Parker's Modern Wills Precedents

Fifth Edition

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Tottel publishing

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by

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Preface

This fifth edition of Parker's comes hot on the heels of the fourth edition in a legislative climate that has forced will draftsmen continually to reconsider their precedents.

Recent statutory intervention includes Civil Partnership Act 2004 (in force from 5 December 2005), Gender Recognition Act 2004 (in force from 4 April 2005), Adoption and Children Act 2002 (effective after 30 December 2005), Mental Capacity Act 2005 (expected to come into force in early 2007) and, of course, Finance Act 2006 (which received the Royal Assent on 20 July 2006 but is effective from Budget day on 22 March 2006 at the latest).

Between them these statutes have introduced a same sex partnership equivalent (but not identical) to marriage; legal recognition of gender changes; new provisions concerning the adoption of children and a rewriting of the law of mental capacity. The Finance Act 2006 has radically altered the inheritance tax treatment of lifetime and testamentary trusts and has been a source of great concern amongst practitioners and the public.

This book continues to be aimed at will draftsmen including general Private Client Solicitors dealing with Wills. Wills are among the most important documents which a client will ever complete although, as with conveyancing, most clients want the job done at a rate which is of marginal profitability for the practitioner. In this practically unregulated area the successful draftsman should have sufficient background legal knowledge and a focussed proficiency in his subject. Given the ever increasing complexity of the law and the time and other pressures under which a practitioner has to work, a degree of specialisation is nowadays essential.

The draftsman must be aware not only of relevant legal points but also of pitfalls and drafting problems thrown up by the client's requirements. Bewildered clients shy from legal detail and glaze over if inundated with excessive legal theory, often of only peripheral relevance. They want practical advice and a practical approach from their will draftsman. At the same time they expect and deserve accuracy of drafting and need to have essential points explained to them. Often points of fundamental importance such as the difference between a joint tenancy and a tenancy in common, or the consequences of a discretionary trust can be the hardest to explain and some time has to be devoted to getting the point across.

The draftsman must be clear and to the point and not pave the way to dispute and uncertainty. He should thoroughly cover the legal, fiscal and other more practical

implications both in the draft and in any associated advice given to the client. Having done that the client ought to understand the terms of his will and raise queries at an early stage.

It is to be hoped that, as with previous editions, this book enables the draftsman to fulfil that goal and that the effect of changes in the law apart, it will stand as well as previous editions. This is a practical book for practical readers. Paul Sharpe, Chairman of the Institute of Professional Willwriters, has made a large number of helpful suggestions, many of which have been taken up in this edition. There is always room for improvement and comments and suggestions from other readers and users which might affect the form and content of future editions are welcomed.

Finally, I would like to thank those who helped in various ways towards the production of this edition. Thanks to Richard Wallington of 10 Old Square for the help that he has given me over the years and to my former pupilmasters Francis Barlow QC and Simon Taube QC for teaching me rather more than I am able to remember. I am also grateful for the patience and support of my clerks Keith Plowman and Marc Schofield and the staff at Tottel. Last, but not least, thanks to my wife Caroline for her tolerance and her proofreading.

The law is stated as at August 2006.

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Preface to the First edition

The aims of this book are similar to those of the earlier volume, *Modern Conveyancing Precedents*, namely:

(1) To provide a comprehensive collection of precedents which produce the full legal effect intended.

(2) To make legal documents more comprehensible to clients, and thus to assist in relations between solicitors and the public.

(3) To avoid abuse of the English language found in many traditional precedents.

(4) To avoid the confusion of thought and expression found in some traditional precedents.

(5) To make legal documents shorter, and so to save time and money for the profession and for clients.

With this in mind it might be helpful to make some comment on the principles that have been followed in drafting these precedents.

Something that lawyers should avoid whenever possible is the use of two languages, legal English and standard English, especially where a word in legal English has a meaning different from the same word in standard English.

One example of this is the word 'infant'. In standard English it means a babe, while in legal language it means a person under 21. To the public it seems absurd to refer to a 14 stone Rugby player aged 20 as an infant. In this book we have used the expression 'minor', or 'under 21'[1]. There is no need to add 'years of age' for the figure obviously does not refer to months or ounces. Occasionally care has to be used in using the word 'minor'; for instance 'a minor beneficiary' *could* mean a beneficiary entitled to a small legacy; 'a beneficiary under 21' is not ambiguous.

Another example is 'enjoy'. The implication of this word has changed; it is now 'take delight in doing or using'. At one time it implied 'to have the advantage of'. 'To enjoy the use of the drains and sewers' at one time sounded right in both legal and standard English, but it now strikes a false, rather comical note and although some dictionaries give both the former and the modern meaning, it is best avoid the word except in its present day implication.

These examples are but two of the many words which have changed in meaning during the course of time. Many lawyers, because of their inclination to follow tradition, are apt to cling to words which have become archaic, or which have

acquired a different meaning. Occasionally the use if an obsolete word is imposed by statute, but when it is not, the modern version should be used. Thus for the purposes of a Will, the word 'give' is both effective and clear. There is no reason to write 'I Give Devise and Bequeath'.

Since the publication of *Modern Conveyancing Precedents* Professor Reed Dickerson of the Indiana University School of law has written a book called *The Fundamentals of Legal Drafting*[2]. In Chapter 9 Professor Dickerson writes:

'Objectional words. The draftsman should avoid the following terms altogether (they are pure gobbledygook).'

A list of words follows, some of which are often used in this country, such as aforementioned, aforesaid, before-mentioned, herein, hereinafter, herein-before, hereunto, said (as substitute for "the", "that", or "those"), same (as a substitute for "it", "her", "him" etc), therewith, to wit, unto, whatsoever, whensoever, whereso-ever, whereof, whosoever, within-names, *witnesseth'*.

In the use of tenses and moods of verbs we have followed what has become common usage rather than what is academically correct[3]. The subjunctive mood, for example 'if she survive me', is falling into disuse in both spoken and written English. Strictly speaking, it would be correct to say or write 'if it rain tomorrow', but this would sound stilted and pedantic. There seems to be little doubt that in a decade or tow, the English subjunctive will be confined to well-worn expressions such as 'if I were you', and will otherwise be discarded.

As for the future tense, it futurity is already specified (or instance 'tomorrow' or next year') or implied, it is today unnecessary to repeat futurity in the verb. Thus we naturally use the present tense: 'When you arrive in London telephone me please' rather than 'when you will arrive in London etc.'

In the case of an expression such as 'if he has reached 21 when I die', it is the *sequence* of tenses that is important; if one thing happens first, it must imply an occurrence earlier than the later happening. The sequence in the expression given is correct.

We are continuing to simplify our language by ignoring grammatical complexities and I think most authorities would agree that English which is lucid and unequivocal is good English. Grammatical rules follow, rather than form, usage.

Some lawyers are afraid that plain English will not receive judicial approval. The answer to this is, I suggest that the use of plain English will make it less likely that a judge need be troubled about interpretation and that in the few cases where judicial interpretation become inevitable, the judge will appreciate the use of clear language. Indeed judges have often been the severest critics of the involved and complex language which is to be found in many Acts of Parliament. The forthright observations of Mackinnon LJ may be taken as an example: 'anyone may be forgiven for making a mistake about the hasty and ill-considered language' of 'this chaotic series of Acts', that 'welter of chaotic verbiage which may be cited together as Rent and Mortgage Interest (Restriction) Acts 1920 to 1939'[4].

Some lawyers, publishers and printers are apt to overdo capital initials, especially in headings. One frequently finds something like this in a heading: 'Will favour of

Wife for Life and after her Death etc', or under the heading, printed or in typescript, 'a Firm of Solicitors'. In order to cut down excessive capital initial letters, in this book we have attempted to use them only in these cases:

(1) When a word refers to a person named before, such as Testator, Vendor, Purchases.

(2) Where the word is the description of a person such as Arthur Brown of etc Medical Practitioner, and where the word refers to a specific body, institution or person, e g the 'Public Trustee'.

(3) 'Will' used as a noun is given a capital initial, to distinguish it from the verb 'will'.

This is not an important or exacting art; the object is to avoid widespread scattering of capital initials. There are many borderline cases where it does not matter whether capital initial are used or not. An amusing satire on the excessive use of capital initials is given in 'Forensic Fables' by 'O'[5]. (The fables themselves, incidentally, make excellent reading. I recommend the book to any lawyer who will find legal humour a change from precedent and text books.)

It may occur to some readers that few forms for complete Wills are provided. This is because a Will consists of a number of clauses selected by the draftsman to suit his client's individual requirements. If a considerable number of long forms were provided, the draftsman would still have to select clauses from a variety of the forms. For instance, if we provide a form of Will for a wealthy landowner, it is beyond the bounds of probability that the wishes of *your* wealthy landowner would coincide with the form presented.

It is not always possible to keep a Will short. If a testator gives fifty pecuniary legacies and another fifty gifts of furniture and personal possessions, there is no way of avoiding the Will taking up a number of pages. Yet standard clauses often can be expressed more concisely that is usually done. For example, this book presents a short attestation clause which has judicial support.

Although I had originally intended to edit this book, circumstances made it impossible for me to do so, and Eric Taylor undertook most of the work; I have done little more than to consult with him, and to deal with literary problems, and legal queries.

Although a personal note is unusual in a legal book, I feel that is may be justified in this case because the contributors and editors are engaged in the same practical work as the users of the book. We are not remote and isolated from the readers. This is shown by the hundreds of letters which I have received. None of these letters is critical, but they do include many constructive suggestions which it is intended to incorporate into a new edition or *Modern Conveyancing Precedents.*

Anthony Parker
7 Queen Street
Scarborough
December 1968

POSTSCRIPT

May I draw readers' attention to section 61 of the Law of Property Act 1925, which provides:

'Construction of expressions used in deeds and other instruments. In all ...wills ...made or coming into operation after the commencement of this Act, unless the context otherwise requires:

(a) "Month" means a calendar month;

(b) "Person" includes a corporations;

(c) The singular includes the plural and vice versa;

(d) The masculine includes the feminine and vice versa.'

Some draftsmen use unnecessarily involved wording because the overlook this very useful statutory interpretation clause.

AP

July 1969

1 At the time of writing 21 was the age of majority.

2 Publishers: Little Brown & Co, Boston, Massachusetts, USA.

3 These paragraphs were written in consultation with Brian Maxwell Parker, then Solicitor Lecturer In English, Ripon College of Education, MA (Law), BA (Oxon).

4 Quoted from Miscellany-at-Law by RE Megarry (Stevens & Sons Ltd). The Acts in question have since been consolidated in the Rent Act 1968.

5 Butterworths, Collected Edition, 1961.

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