影印版法学基础系列

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ESSENTIAL SUCCESSION

安德鲁·伊沃比
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图书在版编目(CIP)数据

继承法基础=Essential Succession:第2版/(英)安德鲁·伊沃比(Andrew Iwobi)著.—武汉:武汉大学出版社,2004.5
(影印版法学基础系列)
ISBN 7-307-04229-0

Ⅰ.继… Ⅱ.安… Ⅲ.继承法—英国—高等学校—教材—英文
Ⅳ.D956.13

中国版本图书馆CIP数据核字(2004)第034283号

著作权合同登记号:图字17-2004-010

责任编辑:张 琼 王承志 版式设计:支 笛

出版发行:**武汉大学出版社** (430072 武昌 珞珈山)
(电子邮件:wdp4@whu.edu.cn 网址:www.wdp.whu.edu.cn)
印刷:武汉大学出版社印刷总厂
开本:920×1250 1/32 印张:8.625 字数:356千字
版次:2004年5月第1版 2004年5月第1次印刷
ISBN 7-307-04229-0/D·568 定价:14.00元

本书导读

本书以英国判例法为背景，详细而全面地介绍了英国继承法的基本知识。全书从遗嘱基本特性的分析入手，指出了一项有效的遗嘱所应具备的形式要件。通过对英国法律关于遗嘱形式要求的发展变化的介绍，提出了遗嘱"苛求严格的法律形式是否恰当"这一现实问题。作者结合英国遗嘱法第9条的修改，阐明了正式生效的遗嘱文件所应具备的几个要件；随后，作者介绍了几类特殊立遗嘱人包括正在服役的士兵、正出海在外的水手或海员以及皇家海军等所立遗嘱的情况。

该书第三部分主要讨论了立遗嘱人立遗嘱的能力与意图这两个问题。为了使一项遗嘱合法有效，立遗嘱人必须具备订立遗嘱的能力，这意味着他必须达到法律规定的最低年龄，同时心智健全。如果立遗嘱人既不知道又不能证明遗嘱的内容或者他是在受欺诈、胁迫或不当影响下所立遗嘱，则该遗嘱无效。

即使一个心智健全的立遗嘱人按照遗嘱法所要求的方式订立了一项遗嘱，但在其死后遗嘱的效力也会因某些事件而受到实质性的影响，诸如遗嘱的撤销、变更、恢复生效与重新宣布。一项合法有效的遗嘱或遗嘱附录也会因为立遗嘱人建立新的婚姻关系、订立新的遗嘱或附录或者通过其他合法文件做出撤销的意思表示等行为而失去法律效力。立遗嘱人也可以通过遗嘱附录、行间书写或涂改删除等形式对所立遗嘱进行修改。被撤销的遗嘱或遗嘱附录也可以通过对撤销的撤销而得以恢复，立遗嘱人还可通过合法有效的附录表明其恢复已被撤销的遗嘱效力的意思。而遗嘱的重新宣布则起到确认遗嘱有效的作用，遗嘱自被重新宣布之日起发生法律效力。

该书第五部分主要探讨了遗赠的法律问题，涉及遗赠的种类及赠与不能的诸种情形。在英国法中，遗赠主要分为特别遗赠、一般遗赠、指示遗赠和剩余遗产的遗赠等几种类型。合法生效的遗嘱也会因为以下事由而导致赠与不能，如遗赠被撤销、受益人先于立遗嘱人死亡、立遗嘱人与受益人之间婚姻关系的解除或被宣告无效、受益人不法杀害立遗嘱人、遗嘱见证人为受益人本人或其配偶、受益人主动放弃遗赠、受益人或遗赠标的物不确定或者遗产终止分配等。

随后，作者结合1995年继承法的改革论述了法定继承的有关问题，主

要包括被继承人遗产分配前的管理、被继承人在全部或部分无遗嘱死亡时的遗产分配等问题。继而，作者立足于英国 1975 年继承法的相关规定，重点阐述了时效、管辖权、适用主体、正当救济条款以及法院有权发布的命令等法律制度。

最后，作者详细分析了遗产管理中所涉及的法律问题，包括遗产执行人与管理人身份的认定、被继承人债务的清偿、遗产足够或不足清偿时债务与责任的承担以及遗产的分配等问题。

本书作为介绍英国继承法律制度的基本读物，内容简明扼要、通俗易懂。作者理论联系实际，借助丰富翔实的案例，深入浅出地勾勒出了英国继承法的基本框架制度。这对于我们开展比较研究，理解和掌握英国的相关法律知识，借鉴和学习英国相对成熟的法律制度是大有裨益的。

本书中文目录及索引部分由武汉大学国际法研究所博士研究生王承志翻译并整理，纰漏之处在所难免，希望广大读者多提宝贵意见。

译　　者

2004 年 4 月

Foreword

This book is part of the Cavendish Essential series. The books in the series are designed to provide useful revision aids for the hard-pressed student. They are not, of course, intended to be substitutes for more detailed treatises. Other textbooks in the Cavendish portfolio must supply these gaps.

Each book in the series follows a uniform format of a checklist of the areas covered in each chapter, followed by expanded treatment of 'Essential' issues looking at examination topics in depth.

The team of authors bring a wealth of lecturing and examining experience to the task in hand. Many of us can even recall what it was like to face law examinations!

Professor Nicholas Bourne AM
General Editor, Essential Series
Conservative Member for Mid and West Wales
Spring 2001

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1 Introduction to Wills

You should be familiar with the following areas:

- the nature and essential elements of a will
- the contents of a typical will
- the effect of a conditional will
- the effect of contracts and promises to leave property by will and the bearing of the doctrines of mutual wills and proprietary estoppel on such contracts and promises
- alternative methods of disposing of property on death

The general nature of a will

Definitions

One of the fundamental features of the English law of succession is the right of the individual to give directions regarding the administration of his estate and disposition of his property when he dies. This right is ordinarily exercised by making a *will*.

According to Sir JP Wilde in *Lemage v Goodban* (1865), 'the will of a man is the aggregate of his testamentary intentions so far as they are manifested in writing duly executed according to statute'. This definition has subsequently been adopted in other cases such as *Re Berger* (1989) and *Re Finnemore* (1991).

Similar definitions can be found in various leading textbooks. One definition, in particular, has been judicially endorsed in such cases as *Re Berger* and *Baird v Baird* (1990). This is the definition in *Jarman on Wills*, which states that 'a will is an instrument by which a person makes a disposition of his property to take effect after his decease and which is in its own nature ambulatory and revocable during his lifetime'.

To appreciate more fully the general nature and basic features of a will, it is instructive to dwell briefly on various aspects of these two definitions.

(a) *Testamentary intentions*

A person's 'testamentary intentions' (see *Lemage v Goodban*) refers to his wishes and desires concerning the handling of his affairs in the period after his death. A person who embodies such intentions in a will is called a testator (or, if female, a testatrix). For the most part, the testator's intentions relate to 'the disposition of his property to take effect after his decease' (see Jarman's definition), but may also encompass various dimensions of his personal affairs.

Although this is not explicitly stated in either definition, English law prescribes that whatever intentions are expressed by the testator must be the product of his free will and volition. Where this is not the case (for example, because the testator is of unsound mind or has been induced to make his will by fraudulent means, coercion or the exercise of undue influence), this is liable to render the will invalid.

(b) *The requirement of writing and the contents of wills*

Both the assertion in *Lemage v Goodban* that a testator's intentions must be *manifested in writing* and Jarman's reference to a will as an *instrument*, reflect the fact that, in English law, a will is not ordinarily enforceable unless the testator's intentions have been expressed in a documentary form.

Two points are particularly noteworthy in connection with the requirement of writing:

(i) *The writing may be embodied in more than one document* – The sum total of the testator's intentions is usually contained in a single document but it is not uncommon for a testator to employ two or more documents. For instance, after executing his will, a testator sometimes finds it necessary to alter its contents in some material respect and may, for this purpose, draw up a supplementary document called a codicil. It must however be stressed that in the strict legal sense a testator can only leave one will. Consequently, as was pointed out in *Douglas-Menzies v Umphelby* (1908), where a person's testamentary wishes are set out in two or more documents, 'it is the aggregate or the net result that constitutes his will'.

(ii) *The law does not prescribe the contents of the will* – As seen from Jarman's definition, the primary concern of a typical will is to dictate the manner in which the testator's property is to devolve on his death. In addition, a testator may, if he wishes, use his will as a medium for:

- giving expression to his views on a variety of matters particularly the conduct of persons who would ordinarily be expected to benefit from his will (for interesting examples of this use of wills, see McConnell (1999) 149 NLJ 454);
- appointing executors and providing for their functions and remuneration;
- appointing guardians for the testator's infant children;
- arranging for the payment of taxes, death duties and debts and the discharge of other obligations due from the testator;
- nominating beneficiaries under any testamentary power of appointment exercisable by the testator;
- making provision for the testator's funeral and other matters relating to the disposal of his body.

Whatever directions a testator chooses to issue in his will, he is not obliged to employ any particular technical form of words. As Buckley LJ put it in *Re Berger*, 'English law does not require a document which is intended to have testamentary effect to assume any particular form or to be couched in language technically appropriate to its testamentary character'. A will may therefore consist of a simple home-made document framed in familiar everyday terms. Thus, for example, a will which simply read 'All for mother' was recognised as valid in *Thorn v Dickens* (1906).

As a matter of prudence, however, many testators prefer to execute wills prepared for them by solicitors who normally employ their drafting skills to good effect in expressing the intentions of such testators in appropriate legal terminology. The chief advantage a testator derives from retaining a solicitor to draft his will is the satisfaction that if there is some defect or deficiency in the process of preparing or executing the will or in its contents, this may render the solicitor liable on the grounds of professional negligence. On the one hand, as seen from the case of *Corbett v Bond Pearce* (2000), a solicitor may successfully be sued by a testator's personal representatives for any loss occasioned to his estate such as costs incurred in responding to judicial challenges to the validity of the will. Similarly, a prospective beneficiary who is deprived of his entitlement under the will as a result of such a defect or deficiency, may sue the offending solicitor (or other professional will writer), as seen from the following cases:

Name of case	Details of negligent act/omission
Ross v Caunters (1979)	Solicitor who prepared will failed to ensure that will was not witnessed by intended beneficiary, thereby causing gift to that beneficiary to lapse under s 15 of the Wills Act (WA) 1837.
White v Jones (1995)	Solicitor retained to prepare will delayed unduly in producing the will. T died before it was ready for execution, thus depriving T's daughters of their intended benefits under this will.
Esterhuizen v Allied Dunbar (1998)	Insurance company offered will-writing service. Its employee who was trained in will drafting (but was not a solicitor) drafted T's will, but did not supervise execution. Will witnessed by just one person with the result that those beneficiaries lost their entitlement.
Carr Glyn v Frearsons (1998)	T (one of two joint beneficial joint tenants of a house) instructed solicitor to make will devising her share of the house to B. Solicitor failed to ensure joint tenancy was severed in T's lifetime, with result that house devolved on other joint tenant by right of survivorship and B received nothing under T's will.
Horsfall v Haywards (1999)	T indicated to solicitor that he intended to devise house to his wife *for life* with remainder to her nieces. The will drafted by solicitor left house to wife *absolutely*, thereby depriving the nieces of their benefit.

For a general idea of what a will drawn up by a solicitor would look like, it is useful to look at the specimen wills contained in various succession texts, for example, Borkowski (pp 57–58), Mellows (pp 687–88) and Parry and Clark (pp 165–70). As these specimens indicate, a well drafted will usually commences with a declaration that 'This is the last will of ...' (or words to the same effect). However, even where an instrument is not declared to be a will, it will be treated as one if:

- it was executed in the manner prescribed by the WA (see below); and
- its maker intended it to take effect only after his death.

The position in this regard is illustrated by the following cases:

Name of case	**Material facts**
Cook v Cock (1866)	Duly executed document declaring that, 'I wish my sister to have my bank book for her own use' upheld as valid will.
In the Goods of Morgan (1866)	Deed executed in like manner as will and expressed to take effect on T's death upheld as a valid will.
Re Berger (1991)	Testamentary wishes embodied in Jewish '*zava*' upheld as valid will.
Re Chapman (1999)	Document entitled 'Outline Will Provisions', but which appeared to have been duly executed in the manner required of a will was held to constitute a will.

(c) *The requirement of due execution*

As well as emphasising the importance of writing in the will-making process, *Lemage v Goodban* makes it clear that a document can only take effect as a will if it has been '*duly executed* according to statute'. As we shall see further in Chapter 2, this presupposes that unless the testator is *privileged*, he must observe certain formalities prescribed in s 9 of the WA.

(d) *The ambulatory nature of wills*

A basic characteristic of a will which is highlighted in Jarman's definition is that it is *ambulatory* in nature. As Critchley explains in this connection in (1999) 115 LQR 631, p 636, this indicates that the will 'rather than being effective immediately upon execution remains indefinite and ineffective ... until the testator's death at which point it operates for the first the first time upon the circumstances as at that date'. See, also, *Countess of Berkeley v Berkeley* (1946); *Re Batty* (1952); *Re Cairnes* (1982); *Re Berger and Miller* and *Miller v Callender* (1993).

The ambulatory nature of wills has several significant implications. In particular:

- During the testator's lifetime, the contents of the will are treated as mere declarations of intention, rather than immutable instructions. Accordingly, he is at liberty to dispose of his property *inter vivos*, notwithstanding that it has already been devised or bequeathed in his will.
- For his part, a beneficiary to whom property has been left in the will cannot ordinarily restrain the testator from disposing of such property. His expected interest does not take effect until the testator's death and is liable to lapse if he predeceases the testator.
- Property belonging to the testator at his death is capable of devolving under his will even though he had not yet acquired it at the time the will was executed. For instance, if T makes a will devising 'all my real property to B' and T later buys some freehold land, which he retains till his death, this land will ordinarily form part of B's inheritance under T's will.

(e) *The revocability of wills*

Closely allied to the principle that a will speaks only from death is the fact that it is, according to Jarman, *revocable* in the testator's lifetime. Revocation may be *total or partial*. The four methods of revocation prescribed in the WA shall be dealt with in greater detail in Chapter 3.

The power of revocation is so deeply entrenched that it has been established in *Vynior's Case* (1609) that it is not extinguished even when the testator declares in his will that it is irrevocable.

Equally, where a testator contracts not to revoke his will, cases such as *Robinson v Ommanney* (1882) establish that the other contracting party cannot prevent such revocation either by *specific performance*

or *injunction*. However, as shall be seen in more detail in the next section:

- where the contracting testator later revokes the will, he may be liable in damages for breach of contract;
- where the contract not to revoke was made in the context of *mutual wills*, the effect of revocation may be negatived by the imposition of a *constructive trust* on the revoking testator.

The effect of contracts and promises pertaining to wills

It is not uncommon for a property owner to enter into a contractual agreement or otherwise make a promise to the effect that on his death his entire estate or an asset forming part of his estate shall pass under his will to a particular beneficiary. Where such a testator or prospective testator (T) fails to fulfil this agreement or promise, an issue arises regarding the remedies available to the disappointed beneficiary (B).

(a) *Contractual remedies*

(1) *Contracts to make wills*

Where T enters into an agreement with B in which he undertakes to make a will leaving property to B, there is a valid contract provided the agreement:

- is under seal or supported by consideration;
- was intended to create legal relations: see *Parker v Clarke* (1960), where the relevant intention was found to exist. Contrast *Taylor v Dickens* (1997), where such an intention was held to be absent;
- is in writing as stipulated by s 2 of the Law of Property (Miscellaneous Provisions) Act 1989, where the property to be left in the will is *land*: see *Taylor v Dickens*.

Where a contract of this nature arises, B may proceed against T for breach of contract in a variety of situations, most notably:

(i) *Where T fails to make a will at all*: If B is aware of T's failure, he cannot compel T to make a will. However, on T's death, B will be entitled to claim damages out of T's estate. Moreover, if T contracted to bequeath or devise a specific asset to B, it appears from cases like *Re Edwards* (1958) that B may be able to compel T's personal representatives to transfer the asset to him.