Succession Law

Trustee Duties (Hypothetical Scenario)

The first matter in need of clarification is the knowledge that a Mrs Matilda Wilson who was originally appointed as co-executor at the time the will was executed on 22 May 2003, divorced Mr Wilson in June 2004. In accordance with s.18 (a) of The Wills Act 1837 Mrs Wilson would at the date of the dissolution have been legally declared dead[1] as far as her powers of appointment extend, which translates that Mr Alan Watson would now become the sole executor and no further contact need be made with Mrs Wilson.

The second is that the codicil made by Mr Wilson on the 18 November 2012 revoking a £50,000 [fifty-thousand pounds] legacy for his former housekeeper, appeared to have been made under the influence of alcohol which raises concerns as to its validity, particularly as it was written on the back of a paper plate and it is not clear whether it was attested in accordance with s.9 of The Wills Act. With regard to the intoxication of Mr Wilson at the time the codicil was written, it would be wise to refer to *In The Estate of Heinke*[2] whereby the court held that a codicil drawn up whilst drunk was considered void in accordance with the *Banks v Goodfellow*[3] test[4]; subsequently referring back to the pre-existing will and denying revocation (clear criteria for mental capacity can also be found in ss. 1-3 of The Mental Capacity Act 2005). With regard to the material used for creation of the codicil it would be necessary to refer to *Hodson v Barnes*[5] in order to support the method of implementation even though there is no existing domestic law limiting the type of materials written upon. Likewise, in order for the codicil to succeed within probate it must be treated in the same way as a will and therefore subject to the same formalities.[6]

'General Legacy' and 'Pecuniary Legacy' are terms defined by their substance[7] inasmuch as a general legacy is a gift of property forming part of the deceased's estate, whereas a pecuniary legacy is a gift of money. In the event that a general or pecuniary gift in a will is not in existence at the time of death, funds are sourced from within the estate to purchase property suitable to replace it (this process is subject to any outstanding debts which unless paid in full prior to the distribution of gifts will require their abatement in order to fulfil them).

In relation to the residue of the estate, Mr. Wilson has been very specific about whom he wished to benefit; those being his daughter Anne and nephew Nathan Metcalfe. Under the terms of The

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[1] (a) Provisions of the will appointing executors or trustees or conferring a power of appointment, if they appoint or confer the power on the former spouse, shall take effect as if the former spouse has died on the date on which the marriage is dissolved or annulled.

[2] (20 January 1959)

[3] [1870] LR 5 QB 549.

[4] 'It is essential to the exercise of a [testamentary] power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and , with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise the of his natural faculties-that no insane delusion shall influence his will in disposing of his property and bring about a disposal of which , if the mind had been sound, would not have been made'

[5] [1926] 43 TLR 71.

[6] s.9 No will shall be valid unless (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and (b) it appears that the testator intended by his signature to give effect to the will; and (c) the signature is made or acknowledge by the testator in the presence of two or more witnesses present at the same time; and (d) each witness either (i) attests and signs the will; or (ii) acknowledges his signature , in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation shall be necessary.

[7] s.55(1)(x) Administration of Estates Act 1925 'includes an annuity, a general legacy, a demonstrative legacy so far as it is not discharged out of the designated property, and any other general direction by the testator for the payment of money, including all death duties free from which any devise, bequest or payment is made to take effect'

Trustees Act 1925 Alan Watson has a duty to administer the residual estate as executor and failure to do so renders him liable for any associated penalties; however s.27 of The Trustees Act provides him with freedom from liability provided he takes specific steps[8] to advertise of the intention to distribute the estate including the requirement that those who can provide evidence they are the named beneficiaries, must make themselves known within two months of said advert. Due to the fact that Anne is known to be living in London and Nathan in Suffolk, an advertisement placed in the London Gazette and any local Suffolk or Harstonbury newspaper provides suitable notice if any other reasonable steps taken to trace them fail. With regard to the misspelling of Nathan's surname s.20 of The Administration of Justice Act 1982 allows the court to rectify the omission[9] so as to allow the executor to carry out the testator/trix's intentions.

Mr Watson revealed that the will was torn, and that the tearing has resulted in the removal of the last three letters of Mr.Wilson's surname, along with the end of the date the will was signed. S.20 of The Wills Act reads:

> No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid or by another will or codicil…or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

In this instance there is no way to know if the tearing was accidental or by design and without extrinsic evidence to support proof of intention, it would be hard for any probate court to uphold the partial destruction as revocation,[10] while consideration would also be given upon the state of the will after the fact[11].

Mark Watson was left a pecuniary legacy of £25,000 [twenty-five thousand pounds] which he is looking to disclaim[12] for taxation reasons. The process that would need to follow would be that in accordance with s.142 (a)(b) of the Inheritance Tax Act 1984 Mark would need to put his disclaimer in writing within a two-year period in order to avoid liability for taxation of said funds should he die anytime in the seven years following his disclaimer. That said, disclaiming by an informal act[13] is more readily presumed where it is to the manifest disadvantage of the beneficiary to retain the gift.[14] This sum would now fall into residue and be equally split between Anne and Nathan (subject to inheritance tax) so Mark would not be able to request any specific measures with regard to recommending a suitable charity to benefit in lieu.

Mark Watson requested that one of the solicitors employed by the law firm that prepared his will, should draft a codicil allowing them to inherit a pecuniary legacy of £20,000 [twenty-thousand pounds], and that in the event that the intended beneficiary predeceases Mark, another employee of the same firm should receive the gift. This scenario conflicts with the Solicitors Regulation Authority Code of Conduct 2011, in particular IB (Indicative Behaviour) (1.9) which suggests 'refusing to act where your client proposes to make a gift of significant value to you or a member of your family, or a member of your firm or their family, unless the client takes independent legal advice.' That aside, there is no current law rendering such an action as unlawful as per viscount Simonds[15]:

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[8] (1) With a view to the conveyance to or distribution among the persons entitled to any real or personal property, the trustees of a settlement…or personal representatives may give notice by advertisement in the Gazette, and in a newspaper circulating in the district in which the land is situated and such other like notices, including notices…as would in any special case, have been directed by a court of competent jurisdiction in an action for administration.

[9] Joshi v Mahida [2013] EWHC 486 (Ch).

[10] Hobbs v Knight [1838] 163 ER 267.

[11] Doe d. Perkes v Perkes [1820] 3 B&A. 489.

[12] Scott (Deceased) Re [1975] 1 WLR 1260.

[13] Harris v Watkins [1856] 2 K & J 473.

[14] F. Barlow, (ed) *Williams on Wills* (3rd supp, 9th edn, LexisNexis 2012) p124

[15] Wintle v Nye [1959] 1 WLR 284.

> It is not the law that in no circumstances can a solicitor or other person who has prepared a will for a testator take benefit under it. But that fact creates a suspicion that must be removed by the person propounding the will. In all cases the court must be vigilant and jealous.

However, IB (1.9) is paradoxical because Principles 2 and 4 of the SRA Code of Conduct also enforce that any solicitor working with a client must treat their clients 'fairly' and 'yet not act if there is client conflict or a significant risk of an own interest conflict'. It must also be noted that both the principles and outcomes contained within the SRA Code of Conduct are mandatory whereas indicative behaviours are non-mandatory. All of this translates that although Mark's request is not impossible to execute, it would be subject to very stringent examination by the court and unless proven conclusive of the deceased's intentions,[16] likely challenged by any remaining family members[17].

Executor Duties (Hypothetical Scenario)

David Wall appointed his wife Lucy Wall as executor of his will with his cousin Thomas Menon acting as executor in the event that Lucy was to predecease him. In 2006 Lucy Wall died and upon the death of David his cousin Thomas stated that he no longer wanted to act as executor and had planned to leave the country three months from date of death. Because of his decision Thomas is legally required to complete a deed of renunciation for submission to probate. Immediately after David died Thomas carried out a number of actions for his cousin including obtaining a death certificate and certified copies, making funeral arrangements and settling a small debt with a local newsagents. In such circumstances there are specific actions that render a person *executor de son tort,* which is to say that by performance it is implied that an individual has accepted the role of executor and certain actions will have been construed as 'intermeddling' with the deceased's estate.

Acts of necessity or compassion for loved ones are not seen as intermeddling as was supported in *Pollard v Jackson*[18], whereupon a tenant who had been living in a property occupied by the owner, continued to live in the home after the owner had died. It was after this passing that the tenant cleared space from the area once occupied by the deceased, in addition to burning rubbish left as a result before moving himself into the now vacant part of the house. The appeal court held that despite his actions he had not done anything resembling that of an executor and had not therefore become a constructive trustee for the purposes of a claim bought by the daughter of the owner (although payment of debts does fall under that scope). Depending on the courts interpretation Thomas could be seen to have intermeddled and as such, surrendered any right to renounce his position. Alternatively should the courts take a lenient view of his involvement and the relatively small debt value, renunciation could be permitted. This would result in the court referring to s.50(1)(a) of the Administration of Justice Act[19] and if needed, s.1 (2) of the Judicial Trustees Act 1896[20] to replace Thomas Menon with a suitable administrator of David's estate prior to probate as per *Goodman v Goodman*[21]*;* a case where the court of appeal dismissed a claim preventing such an action. In this instance the wife of her late husband and executrix-beneficiary had applied for an independent professional to administer the estate whereupon their two sons, who were also executors of said estate opposed the request. After careful consideration the court took the view that any argument contrary to s.50 of the Administration of Justice Act could not apply where a person named as executor/trix had not sought to obtain grant of probate prior to any application to substitute.

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[16] Fuller v Strum [2001] EWCA Civ 1879.

[17] Royal Bank of Scotland v Etridge [2001] UKHL 44.

[18] Pollard v Jackson [1995] 67 P & CR 327.

[19] (1) Where an application relating to the estate of a deceased person is made to the High Court under this subsection by or on behalf of a personal representative of the deceased or a beneficiary of the estate, the court may in its discretion (a) appoint a person (in this section called a substituted personal representative) to act as personal representative of the deceased in place of the existing personal representative or representatives of the deceased or any of them.

[20] (2) The administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee, within the meaning of this Act

[21] Goodman v Goodman [2013] EWHC 758 (Ch).

Gifts (Hypothetical Scenario)

The Beneteau 670 Motor Boat and Honda 580 Adventurer Inflatable Rib Boat left for David's friend Jonathan are considered specific[22] gifts but as there was no mention of a surname and with the knowledge that David had two friends named Jonathan, the gifts will both fail as noted in *Dowset v Sweet*[23] where a Gideon Hayward left a legacy of £100 to John and Benedict Sweet, the two sons of John Sweet. John Sweet's sons were called James and Benedict but it was also found that John Sweet had another son named John, who had predeceased Gideon. It was also learned that the testator often referred to James as 'Jacky'. Upon consideration Lord Thurlow decided 'it is within all the rules of ambiguities, therefore…the evidence was *not sufficient to show intention*, and then it became uncertain.'[24] The Honda 580 Adventurer Inflatable Rib Boat will also fail under the doctrine of ademption as it was stolen from Buckden Marina in 2012 and was never found, whereas the Beneteau 670 Motor Boat will fall into the residue of the estate.

David left his daughter Charlotte and son Angus pecuniary legacies of £200,000 [two-hundred thousand pounds] each but Charlotte died in 2012. In some circumstances where a beneficiary predeceases the testator/trix any gift made under a will pass under the intestacy rules. On this occasion s.33 (1)(a) of the Wills Act provides that where:

> A will contains a devise or bequest to a child or remoter descendent 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 by the will, the devise or bequest call take effect as a devise or bequest to the issue living at the testator's death.

This means that the gift shall be passed on to her remaining children Katherine and Heather, being divided equally between the two as per s.33(3) of the Wills Act. The wording of the gift of consisting of 'my' Georgian Oak Bureau would provide that it is a specific gift, which in this case has not left the estate of David, rather it has been *loaned* to the Saffron Walden Heritage Museum in Essex. If the bureau had been *donated* them it would be fair to say that it was no longer part of the estate and should therefore fall under the doctrine of ademption, which would result in Georgina Moncrieff becoming a disappointed beneficiary.

David left a 1964 Porsche 356 C to his niece Brenda Raishbrook, but the car was sold in 2009 and the funds raised were used to purchase a 1965 Mercedes Benz 230SL. In this instance one would need to look at the courts opinion regarding a change in form or substance in order to circumvent ademption. Because the car specified in the will was of a very different make and model and production year to the car which replaced it, a change in substance would stand as agreed in *Slater v Slater*[25]*;* whereupon the testator had bequeathed all profit derived from monies previously invested in the Lambeth Waterworks Company to an existing beneficiary. Two years prior to his passing, Lambeth Waterworks Company had been acquired by the Metropolitan Water Board at which point stock first purchased had been issued to the testator as compensation arising from the takeover. The appeal court held that due to the nature of the change of company name the new shares could not pass under the bequest as they had undergone a change of substance. This case could also be used to distinguish the argument that an alteration in the overall form[26] of the car ought to apply, resulting in the 1965 Mercedes Benz 230SL falling into the residue of the estate.

Lucy Wall had an eight year-old son Sam from a previous marriage to David, who he always treated as part of the family both finically and emotionally. Sam was not included in David's will however

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[22] Rose, Re; sub nom. Midland Bank Executor & Trustees Co. Ltd v Rose [1949] Ch 78.

[23] Dowset v Sweet [1753] 27 ER 117.

[24] Dowset v Sweet [1753] 27 ER 117. (Lord Thurlow) (emphasis added)

[25] Slater, Re; sub nom. Slater v Slater [1907] 1 Ch 665 CA.

[26] Clifford, Re sub nom. Mallam v McFie [1912] 1 Ch 29 Ch D.

his mother Lucy was specified as the sole beneficiary of the remaining estate subject to all debts, gifts and costs outstanding (this would include the Beneteau 670 Motor Boat and Mercedes Benz 230SL that both failed as legacies under the doctrine of ademption). As is already known, Lucy predeceased David and under the rules of intestacy it is considered that David has now died partially intestate. This is because the deceased may have made a valid will which dealt with the whole of his or her estate but the residuary gift may fail in whole or part (for example, because a residuary beneficiary predeceases the testator and the will does not contain an substitutional gift.[27])

The Administration of Estates Act 1925 provides that on the death of a person intestate as to any real or personal estate, such estate shall be held on trust by his personal representative with the power to sell it.[28] Furthermore the Administration Of Estates Act also provides that where the testator/trix dies intestate (partially or wholly) and has left issue, the remaining spouse will share the estates with those children. In this instance Lucy Wall predeceased David so the remaining estate held on trust will be decided between the three children, Katherine, Heather and adopted son Sam. Sam is entitled to an equal claim under s.39 of the Adoption Act 1976[29]. With Katherine being aged twenty-two, her interest would be *vested* as she is over the age of eighteen, whereas Heather aged sixteen would have a *contingent* interest. It is not possible to ascertain Sam's exact age as the history of the marriage is not known, however he would fall under either of the relevant conditions described. Once either Heather or Sam (on the assumption he is of a similar age) reach eighteen their interest would become *vested* as in 'possession of life-long ownership over any property received' rather than subject to maturity or marriage.

David has chosen to leave a pecuniary gift of £15,000 [fifteen-thousand pounds] to the East Anglia Canine Rescue Society to help save the lives of abandoned dogs. Unfortunately the registered charity ceased to exist three years prior to his death which under normal circumstances and observing the rule of uncertainty of objects, a pecuniary charitable gift found to be lapsed would fall into the testator/trix's residual estate as demonstrated in *Ogden v Shackleton*[30] where the testator had failed to provide *exact* intent regarding a partial legacy left for 'the Blind Home, Scott Sheer, Keighley for the benefit of the patients'. It was learned that a 'Keighley and District Association for the Blind' did exist at the time of death but was neither a charitable organisation nor operational in the manner of housing patients. The court held that the gift was therefore non-relatable to such circumstances and must pass into intestacy.

There are however, exceptions whereby the court can apply under the doctrine of *cy-près* for a charitable gift to remain in substance to allow another registered[31] charity of a similar or 'as near as possible' nature to receive the legacy. In order to uphold this application it must be made clear and evident that the testator/trix intended such a gift to be used in a charitable way and not for the specific benefit of the charity itself which was defined in *Rymer v Stanfield*[32] where in a similar vein to *Ogden,* a legacy of £5000 was left to the resident rector of St.Thomas Seminary for the purpose of educating priests within the diocese of Westminster. At the time the will was made the seminary was held in Hammersmith but shortly before the testator died it had been closed, with all existing students continuing to learn in Birmingham. The court held that the bequest was for the benefit of a specific institution and that having ceased operations during the testators lifetime, the legacy could not be applied cy-près but instead lapse into residue.

David's chosen words were 'to help save the lives of abandoned dogs' which can be readily construed as a qualifying intention to benefit such an organisation should one be found. Provided the courts application was successful, the pecuniary gift of £15,000 [fifteen-thousand pounds] would

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[27] J. Barlow, L. King, A. King Wills, *Administration and Taxation Law and Practice* (11th Edn, 2014) p48

[28] The Administration Of Estates Act 1925 s.33 (1)

[29] (1) An adopted child shall be treated in law (a) where the adopters are a married couple, as if he had been born as a child of the marriage (whether or not he was in fact born after the marriage was solemnized)

[30] Ogden v Shackleton [1978] 3 ALL ER 92.

[31] Charities Act 2001 s.35

[32] Rymer v Stanfield [1895] 1 Ch 19.

ultimately be distributed and saved from lapse, as was the outcome of *Hannen v Hillyer*[33]. The testatrix in question left various pecuniary legacies to established charities designed to aid numerous causes, one of which was 'the Home for the Homeless, 27 Red Lion Square, London'. At the time of the will it was agreed there was and never had been any charitable institution named 'Home for the Homeless' however the court decided that the term 'institution' was broad enough to include any authority or person capable of administering the funds on the proviso that their existence served to aid the homeless within London.

[33] Hannen v Hillyer [1902] 1 Ch 876.

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