEX Code contains the following principles. It states that:

“You must:

1. uphold the rule of law and the impartial administration of justice;
2. maintain high standards of professional and personal conduct and justify public trust in you, your profession and the provision of legal services;
3. behave with honesty and integrity;
4. comply with your legal and regulatory obligations, and deal with regulators and ombudsmen openly, promptly and cooperatively;
5. act competently in the best interests of your client and respect client confidentiality;
6. treat everyone fairly and without prejudice;
7. ensure your independence is not compromised;
8. act effectively and in accordance with proper governance and sound financial and risk management principles; and
9. protect client money and assets.”

The SRA principles are slightly shorter, but they are similar, though you may feel they are less specific and direct. They say solicitors should act:

1. in a way that upholds the constitutional principle of the rule of law and the proper administration of justice;
2. in a way that upholds public trust and confidence in the solicitors profession and in legal services provided by authorised persons;
3. with independence;
4. with honesty;
5. with integrity;
6. in a way that encourages equality, diversity and inclusion; and

7. in the best interests of each client.

What does this mean in practice? Clearly, each set of principles imposes a high standard of behaviour on regulated lawyers. This can have implications for wills and probate in a number of ways.

Think about the following situations – which principle or principles might be at risk? (It is probably fair to say that Principle 1 for both professions is overarching and applies in all these cases. Also, there is no hard and fast rule as to which principle applies in which circumstances, and legal professionals are expected to exercise judgement in applying them.)

The suggestions I have made as to which principles apply are my views – you may think others are more to the point.

a) You have been asked to take on a fairly complicated probate matter. You do not feel you have the expertise to deal with it – but you take it on nonetheless. This could be subject to CILEX Principles 2, 4, 5 and 8, and also SRA Principles 2 and 7.

b) You are incredibly busy and it is taking you six weeks or more from taking instructions to get draft wills to clients (CILEX Principles 2, 4, 5 and 8, SRA Principles 2 and 7 might apply here). In both of these cases, you might also be in breach of your duties to act honestly and with integrity, depending on what you promised each client.

c) You have a commission arrangement for referrals from a local funeral director (CILEX Principle 7, SRA Principle 3).

d) You have been telephoned by someone claiming to be the daughter of one of your clients who wants to know whether he has left her a gift in his will (CILEX Principle 5, SRA Principle 7). You will be unsurprised to know that the duty of confidentiality extends until the client's death and beyond; so even after the client dies, you have the same duty to their PRs.

e) You are a sole practitioner and, struggling to pay the wages bill one month, you temporarily "borrow" money you are holding for the administrators of an estate you are dealing with (CILEX Principle 9, SRA Principle 7).

f) You attended the local law society's annual dinner last night. Having had rather too much to drink, you got into a fight with a paralegal from another firm (this might infringe CILEX Principle 2; interestingly, there doesn't appear to be a corresponding SRA principle).

Of course, this is only a limited selection of possible scenarios – there are no doubt others that you could think of, or have encountered in your professional life.



Law in Context: Risk management in wills and probate

The vast majority of lawyers take their responsibilities with regards to wills and probate very seriously and have detailed protocols in place to ensure they follow proper procedures. Occasionally, though, a lawyer falls short of their professional obligations.

Go to the website of the [Solicitors Disciplinary Tribunal](#). Using the Search Judgements button on the right-hand side, search for and read the decision in the case of Robert Ian Cartmell.

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 3 questions in this knowledge check.

Question 1 of 3

Which of the following statements, following from the decision in ***White v Jones [1995]***, is correct?

- ☐ A lawyer owes duties in contract and in negligence, only to the testator for whom they have drawn up the will and their executors.
- ☐ A lawyer owes duties in contract and in negligence to the testator for whom they have drawn up the will, and in negligence to any actual or potential beneficiary of the will.
- ☐ A lawyer does not owe duties in negligence, only in contract, and only to the testator for whom they have drawn up the will, and no one else.



A lawyer owes duties in contract and in negligence to the testator for whom they have drawn up the will, and in negligence to any actual beneficiary of the will.

SUBMIT



Complete the question above before moving on.

Question 2 of 3

Which of the following statements about deathbed wills are correct?
(Select 2 correct answers)

☐

Deathbed wills are never permissible.

☐

Always try to interview the client alone.

☐

Deathbed wills must never be handwritten; you must take instructions and then get the will word processed.

☐

You are unlikely to have any problem finding witnesses from the staff in hospitals and care homes.

☐

Make sure your client is as alert and well rested as possible in the

circumstances.

SUBMIT



Complete the question above before moving on.

Question 3 of 3

In which of the following scenarios is T's will **not** correctly executed according to **s9 WA 1837**?

(Select 4 correct answers)

☐

T signs the will whilst alone. Later, A and B arrive. T shows them the will and says *"This is my will which I signed earlier."* A and B each sign in T's presence.

☐

T signs the will in the presence of A and B. B leaves the room and A signs in T's presence. A leaves the room and B returns. B signs in T's presence.

☐

T is terminally ill and very weak, but mentally perfectly alert. T asks their carer X to sign the will, which X does in the presence of T, A and B. A and B each sign in T's presence.

☐

T signs the will in the presence of A and B. A and B then each sign in T's presence.



T signs the will in the presence of A and B. A signs in the presence of T. T has to leave the room to answer a telephone call. B signs whilst T is out of the room.

SUBMIT



Complete the question above before moving on.

3.5 Summary

Taking Client's Instructions

- See client in person and alone
- Use checklist
- Ascertain client's wishes
- Make a detailed attendance note of client's wishes and advice given
- Write to your client after the meeting to record advice given
- Send a draft will to your client for approval
- Arrange to see client for execution so that you can oversee the process
- If unable to oversee execution, send will together with clear instructions to execute
- If client does not understand English, arrange for an independent translator

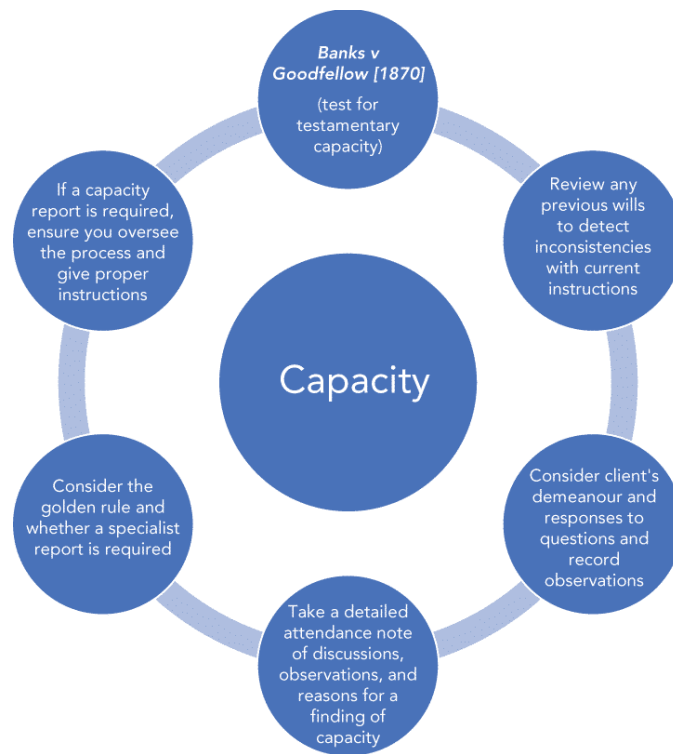
Figure 3.5a



Capacity

- *Banks v Goodfellow [1870]*: test for testamentary capacity
- Review any previous wills to detect inconsistencies with current instructions
- Consider client's demeanour and responses to questions and record observations
- Take a detailed attendance note of discussions, observations, and reasons for a finding of capacity
- Consider the golden rule and whether a specialist report is required
- If a capacity report is required, ensure you oversee the process and give proper instructions

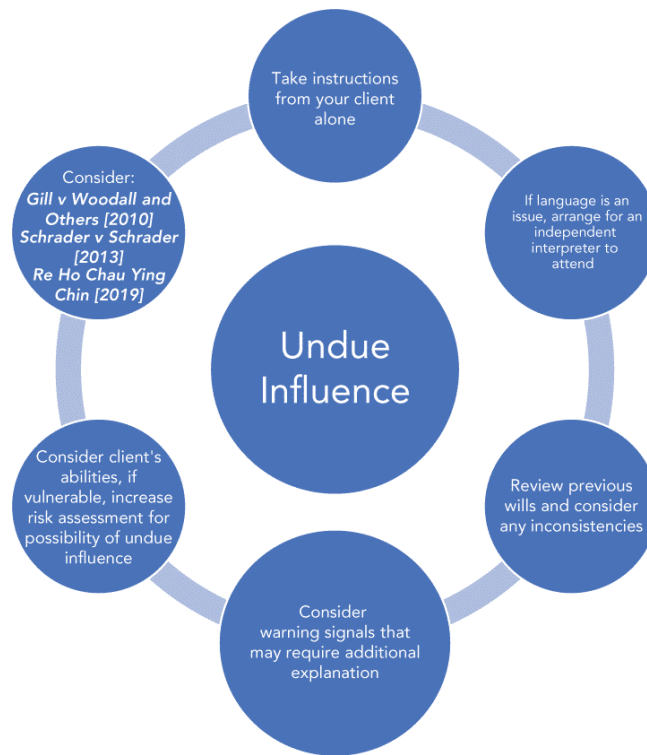
Figure 3.5b



Undue influence

- Take instructions from your client alone
- If language is an issue, arrange for an independent interpreter to attend
- Review previous wills and consider any inconsistencies
- Consider warning signals that may require additional explanation
- Consider client's abilities; if vulnerable, increase risk assessment for possibility of undue influence
- Consider:
 - *Gill v Woodall and Others [2010]*
 - *Schrader v Schrader [2013]*
 - *Re Ho Chau Ying Chin [2019]*

Figure 3.5c



Will execution

- s9 Wills Act 1837 (as amended): Familiarise yourself with the requirements for proper execution.
- Make arrangements to see client either at office or at home to ensure s9 requirements fulfilled
- If there is any doubt as to whether there will be two witnesses available, bring someone with you to act as second witness
- Read or summarise will to the client, to satisfy yourself the client truly knows and understands the content and its effect

- If language is an issue, ensure the will is translated in the client's native language and an independent interpreter is on hand to translate any questions and answers
- If client insists on attending to execution without you, send clear instructions on execution and ask the client to return the executed will so that you can check it complies on the face of it

Figure 3.5d

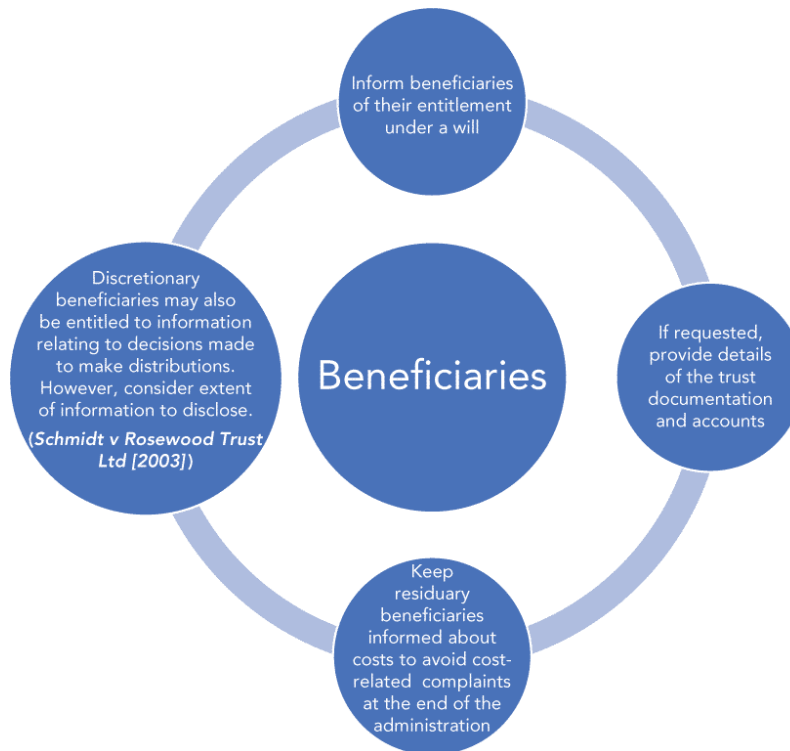


Beneficiaries

- Inform beneficiaries of their entitlement under a will
- If requested, provide details of the trust documentation and accounts
- Keep residuary beneficiaries informed about costs to avoid cost-related complaints at the end of the administration

- Discretionary beneficiaries may also be entitled to information relating to decisions made to make distributions. However, consider extent of information to disclose (*Schmidt v Rosewood Trust Ltd [2003]*).

Figure 3.5e



You have completed Chapter 3.

EXIT