# Introduction to Legal Practice Volume 2

Edited by
C.Blake
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SWEET & MAXWELL

# INTRODUCTION TO LEGAL PRACTICE

VOLUME 2

Edited
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# PREFACE

This is the second edited volume in a set of books published jointly by the Institute of Legal Executives and Sweet and Maxwell Ltd. It is prescribed reading for the second year of study for the Institute's Part 1 examination.

The aim of this work is the same as that of the first volume: "to introduce readers to the legal profession and to describe and explain much of the day-to-day work of a solicitor's office." For a further note on the form of the work readers are referred to the preface to Volume 1. We hope that the book will be read with interest and profit by those who have not yet begun a formal course of study for the Institute's examinations but who, by their reading, may be stimulated to do so. Those entirely outside the law may find something of value here in explaining the mysteries of legal practice.

It is necessary to say something about some specific chapters. The general approach has been to build upon the knowledge and skills that trainees will have acquired both from Volume 1 and from the courses they will have followed. The chapter on probate practice may appear daunting at first. A decision was made at an early stage to demonstrate not only how probate is obtained but how a will is drafted. In this connection it has been possible to take account of the Administration of Justice Act 1982 which makes some changes in the law relating to the formalities of wills.

The chapter on High Court procedure does not always follow the form of the chapter on County Court procedure in Volume 1. This is deliberate and is intended to allow a variety of procedures in both courts to be examined in some detail. However, it has not always been possible to take full account of procedural changes announced early in 1983 resulting from other parts of the above Act.

Many people have helped in the production of this book. In particular we wish to mention the assistance of the members and staff of the Institute of Legal Executives, notably the Chairman of the Education Committee, Peter Stevens, F. Inst. L. Ex., the Secretary-General, Dennis Hill, LL.M., and the Education Officer, Ian Watson, B.A. (Hons.) Law. The joint publishers Sweet & Maxwell Ltd. have been of inestimable service to us. The Editorial Staff have come to expect our arrival at any hour and have efficiently arranged for a complex production process (given the quantity of forms reproduced) to be completed smoothly. They have also been responsible for the preparation of the Index.

Acknowledgments are also due to Oyez Publications Ltd. for allowing us to reproduce forms used in the chapters on probate, High Court and companies procedure and to H.M.S.O. and to the Commissioners of Inland Revenue for permitting the use of Capital Transfer Tax forms.

Charles Blake
Grenfell Huddy

April 1983

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CHAPTER 1

# SUCCESSION

THE law of succession is concerned with the way in which a person's property passes on his death to those thereafter entitled to it. The deceased may have expressed his own wishes in this respect—for example, in his will. Normally to be valid a will must be in writing and comply with certain formalities required by the *Wills Act 1837*. If a person dies without leaving a valid will, the rules of intestate succession govern the devolution of the deceased's property. Sometimes a partial intestacy arises—*i.e.* where the deceased has effectively disposed by will of some, but not all, of the beneficial interests in his property. In such a case the intestacy rules will take effect subject to the provisions of the will.

In any event, certain procedural steps will be necessary in practice to enable the deceased's property to be transmitted. It is the purpose of this chapter to explore in outline these procedures by reference to two cases dealt with by the Probate Department in the firm of Messrs. Makepiece and Streiff. Mr. Amity is the partner who oversees the work of this Department, the day to day running of which is entrusted to an experienced Legal Executive, Mr. Oliver De'Ath with the assistance of a trainee Legal Executive, William. The two cases to be considered are fairly typical of many dealt with in solicitor's offices: no attempt is made to deal with all the possible complications or variations which might be encountered, though some of the more common of these may be mentioned in passing.

Capital Transfer Tax is an important matter to be considered in relation to an estate. The completion of the two main accounts to be lodged with the Revenue in this connection (CAP FORMS 200 and 202) will be explained. Neither of the two case studies will in fact involve the payment of any tax, but an indication of the action required in the event of tax being payable will be given. An explanation of the provisions of Capital Transfer Tax will not be given save to the extent necessary for understanding the completion of the necessary Inland Revenue Accounts.

One of the case studies to be examined later in the chapter is concerned with obtaining a grant of probate of the will of Mr. Willmade. The first section, however, considers some of the issues involved in the drafting of wills, illustrated by Mr. Amity's approach to Mr. Willmade's case.

## PREPARING A WILL

The preparation of wills is a matter involving considerable skill and not something to be lightly undertaken by those lacking the necessary experience and expertise. The will draftsman can turn to numerous precedents to help him with the precise wording of the various clauses to

be included in the will; but the exercise involves much more than the slavish copying of various formulae—indeed that would be a recipe for disaster, sooner or later.

The solicitor preparing a will for a client has a duty to ensure two things. First, that the will is valid and secondly, that it accurately expresses the testator's wishes.

**Validity**

There are essentially three issues involved in relation to the first matter:

1. The testator must have the necessary capacity. Normally, this means that he must be aged 18 or over, and must understand the nature of his act and its effects; the extent of his property; and any moral claims he ought to consider. In practice, in the vast majority of cases, this fundamental requirement is not likely to be seriously in issue. If there is a doubt—*e.g.* because the testator is very ill or a mental patient—medical advice should be taken. In these cases, it may also be helpful if a doctor acts as one of the witnesses.

2. The testator must have the necessary intention to make the will. This involves the intention not only to make a will but also the particular will he executes. He must, therefore, know and approve its contents. In practice this will normally be presumed from the fact that the testator had capacity and has executed the will—though special care will be necessary if the testator is blind or illiterate to show the necessary knowledge and approval: this is usually done by adapting the attestation clause to evidence the fact that the will was read over to the testator in the presence of witnesses and that he signified his approval. The presumption referred to above, however, will not be made where there are "suspicious circumstances," *e.g.* where the will substantially benefits the person who prepared it. Here, the person seeking to prove the will must remove the suspicion if the will is to be admitted to probate.

3. The formalities in the *Wills Act 1837* must be observed. There are two matters to be considered here:

(a) *Section 9.* This section, in effect, requires that a will (to be valid under English Law) must normally be in writing; be signed by the testator (or by someone else in his presence and at his direction) and have such signature made or acknowledged in the presence of two or more witnesses present at the same time. The witnesses must then attest and sign the will (or acknowledge their signatures) in the testator's presence, though not necessarily of each other.

The section specifically provides that no form of attestation is necessary. However, it is usual, and highly desirable, to include an attestation clause purporting to show compliance with the requirements of section 9, so that a presumption of due execution is raised. In the absence of such a clause, an affidavit of due execution will normally be required to enable the will to be admitted to probate; this may present particular difficulties, for example, where the witnesses are dead or cannot be traced.

(b) *Section 15.* Witnesses must be competent to act as such. A blind person or a mental patient is not so competent; but in principle a

beneficiary or executor is a competent witness to a will. However section 15 effectively deprives an attesting witness and his/her spouse of any benefit under a will; therefore a beneficiary or his/her spouse should not be a witness to a will. "Benefit" includes the benefit of a charging clause given to an executor: it is normal to include such a clause in a will appointing a professional executor, for example, a solicitor. In such a case, the solicitor/executor should not act as a witness (though strictly competent to do so); nor should any of his partners. The effect of section 15 has been modified by the *Wills Act 1968*, so that now a witness/beneficiary will not be deprived of his/her gift provided there are at least two other non-beneficiary witnesses signing as such under section 9.

**Testator's intentions**

It is the responsibility of the solicitor preparing the will to ensure that it accurately expresses the testator's wishes. This can only be done by taking full instructions from the client himself (and not, *e.g.* from the bank manager introducing his customer as a client) and giving guidance and advice on a number of matters.

**Instructions for the preparation of the will**

Almost invariably, obtaining the client's instructions for the preparation of a will involves an interview with the client—even if the client has set out his wishes in apparently clear terms in a letter to his solicitor. There may be, for example, implications in what he proposes which the client does not appreciate; he may not realise that there are alternative and possibly more advantageous ways of achieving what he has in mind; and there may be other important issues which the client should be invited to consider. At the end of the day the will prepared must, of course, be the client's will, but in practice he will often rely considerably upon his solicitor's advice and guidance to achieve the most appropriate will to suit his particular circumstances.

It would be inappropriate here to attempt to do more than outline some of the issues and considerations involved in the drafting of a will. This will be done by reference to the case of a client of Messrs. Makepiece and Streiff, who asks Mr. Amity to prepare for him a will under which the principal beneficiaries are to be his wife and children—a common enough situation met with in any solicitor's practice.

## THE MAKING OF A WILL

Mr. Willmade is an existing client of the firm and Mr. Amity acted for him when he and his wife purchased their present home some five years ago. Like many firms, Messrs. Makepiece have a simple pro forma upon which those members of the firm involved in will drafting (mainly Mr. Amity and Mr. De'Ath) may summarise the instructions upon which the draft will is to be based. The use of a form such as this can also serve as a reminder to those less experienced than, say, Mr. Amity of the main considerations upon which instructions and advice may be required; and

it may also double as a "diary note" for the purpose of recording the time spent on the matter.

The Instruction Sheet completed by Mr. Amity in this case is set out below.

INSTRUCTIONS FOR WILL

**Taken by:** CA **Date:** 4/8/82 **Engaged:** 30 mins.

**CLIENT:** IVAN WILLMADE
1 Cherry Close
Barset

**Existing will?** None

**Age:** 45 **Occupation:** Computer Salesman

**Family & Dependants:**
Wife: Sylvia Willmade (40)
Children: Brenda Joy Willmade (19) Medical Student
Christopher Robin Willmade (16) still at school

No other dependants.

**Present Estate** (A):

| | | |
|---|---|---|
| House: jointly with SW worth (net of mortgage) £40,000 | | |
| | IW's share | £20,000 |
| Shares: XYZ PLC | | £ 3,000 |
| Personal Effects: Incl. grandfather clock (£1,000) CW (£3,000) | | £ 6,000 |
| Premium savings bonds | | £ 1,000 |
| Building Society A/c (jointly with SW £20,000) | IW's share | £10,000 |
| Insurance Policies | | £35,000 |

**Lifetime Gifts** (B): None made or contemplated

**Expectations** (C): None

Total (A+B+C) £75,000

**Spouse's Estate:** (SW has part-time job)

| | |
|---|---|
| Share of net value of house | £20,000 |
| Other assets | £ 5,000 |
| | £25,000 |

**Executors:** C. Amity—charging clause
S. Willmade—if predeceases, Brenda Joy Willmade

**SPECIFIC GIFTS:** (free of tax/expenses) yes yes
B. J. Willmade—XYZ Shares
C. R. Willmade—grandfather clock

| | | |
|---|---|---|
| **PECUNIARY LEGACIES:** (free of tax) yes | Barset Dogs Home—£1,000<br>C. R. Willmade —£2,000 | |
| **RESIDUE:** | Sylvia Willmade provided she survives for 30 days otherwise to surviving children at 18 equally substitutional gift to grandchildren. | |
| **ADMINISTRATIVE PROVISIONS:** | Extend powers of maintenance, advancement, investment, insurance<br>Include Appropriation clause<br>Authority to accept receipt from infant's parent or guardian or infant himself if 16. | |
| **OTHER MATTERS:** | None (guardianship discussed, but no appointment required.) | |

**Form of instructions for will**

The first noteworthy point is Mr. Amity's confirmation that Mr. Willmade does not already have a will. Had this been the case, it might have been possible to give effect to his instructions by a codicil to his existing will. To be valid a codicil must be executed in the same manner as a will.

Mr. Amity has then noted brief details of Mr. Willmade's family, whose needs and resources will doubtless be an important factor influencing Mr. Willmade's ultimate instructions. Apart from his wife and children, there are no other dependants. This is important to establish since there might otherwise be a possibility of a claim under the *Inheritance (Provision for Family and Dependants) Act 1975*. It will also be important to consider this possibility in the event of a testator giving "unusual" instructions—for instance, omitting his wife and or children from the benefits conferred by his will.

A most important matter is to obtain some idea of the present constitution and value of the testator's estate. Obviously both in value and content, it may have significantly altered by the time of the client's death, but at least some indication of the potential Capital Transfer Tax liability can be obtained—and, where appropriate, consideration be given to some tax planning measures (*e.g.* lifetime gifts) in an attempt to mitigate the impact of that tax.

**Taxation aspects**

For tax purposes, it is also important to ascertain whether there have been any lifetime gifts, or whether any may be contemplated or advised. Capital Transfer Tax is a cumulative tax. If on his death a deceased has a cumulative total of lifetime gifts of £100,000 and leaves an estate of £50,000 to pass under his will, that £50,000 will be taxed at rates appropriate to it as the "top" £50,000 in a "combined" estate of £150,000. Generally, the consideration of the contents of a client's will affords a good opportunity to consider various financial and tax planning matters.

Clearly, in all this, the size of a client's estate is a critical factor. The advice given—both generally and in drafting the will—to the man worth £500,000 will be very different from that given to one whose estate is £50,000. And to obtain the fullest possible picture, it is obviously helpful to have in mind any expected increases in the present estate. Thus, for example, the client may stand to inherit a sizeable fortune on the death of his father. Also—and especially since both in respect of lifetime transfers and on death, transfers between spouses are normally wholly exempt from Capital Transfer Tax—it will be helpful to have some idea of the size of the estate of the client's spouse. He or she should perhaps also be advised to make a will if this has not already been done.

**Drafting the will**

Turning to the contents of the will itself, Mr. Amity has discussed with his client the choice of executors, and has established that he wishes Mr. Amity and Sylvia Willmade to act, with the substitution of his daughter Brenda in the event of Mrs. Willmade predeceasing him. Mr. Amity, as a professional man, wants to be able to charge for his services and so has secured Mr. Willmade's instructions to include a charging clause; without this, Mr. Amity could not charge a fee for the work undertaken as executor.

**Choice of executors**

The client may well have settled views on the question, but the choice of executors is a matter upon which frequently a solicitor's advice will be sought. The ultimate choice is, of course, the client's and will depend upon a number of factors such as the size and nature of the estate and the dispositions of it contemplated; the availability and suitability of relations and/or friends who might be willing to act. Generally it is sensible to consider appointing at least two individuals, especially where the will envisages a trust arising, when it will be convenient—and the usual practice—to appoint the same persons both executors and trustees. Normally any professional appointee will wish to charge for his services; so too will a trust corporation or a Bank, which will require appointment upon its standard terms and conditions. It is worth noting in this respect that such an institution will employ a solicitor to obtain the Grant, whose charges will have to be met in addition to the Banks' own fees. There is no reason why a beneficiary should not act—indeed frequently a sole beneficiary is also appointed sole executor. However, it would normally be unwise to appoint one of several beneficiaries to act alone because of the danger that a conflict of interest would arise.

**Specific gifts**

Mr. Willmade has decided to make a number of specific and pecuniary legacies. An important preliminary matter to be determined is whether or not these are to be "free of Capital Transfer Tax." In the majority of cases the tax may in any event be borne by the estate (usually by the residue) rather than by the beneficiary. However, in the case of realty the tax has to be borne by the beneficiary unless the will otherwise provides; and even in the case of other types of property it may sometimes happen (for reasons which it would be inappropriate to

explore here) that the beneficiary may have to bear some of the tax. In all cases, therefore, it is good practice to establish the testator's wishes and provide accordingly. A similar issue arises in relation to specific legacies. Normally, the expenses incurred in the upkeep and preservation of the subject matter of a specific gift, and of transfer to the legatee must, in the absence of provision in the will, be borne by the beneficiary entitled. Again, instructions should be sought and the appropriate action taken.

The specific gift of the shares proposed by Mr. Willmade will be *adeemed* (*i.e.* will fail) if he does not own any such shares on his death. It will normally be appropriate to draft the clause giving effect to such a gift to deal with possible amalgamations, takeovers, etc., so as to avoid difficulties that might otherwise arise. The doctrine of ademption will, of course, also apply to the other specific gift—of the grandfather clock—if this no longer forms part of Mr. Willmade's estate on his death.

As regards the gift to the charity—the Barset Dogs Home—a number of points arise. It is important to check that the institution concerned does indeed exist and is correctly named. Secondly, it is prudent to include provision for possible changes—*e.g.* change of name, amalgamation, dissolution. Thirdly, the clause should specify the manner in which the executors may obtain a valid receipt.

**Providing for the family**

Where, as here, the testator has a wife and children it is likely that he will wish the bulk of his estate to pass to one or more of them. There are a variety of possibilities, and it is a question of establishing the testator's priorities. It is important to remember that property passing under the will from one spouse to the other will be exempt from Capital Transfer Tax. Thus property passing from, say, husband to wife will not suffer tax on the husband's death; but that property is now part of the wife's estate and taxable as such on any lifetime transfer by her or on her death. This could cause problems if she has a considerable estate of her own; because of the exemptions and reliefs available to individual transferors and the availability of nil rate bands (currently £55,000), two estates of £100,000 each will bear less tax than one estate of £200,000. This problem could be aggravated if, for instance, the wife was to die very shortly after the husband. Hence it is usual to include "survivorship clauses" to prevent this "bunching" of estates.

Basically, the sort of provisions normally considered in these cases fall into the following categories:

(a) An absolute gift to the surviving spouse with a substitutional gift to the children in the event of the spouse predeceasing or not surviving for the survivorship period. As already explained, there will be no Capital Transfer Tax payable on the death of the spouse, but control of the ultimate destination of the testator's estate is transferred to the spouse if he/she survives.

(b) A life interest to the surviving spouse with remainder to the children. Here the surviving spouse will be treated for tax purposes as (in effect) owning the property and so the spouse exemption will apply and no Capital Transfer Tax will be payable on the death of the spouse.