WILLIAMS ON WILLS

2
PRECEDENTS TABLES AND INDEX

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Williams' Law relating to Wills

Fifth edition

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Precedents

Part A

Forms of complete wills, codicils and Statutory Will Forms 1925

Introductory note

I. GENERAL

The purpose of this note is to mention some of the practical matters that ought to be borne in mind when taking instructions for, preparing and executing wills and codicils. Most of these matters are fully considered in the text as well as in notes to the individual precedents and it is not proposed to touch on any of them more than briefly here. Nor is it claimed that the matters mentioned below constitute an exhaustive list but only that they are some of the matters more commonly encountered.

(a) Capacity

A person's capacity to dispose of his property by will is affected by a number of factors. Most obviously the would-be testator will need to be of full age (now 18 except in the case of privileged wills) and of a sound disposing mind. If instructions for a will are taken in circumstances where an attack on the testator's mental capacity is anticipated, it is a wise precaution for the will to be witnessed if at all possible by the testator's medical attendant and his solicitor and for these witnesses to make statements as to the testator's capacity, and see Templeman, J.'s remarks in *Kenwood* v. *Adams* (1975), Times, 29 November, and *Re Simpson* (1977), 121 Sol. Jo. 224. In the case of the testator's solicitor this may not be possible if he is to be an executor, but he can be present at the execution of the will. In any subsequent dispute the testator's solicitor may be called upon to give a statement to any interested party: see (1959), 56 Law Society's Gazette 619, and *Larke* v. *Nugus* (1979), 123 Sol. Jo. 337, C. A. If a solicitor, or indeed any other person, preparing a will takes any substantial interest under it he must see that the testator obtains independent advice (see *Re a Solicitor*, [1975] Q. B. 475; [1974] 3 All E. R. 853; *Tristram and Coote's Probate Practice*, 25th Edn., 676 and the Law Society's "A Guide to the Professional Conduct of Solicitors", (1974), 23).

A foreign domicile (or foreign matrimonial domicile) may affect a would-be testator's power to dispose by will of movables or even of English immovable property: *Re De Nicols*, *De Nicols* v. *Curlier*, [1900] 2 Ch. 410. And with the enactment of the Domicile and Matrimonial Proceedings Act 1973, it can no longer be taken for granted that a wife's domicile is the same as her husband's.

Other restrictions may be dictated by the nature of the testator's assets or of his interest in them (see generally Chapter 5, *ante*). The testator may own foreign property which is not freely alienable under the *lex situs*. He may be entitled to an interest in realty as a beneficial joint tenant in which case he will be unable to dispose of it by will unless he has first severed the joint

tenancy (e.g. by notice) during his lifetime. He may be entitled to a capital sum under a pension scheme under the rules of which his power of disposition may be restricted. He may have a limited interest in settled property or have a power of appointment limited to a particular class. In all cases the extent of the testator's property and his power of disposition over it must be carefully considered if possible by reference to the relevant documents.

(b) Form of will

The will is a flexible instrument capable of accommodating the universal beneficiary at the one extreme and the large discretionary class at the other. Many considerations (some of which have been referred to above) will dictate the form of the will. The extent and nature of the testator's property (and liabilities) and the circumstances and needs of the members of his family or dependants will loom large. Unless a testator has a substantial estate he should be discouraged from making elaborate provisions in his will which may make the administration of the estate difficult and expensive. A number of the more common forms of testamentary provision are briefly considered below together with some of the difficulties that may arise in connection with them.

Pecuniary legacies. These are frequently given as a token of friendship or for some charitable purpose which the testator has supported in his lifetime. There is a danger, however, that a testator's generosity in giving legacies may seriously prejudice the interests of the persons interested in residue who will ordinarily either be relatives or dependants. This danger may be aggravated by the fact that the testator's circumstances may deteriorate between the date of his will and the date of his death and by the fact that he may not fully appreciate either the extent of his existing liabilities or the effect or the incidence of capital transfer tax. Where the estate is relatively small or the aggregate amount of the legacies relatively large, provision ought to be made for ensuring that residue does not fall below a certain value. See Form B10.43 on p. 1346, *post*.

Life interests. Life interests in residue or a settled fund are frequently employed as a means of giving income security to a surviving spouse or other relative. One of the difficulties that they pose is that it is not easy to predict what the amount of income is likely to be especially in the case of a life interest in residue. Further the amount of income may fluctuate with changing economic circumstances. One way of protecting the life tenant from a reduction in income is to empower the trustees to resort to capital for the benefit of the life tenant. It should be remembered, however, that such a power may be framed or exercised in such a way as to render capital paid over to the life tenant income in his or her hands and taxable accordingly. For suitable precedents see Forms A2.11 and A2.12 on pp. 1074, 1076, *post*, and the notes thereto, and for capital transfer tax on settled property subject to a life interest see pp. 1010–1012, *post*.

Annuities. These are often employed particularly in the case of larger estates to make income provision for relatives or other dependants. While the current period of high inflation continues annuities will often fail to achieve their purpose, and the grant of an annuity to be charged on property may create capital transfer tax problems which are avoidable if the annuity is provided

for in some other way. Tax considerations also arise. Is the annuity to be paid "free of tax" and, if so, free of tax at the basic rate or at some higher rate? And what is to become of any tax repayments to which the annuitant may become entitled? These matters are discussed in Chapter 30, *ante*, and in the note on pp. 1352 *et seq.*, *post*, and suitable alternative forms are set out on pp. 1355 *et seq.*, *post*.

Specific gifts. Specific gifts of property, though frequently resorted to, are liable to ademption by a subsequent sale or other disposition during the testator's lifetime. This may not matter much where the gift is of some small personal item but where, for example, a specific gift of the testator's residence is adeemed, the testator's calculations (as well as the beneficiary's expectations) may be seriously upset. The testator may wish to include an express provision against such an event and Form B7.18 on p. 1297, *post*, may be used or adapted for this purpose. A testator should be informed that where property is specifically given the donee is *prima facie* liable to discharge any incumbrances. He should also be informed that all foreign property and U.K. real property *prima facie* bears its own capital transfer tax. He may wish to displace these presumptions if the beneficiary would be unable to discharge such liabilities without resorting to a sale: see, e.g., Form B7.4 on p. 1292, *post*, and pp. 1017 *et seq.*, for a note on incidence of capital transfer tax.

Personal chattels. For obvious reasons these should not save in specified cases be settled. A frequent device is to make an outright gift of such chattels coupled with a non-binding expression of desire as to their distribution. For a discussion of the alternative possibilities see the note on p. 1266, *post*, and the notes and forms which follow, especially pp. 1269–1270, *post*.

Business and partnership interests. These call for special care. If it is intended that the business should continue to be run by the beneficiary or the trustees suitable powers must be conferred and sufficient working capital made available. The incidence of capital transfer tax must also be considered. See the note on pp. 1139–1140, *post*, and the forms which follow.

Rights of residence. Testators are often as much concerned to provide their dependants with a roof over their heads as to provide income. This can be effected in a number of ways. For example, the will may create a strict settlement of the property in question, perhaps coupled with a supporting rentcharge. This is not nowadays a much favoured method, conferring as it does wide powers on the life tenant, including a power of sale, which he or she may choose to exercise so as to provide an income in lieu of a place to live in, thereby defeating the testator's intentions. A trust for sale of the property with the beneficiary's consent with power to permit such beneficiary to reside in the property so long as he or she desires, may more readily realise the testator's intentions. A lease of the property at a nominal rent is not a satisfactory alternative if it is determinable on death because it will be treated as a "settlement" of a disadvantageous form for capital transfer tax purposes: see p. 1290, *post*. The operation of the doctrine of ademption and the incidence of capital transfer tax in relation to realty (see p. 1017, *post*) should not be overlooked. For a fuller discussion of the merits of the various alternatives see the note on p. 1290, *post*, and for alternative precedents see Forms B7.30–B7.36 on pp. 1302–1306, *post*.

Commorientes provisions. Particular care should be taken to ensure that spouses do not so dispose of their respective estates as to create additional and avoidable liabilities to capital transfer tax to the prejudice of their issue in the event of their simultaneous deaths. Where there are no issue or dependants the order of deaths could divert the joint estate entirely to the kin of the survivor, a consequence which neither spouse may have envisaged. These considerations are discussed in the note on pp. 1261 *et seq.*, *post*, and alternative solutions are given in the forms which follow.

Strict settlements. As has already been mentioned the strict settlement, under which the powers of sale and leasing and all the important powers of management are conferred on the tenant for life, has fallen from favour and few of the forms which follow create strict settlements. One notable exception is Form A11.1 on p. 1196, *post*, which creates a form of dynastic strict settlement with life interests and remainders in tail, which would have been common in the last century. The strict settlement has been largely supplanted by the trust for sale which should ordinarily be used unless the former is specifically asked for, and care should be taken that in subjecting land to trusts a strict settlement is not accidentally created. A detailed examination of the machinery of the strict settlement is not appropriate to this work and this may be found in *Cheshire's Modern Law of Real Property*, 12th Edn., at pp. 165–196. Some of the respective advantages of the strict settlement and the trust for sale in the context of the administration of an estate are discussed in the note on p. 1290, *post*.

Discretionary trusts. Once very popular on account of its inherent estate duty advantages, the discretionary trust has now lost most of its former appeal. The Finance Act 1975 introduced a system of charging discretionary trusts to capital transfer tax which is most unfavourable; see further pp. 1114 *et seq.*, *post*, where the circumstances in which a discretionary trust can still be advantageous are also considered.

"Paragraph 15 trusts". These are trusts for persons under 25 which, if they fulfil certain conditions, attract important capital transfer tax advantages (provided in para. 15 of Sch. 5 to the Finance Act 1975). Where any beneficiary under a will may still be a minor when the testator dies, care should be taken to see that the trusts for the beneficiary satisfy para. 15. See further, pp. 1013–1016, *post*.

Ademption, lapse and incidence of capital transfer tax and other liabilities. Any one of these may defeat either wholly or partly a testator's intentions. Ademption, which has already been referred to, is fully considered in Chapter 31, *ante*, and for a precedent for its exclusion see Form B7.18 on p. 1297, *post*. The effect of the incidence of capital transfer tax and other liabilities has also already been referred to and the incidence of capital transfer tax is further considered at p. 1017, *post*. Lapse, which has not so far been mentioned, like ademption, often presents a trap for the unwary testator, for if the donee predeceases him then unless the donee is also a child or issue of the testator and leaves issue surviving the testator, the gift fails. This may be the testator's intention but equally he may if his attention is drawn to the matter wish to make some provision for the donee's family or dependants possibly by means of a substitutional gift. This matter is more fully discussed in Chapter 68,

ante, and for alternative precedents see Forms B7.39 and B14.71–B14.74 on pp. 1307 and 1406–1407, *post*.

(*c*) *Other drafting points*

Attention is drawn to the following drafting points:

The age of majority. As from January 1, 1970, this has been reduced from 21 to 18 by the Family Law Reform Act 1969 (see p. 24, *ante*). Testators have in the past very frequently adopted 21 as the age contingency which a beneficiary has to satisfy in order to attain a vested interest. No doubt some testators will begin to adopt 18 instead, but many will probably stick to 21. In most of the precedents which follow in which an age contingency is specified, 18 and 21 are inserted in the alternative. If a testator wishes to enable a minor to be able to give a good receipt then Form B10.16 on p. 1336, *post*, may be employed.

Illegitimate and legitimated children. The rules of construction relating to children and issue have also been substantially affected by the 1969 Act, the effect of which in this respect is fully considered on pp. 574–578, *ante*. The present rule of construction is that references to children and issue and any other term denoting a blood relationship will *prima facie* be treated as including a reference to persons of the appropriate class who are themselves illegitimate or claim through illegitimate persons. The new rule applies to all instruments made after 1969. In the case of a will this means not merely that the will must come into force after 1969 but that it must also have been executed after 1969. A codicil which merely confirms a pre-1970 will does not displace the common law rules of construction. The rules are similar for legitimated children, but with the important difference that they apply to the will whenever made of a testator dying on or after 1st January 1976 (Legitimacy Act 1976, s. 5).

Adopted children. Since 1950 references in wills or codicils to children are *prima facie* treated as including a reference to adopted children. For wills and codicils of testators who died before January 1, 1976, the rule applied only to persons adopted under the 1958 Act or the corresponding Northern Irish legislation and also only applied to persons adopted *before* the date of the testator's death. However, Sch. 1 to the Children Act 1975 (see Chapter 80, *ante*) provides that in relation to wills and codicils of testators dying on or after January 1, 1976 children adopted by any adoption recognised by the law of England and Wales are treated for, *inter alia*, the purposes of devolution of property as legitimate children of their adoptive parents, whether the adoption occurs before or after the testator's death.

Nephews and nieces. References to nephews and nieces and to cousins or other classes of relative may cause difficulties, e.g. where relatives of the half-blood or spouses of blood relations are or may be involved. (See generally Chapter 72, *ante*.) Where possible it is safer to refer to such relatives by name.

Rules of apportionment. The rules of apportionment laid down by the Apportionment Act, 1870, and the rules of apportionment between capital and income known as the rules in *Howe* v. *Earl of Dartmouth*, *Re Earl of Chesterfield's Trusts* and *Allhusen* v. *Whittell* are widely regarded as an administrative inconvenience, especially in the case of smaller estates, and are

frequently excluded. For suitable precedents see Form B14.4 and Forms B19.38 to B19.42 on pp. 1380 and 1473–1475, *post*.

"Free of tax" and "free of duty". "Free of tax" in relation to annuities refers to income tax, and the effect of the term is considered on pp. 244–247, *ante* (see also pp. 1355 *et seq.*, *post*). It must not be confused with "free of capital transfer tax", which is a direction concerning the incidence of the capital transfer tax on the testator's death (see further, p. 1312, *post*). "Free of duty" is a phrase that can still be used (s. 49 (5) of the Finance Act 1975), but we prefer to use "free of capital transfer tax".

Capital gains tax. Although the death of a person still constitutes a disposal of all his assets for capital gains tax purposes, under the Capital Gains Tax Act 1979, s. 49, the charge is excluded by s. 56. No special provision need therefore be made for the incidence of such tax. Where property is given to a minor contingently on attaining his majority a charge will arise on the beneficiary's satisfying such contingency under s. 54 of the 1979 Act, on the ground that he then becomes absolutely entitled to the property as against the trustees: *Tomlinson (Inspector of Taxes)* v. *Glyns Executor and Trustee Co.*, [1970] Ch. 112; [1969] 1 All E. R. 700. Some testators may therefore be tempted to give property to minors outright so as to avoid such liability, but whether this is altogether desirable is a matter that must be carefully considered in the circumstances of each case. Where powers to create fresh trusts of settled property are to be included, they should, where possible, be special powers of appointment which when exercised bring about a change in an existing settlement rather than a completely new settlement. The creation of a completely new settlement under, e.g., a power to apply capital can give rise to a capital gains tax charge: see *Hoare Trustees* v. *Gardner (Inspector of Taxes)*, [1979] Ch. 10; [1978] 1 All E. R. 791.

Income tax. The new system of income taxation introduced for the year 1973–74 and subsequent years is fully discussed on pp. 244–247, *ante*. The special taxation provision for discretionary and accumulated income there referred to in the note on p. 1116, *post*.

(d) Codicils

Codicils can be useful where a small variation of a testamentary provision is to be effected, e.g. the increase or reduction of a legacy. Where the changes are more substantial it is advisable where time permits for a fresh will to be prepared and executed, since the combined operation of will and codicil may produce unintended effects which a fresh will would have avoided. For the law relating to codicils see Chapter 21, *ante*, and for suitable precedents see the forms on pp. 1210–1218, *post*.

(e) Execution

The formal requirements for the due execution of an English will are set out in Chapters 9 and 10, *ante*. A testator who executes a will without a solicitor being present should be informed of these requirements in detail. He should also be warned that neither a witness to a will nor the spouse of such witness can in general take a benefit under the will. Such gifts will only be saved by the Wills Act 1968, if such attestation is superfluous.