### *Pilot Trusts*

**2.24** It is often convenient to leave property on trusts already created during the deceased's lifetime ("pilot" trusts) but when drafting such gifts it is important to comply with the above requirements. The trust must be already in existence and referred to as such in the will.

The document referred to becomes testamentary and must be construed with the will. Therefore anything in the document which would be invalid in the will, is inoperative.

In *Re Jones* (1942) a testator left a legacy to trustees appointed under a declaration of trust for the benefit of [X] made at the same date as the Will or "any substitution therefore or modification thereof or addition thereto which I may hereinafter execute". The gift failed on the basis that the testator was trying to reserve power to alter the gift in the will by a later unexecuted document. In *In Re Edwards' Will Trusts* (1948) a testator left the residue of his estate upon the trusts and subject to the powers and provisions of a lifetime settlement "so far as such trusts and provisions are subsisting and capable of taking effect". The settlement provided that the trust funds were to be held for the benefit of the settlor's wife and children subject to a power for him to appoint the property as he saw fit. He made an appointment after the date of the will. The Court of Appeal held that the gift to the settlement was effective but on the original terms unaffected by the subsequent appointment.

## 2. Capacity

### Age

**2.25** Persons under the age of 18 cannot make a valid will (Wills Act 1837 s.7 as amended by the Family Law Reform Act 1969 s.3(1)(a)) unless they have privileged status. Privileged status is enjoyed by soldiers on actual military service and mariners and seamen at sea (see above—Wills Act 1837 s.11).

On the death of a minor (other than one who has made a privileged will) their estate will be administered under the intestacy rules.

Persons aged 16 and over can, however, make a valid statutory nomination of certain assets provided the nomination is in writing and witnessed by at least one person. For a fuller discussion of nominations see Ch.21.

### The mental state of the testator

#### *Testamentary capacity*

**2.26** The test of testamentary capacity has traditionally been that set out in *Banks v Goodfellow* (1870) according to which a testator only has testamentary capacity



if they have "a sound and disposing mind and memory". This requires the testator to understand three things:

(a) *The nature of the act and its effects.* It is not necessary for the testator to understand the precise legal machinery involved in the will so long as they understand its broad effects.

(b) *The extent of the property of which he is disposing.* The testator is not expected to be able to produce a detailed list of every item of property owned. It is sufficient if they have a broad recollection of its extent.

(c) *The claims to which he ought to give effect.* This means that the testator must be able to bring to mind the persons who are "fitting objects of the testator's bounty" (per Sir J. Hannen in *Boughton v Knight* (1873)). It does not of course mean that having done so he must dispose of his property to those people. It is sufficient that he is capable of considering them. In *Battan Singh v Armirchand* (1948) a testator who was very ill in the last stages of consumption left his property to certain creditors stating that he had no living relatives. In fact he had three nephews of whom, the evidence showed, he was very fond. The court said that he clearly lacked testamentary capacity having forgotten the moral claims of his nephews.

In *Key v Key* (2010) Briggs J. accepted that the symptomatic effects of bereavement are capable of being almost identical to that associated with severe depression and can, therefore, mean that someone suffers a temporary loss of capacity. He accepted that it was not possible to point to any "conspicuous inability of the deceased to satisfy one of the distinct limbs of the *Banks v Goodfellow* test". However, taking the evidence as a whole, it was clear that the testator in question was simply unable during the week following his wife's death to exercise the decision-making powers required of a testator—or, at least, those propounding the will had not proved that he was. He admitted that that this was "a slight development of the *Banks v Goodfellow* test, taking into account decision-making powers rather than just comprehension", but considered that advances in the understanding of the mind and, in particular affective disorders justified it.

**2.27** The Mental Capacity Act 2005 introduced statutory provisions relating to capacity to make decisions. Section 1 provides that for the purposes of the Act a person is:

(a) to be assumed to have capacity until the contrary is established on the balance of probabilities;

(b) not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success; and

(c) not to be treated as unable to make a decision simply because they make an unwise one.

example of the latter type of mistake occurred in *Re Phelan* (1972). The testator bought three printed will forms and, thinking that every holding of shares had to be dealt with in a separate will, executed three wills in favour of X each will disposing of a separate shareholding. Each will was executed on the same day and each contained a printed revocation clause. Stirling J. held that as the words of revocation were clearly included in the wills by inadvertence and misunderstanding they could be omitted from probate.

It used to be said that the probate court will not interfere where a testator deliberately selects certain words and includes them in the will even if it is clearly shown that the testator was mistaken as to their legal effect. Thus in *Collins v Elstone* (1893) a testatrix deliberately included a revocation clause under the misapprehension that it would revoke only a small part of her earlier will. The court held that the revocation clause could not be omitted from the will. The rule is the same where a draftsman prepares a will on behalf of a testator and deliberately selects words being mistaken as to their legal effect; those words will be admitted to probate (*Re Horrocks* (1939)). The probate court has always had power to omit words from probate.

However, in *Marley v Rawlings* (2014) the Supreme Court made it clear that the modern approach to the interpretation of wills should mirror the more flexible modern approach to the interpretation of lifetime documents as set out in a number of House of Lords decisions. See, for example, Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* (2009) who said:

> "[T]here is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant."

In *Marley v Rawlings* (2014) at [20] Lord Neuberger accepted that wills were subject to the same rules of construction as other documents:

> "Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context."

Earlier case law is therefore likely to be ignored in favour of the more flexible approach indicated by the Supreme Court. In two cases decided since the Supreme Court decision (*Brooke v Purton* (2014) and *Burnard v Burnard* (2014)) first instance judges felt able to interpret wills in a way which gave effect to the clear intention of the testator without needing to consider the statutory remedy of rectification dealt with below.

**2.49** Prior to the Administration of Justice Act 1982 the court did not have any power to insert words even where it was obvious that words had been omitted accidentally. However, s.20 of that Act alters this rule to a limited extent. It provides that if a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions in consequence of:

(a) a clerical error; or

(b) a failure to understand his instructions,

it may order that the will be rectified so as to carry out their intentions. If, therefore, a typing error is made in a will the probate court can order that words included by mistake be omitted and that words omitted by mistake be inserted. Similarly if a solicitor misunderstands their instructions the court can order that the mistake be rectified. In *Wordingham v Royal Exchange Trust Co* (1991) the draftsman omitted a clause containing a power of appointment which should have been included in the will. This was held to be a clerical error and so rectification was ordered. However, if the testator or draftsman is mistaken as to the legal effect of words deliberately selected for inclusion in or exclusion from the will the court cannot interfere. *Bush v Jouliac* (2006) is a nice illustration of the difference between the two. A solicitor drafted a will leaving the testatrix's estate equally between her son and daughter. He had a clear instruction that should the son predecease his mother his share was not to pass to his daughter. The solicitor did not include words to exclude Wills Act 1837 s.33 (which gives children of a deceased child the right to the share their parent would have taken). The court held that had the solicitor been ignorant of the section rectification would not have been possible. However, the solicitor said in evidence:

> "I can confirm that my error in drafting was not a failure to appreciate section 33 of the Wills Act needed to be expressly excluded, but rather an inadvertent clerical error in failing to insert the necessary words."

Rectification was, therefore, allowed. For further recent examples see *Joshi v Mahida* (2013) where a solicitor's error in the wording of a legacy was held to be clerical and therefore rectifiable and *Kell v Jones* (2013) where the draftsman had deliberately selected the words used in the will after careful thought with the result that rectification was not possible.

**2.50** In *Marley v Rawlings* (2012) the Court of Appeal refused rectification where a husband and wife had signed each other's will. The effect of the error was that the will was invalid because it was not properly executed and rectification was only available where there was a valid will to rectify. However, on appeal the Supreme Court did allow rectification *(Marley v Rawlings* (2014)). Lord Neuberger, who delivered the judgment of the court, was persuaded that the requirements of s.9 of the Wills Act were satisfied. Mr Rawlings had signed the document in the presence of two witnesses and did so with the intention of it being his last Will and Testament. Accordingly, Lord Neuberger accepted that s.9(a) was satisfied. There was no doubt that it was Mr Rawlings's intention at the time he signed the Will that it should have effect and so s.9(b) was also satisfied. Therefore rectification was available.

## 2. Total or Partial Intestacy

**3.03** For the rules to apply, the deceased must have died either totally or partially intestate.

The deceased dies totally intestate if he or she has either made no will at all, has made an invalid will, has revoked any wills that he or she has made or has made a will which does not effectively dispose of any property.

The deceased dies partially intestate if he or she has left a valid will which disposes of only part of his or her estate. This can happen in two ways:

(a) the deceased may have made a valid will which fails to dispose of the whole estate (for example, because it contains no residuary gift). An example of such a will is one leaving money in a building society account to X but not dealing with the rest of the estate; or

(b) 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 in part (for example, because a residuary beneficiary predeceases the testator and the will does not contain a substitutional gift).

In general the same rules apply whether the deceased died totally or partially intestate. Where there are differences these will be indicated later.

## 3. Undisposed of Property is held on a Statutory Trust

### The general rule

**3.04** The Administration of Estates Act 1925 s.33(1) as amended by the Trusts of Land and Appointment of Trustees Act 1996 provides:

> "on the death of a person intestate as to any real or personal estate, such estate shall be held on trust by his personal representatives with the power to sell it."

Section 33(2) provides that:

> "The personal representatives shall pay out of:
>
> (a) the ready money of the deceased (so far as not disposed of by his will, if any); and
>
> (b) any net money arising from disposing of any other part of his estate (after payment of costs),
>
> all . . . funeral, testamentary and administration expenses, debts and other liabilities . . . and out of the residue of the said money the personal representatives shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased."



### Partial intestacy

**3.05** The statutory trust imposed by s.33 applies to a partial intestacy as well as to a total intestacy. The provisions of the will take precedence over the intestacy rules. Thus, if the undisposed of property was left on an *express* trust (for example, T leaves "residue on trust to A and B in equal shares" and A predeceases T), the express trust prevails over the statutory trust. This may appear to be a minor point but will be important if the *terms* of the express trust differ from s.33 (for example, by directing payment of inheritance tax attributable to lifetime gifts made by the deceased).

## 4. Order of Entitlement Under the Intestacy Rules

**3.06** Before considering the detailed rules relating to the entitlements of the beneficiaries it is useful to set out the basic structure of the Administration of Estates Act provisions. First, where there is a surviving spouse or civil partner he or she takes everything unless the intestate also left certain relatives.

(a) If the intestate also left issue (that is children, grandchildren and remoter lineal descendants) the spouse or civil partner and issue share the estate provided the issue satisfy the requirements of the statutory trusts.

(b) If the intestate died before the Inheritance and Trustees' Powers Act 2014 came into force (at the time of writing this is expected to be October 1, 2014) and left no issue, but left a surviving parent or parents, the parent(s) and the spouse or civil partner share the estate. The parent(s) take(s) the property absolutely or in equal shares. If no parent survives, but the intestate left a living brother or sister of the whole blood (or their issue) they share the assets with the spouse or civil partner, provided that they satisfy the requirements of the statutory trusts.

(c) If the intestate died after the Inheritance and Trustees' Powers Act 2014 came into effect (at the time of writing expected to be October 1, 2014) without issue, the surviving spouse will take the whole of the undisposed of property even if there are parents and/or brothers and sisters of the whole blood. The surviving spouse no longer has to share.

(The "statutory trusts" are defined at para.3.27, below.)

If the intestate left no surviving spouse or civil partner, the estate is distributed as follows:

(a) to issue on the statutory trusts, but if none, then to,

(Finance Act 1986 s.102)

The relevant period is the period ending with the date of death of the deceased and beginning seven years earlier or at the date of the gift if it was made within seven years of the death.

According to the Court of Appeal in *Buzzoni v RCC* (2013) the donee's enjoyment is to the entire exclusion of benefit to the donor within the meaning of s.102 even if the donor retains a benefit if that benefit is not obtained at the expense of the done.

**4.40** In *Sillars v IRC* (2004) the deceased had put a bank account into the joint names of herself and her two daughters. Her personal representatives argued that only one third of the balance should be included in her estate at death but HMRC contended successfully that she should be treated as entitled to the whole for inheritance tax purposes. There were two grounds for the decision. First, the deceased had a general power or authority to deal with the account as she thought fit and, therefore, the account was part of her estate under IHTA 1984 s.5(2). Secondly, the account was part of her estate under the reservation of benefit rules because the gift was a gift of the chose in action of the whole account and she was clearly not excluded from benefit.

Membership of a class of discretionary beneficiaries will inevitably amount to a reservation of benefit. See *IRC v Eversden* (2002) and *Lyon's PRs v HMRC* (2007).

**4.41** If a donor dies and there is property which is regarded as subject to a reservation at the date of their death, the property is treated for the purpose of inheritance tax as if it was part of their estate on death.

If property ceases to be subject to a reservation within the "relevant period" the donor is treated as making a potentially exempt transfer at that date. This means that tax will be payable on the property which was subject to a reservation if the donor dies within seven years of the property ceasing to be subject to a reservation.

There is clearly the possibility of double charges to tax on the same property.

*Example*

**4.42**

> A transferor gives a country cottage to his son in 2013 stipulating that he retains the right to spend holidays there for three months in the summer for the next four years. He dies in 2018. The initial transfer in 2013 is a PET (arguably the value transferred is reduced because of the transferor's entitlement to occupation). The termination of the right to holidays after four years in 2017 is a PET equal in value of the right to occupation. Because this is a "deemed" PET it cannot be reduced by annual exemptions. When the transferor dies in 2018 both PETs become chargeable.

Had the transferor died before their right of occupation ceased, the continued reservation of benefit would mean that the entire value of the cottage would have been included in his estate for inheritance purposes. Note that the inclusion in the estate is a fiction and is only relevant for inheritance tax purposes. The house would not be treated as part of the transferor's estate for capital gains tax purposes so there would be no uplift in value on the death of the transferor; nor would main residence relief be available on a lifetime disposal.



The Inheritance Tax (Double Charges Relief) Regulations 1987 provide a measure of relief in the case of double charges. They require alternative calculations to be made. It is necessary to consult the Rules carefully since the procedure varies according to the types of transfer involved.

## *Exceptions to the reservation of benefit rules*

**4.43** There are exceptions to the reservation of benefit rules. The gifted property must be enjoyed to the entire or *virtually* the entire exclusion of the donor so de minimis benefits can be ignored. HMRC's views on what amounts to de minimis are set out in the IHT Manual at IHTM14333. Under the Finance Act 1986 ss.102A(3), 102B(3)(b) and Sch.20 para.6(1)(a) the reservation of benefit rules do not apply to an interest in land or enjoyment of a chattel if the donor provides full consideration. The consideration must be full throughout the relevant period so rent review clauses should be included in any agreement.

In the case of land, there will be no reservation of benefit if a donor has to go into occupation because there has been an unexpected change in circumstances and as a result of old age or infirmity or otherwise, the donor is unable to maintain themselves (Finance Act 1986 Sch.20 para.6).

Section 102B of the Finance Act 1986 contains two "get outs" from the reservation of benefit rules where the donor makes a gift of an undivided share in land.

(a) There is no reservation of benefit where the donor makes a gift of a share in land; the donor and donee both occupy the land; and the donor receives no benefit connected with the gift other than a negligible one (s.4). This exception is designed to cover the situation where, for example, an elderly parent gives an interest in the family home to an adult child and both occupy the property. It is fatal if the whole house is given away or if the child moves out. In both cases the requirements of the section are not fulfilled and the reservation of benefit rules will apply (unless the donor can pay full consideration for the occupation). The donee must not pay more than a fair share of the running costs or the donor will receive a benefit. The section replaces an earlier, more restricted, exception based on a statement made in parliament in 1986 when the reservation of benefit rules were first introduced.

(b) There is no reservation of benefit where the donor makes a gift of a share in land and does not occupy the land (s.3). This exception would apply where the donor gives away let land and continues to enjoy the rental income.

**4.44** The reservation of benefit rules are very troublesome to taxpayers who are trying to enjoy their assets while reducing their exposure to inheritance tax and there have been a number of ingenious attempts to capitalise on loopholes in the legislation.

*Example*

**4.126** A dies having made chargeable lifetime transfers which leave £300,000 of the nil-rate band remaining. Her estate comprises:

| | £ |
|---|---|
| Land | 500,000 |
| Liquid Assets | 300,000 |

Her will directs that the land is to bear its own tax and is to pass to B, that a pecuniary legacy of £60,000 bearing its own tax is to pass to C, and that residue is to pass to D. No exemptions apply.

| *Band* | *Rate* | | |
|---|---|---|---|
| £ | £ | % | £ |
| First | 300,000 | nil | nil |
| 300,000 | – 800,000 | 40 | 200,000 |
| Total Inheritance Tax bill | | | 200,000 |

The tax must then be apportioned.

*Using method 1: Calculate an estate rate*

$$\frac{\text{Total Tax}}{\text{Value of Estate}} \times 100 = \%$$

$$\frac{£200,000}{£800,000} \times 100 = 25\%$$

This rate can then be applied to the property bearing its own tax passing to each beneficiary:

*B's share of tax burden*

£500,000 × 25% = £125,000

*C's share of tax burden*

£60,000 × 25% = £15,000

The rate will also be applied to the residue passing to D. The residue amounts to £240,000 that is the liquid assets of £300,000 less the £60,000 legacy:

*D's share of tax burden*

£240,000 × 25% = £60,000

The total tax payable on the whole estate is £200,000.

*Using method 2: Allocate a proportion of the total tax to each beneficiary:*

*B's share of tax burden*

$$\frac{£500,000}{£800,000} \times £200,000 = £125,000$$



*C's share of tax burden*

$$\frac{£60,000}{£800,000} \times £200,000 = £15,000$$

*D's share of tax burden*

$$\frac{£240,000}{£800,000} \times £200,000 = £60,000$$

The total tax payable on the whole estate is £200,000.

## 9. Time for Payment

### General position

**4.127** The tax on a transfer on death is payable six months after the end of the month in which death occurred. The tax on a chargeable transfer made before death is payable six months after the end of the month in which the transfer is made or, if the transfer is made after April 5, and before October 1, at the end of April in the next year. Where tax or extra tax is payable on a lifetime transfer because of the death of the donor it is payable six months after the end of the month of death.

Where tax is paid after the date on which it should have been paid interest is chargeable on it. The rate of interest is prescribed by statutory instrument.

### Instalment option

**4.128** The inheritance tax on certain types of property may be paid by instalments over a 10-year period in certain circumstances (IHTA 1984 ss.227–228).

#### *Transfer on death*

**4.129**

(a) Land of any description (this term is not further defined but clearly freehold and leasehold interests are included).

(b) Shares or securities in a company giving the deceased control of the company immediately before death.

(c) Unquoted shares or securities which did not give the deceased control provided that HMRC are satisfied that the payment of the tax in one sum would cause undue hardship.

(d) Unquoted shares or securities which did not give the deceased control where at least 20 per cent of the tax payable on the death by the person paying the tax on those shares is either tax on those shares or on those shares and other instalment option property.

(4) How is the tax liability calculated?

(5) When is the tax payable?

## What is income?

**6.04** The first problem that arises is to define the kind of receipt which attracts the charge to income tax. Most people would probably not be able to define income but no doubt would hope to recognise it when they receive it.

As there is no statutory definition of "income", over the years, lawyers have attempted to define the nebulous concept of "income" which is subject to tax. In the case of *London County Council v Att.-Gen.* (1901) Lord MacNaughten said "income tax, if I may be pardoned for saying so, is a tax on income". As a definition this is of little assistance. However, more precise guidelines have developed and it can now be said that the tax is paid on profits of an income nature, as opposed to profits arising on the disposal of a capital asset (although there are cases where capital receipts can be treated as income, such as certain premiums on leases). The distinction between these two types of receipt is, broadly speaking, that to be of an income nature, the receipt should be recurrent.

## What income is taxable?

**6.05** The charging statute for income tax is the Income Tax Act 2007 (ITA 2007) as amended by later Finance Acts. The statutes which specify the sources of income subject to income tax are the Income Tax (Trading and Other Income) Act 2005 (ITTOIA 2005) and the Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003).

The most important sources of income taxed under ITTOIA 2005 and ITEPA 2003 are:

(a) Under ITTOIA 2005:
Part 2 Trading income (so profits from a trade, profession or vocation).
Part 3 Property income (so rents and other profits from receipts from land in the United Kingdom).
Part 4 Savings and investment income (so interest, annuities and dividends).
Part 5 Other miscellaneous income (such as other annual income not otherwise charged to tax).

b) Under ITEPA 2003:
Employment and pensions income.

**6.06** A few types of income are specified in Pt 6 ITTOIA 2005 as being exempt (for example, scholarship income) and so are tax-free.

Each part of ITTOIA 2005 and ITEPA 2003 lays down its own rules for the particular type of income dealt with. For example, the rules as to what expenses can be deducted to determine taxable income vary according to the type of income. The tax year in which the income will be taxed is determined by the basis of assessment relevant to the particular part of ITTOIA 2005 or ITEPA 2003.



## What is the relevant year of assessment?

**6.07** Tax is calculated by reference to years of assessment (commonly called "tax years"). A new tax year commences on April 6 each year. The charging statutes lay down the basis of assessment—the current year basis. This requires that tax is assessed in each year on the income of that tax year.

## How is the tax liability calculated?

### *General*

**6.08** Section 23 of ITA 2007 provides that there are five main steps necessary to calculate income tax:

Step 1: calculate "total income".
Step 2: deduct any allowable reliefs (e.g. interest on a loan qualifying under ITA 2007 s.383).
Step 3: deduct any personal reliefs.
Step 4: calculate tax payable at the appropriate rates on total income less allowable and personal reliefs.
Step 5: add together the sums calculated at Step 4.

### *What is "total income"?*

**6.09** The taxpayer's "total income" is the aggregate of the taxpayer's income from all sources (after deducting allowable expenses) which is chargeable to income tax. The sources are listed at para.6.05, above. Total income is reduced by reliefs at Steps 2 and 3 to give the net income on which tax is calculated.

Total income includes sums received gross (such as trading income) and the grossed up amounts of sums which are received net of tax. Some income is received net of tax. For example, interest from banks and building societies normally has tax deducted at the rate of 20 per cent. Dividends have a tax credit of 10 per cent. Salaries will have tax deducted under the PAYE scheme. Unlike interest and dividends where the tax deducted is always at the same rate, the rate at which tax is deducted under the PAYE system varies depending on the personal circumstances of the employee.

**6.10** Income tax is calculated on the basis of a person's gross income and so it is necessary to gross up sums received net of tax (credit is then given for the tax paid or tax credit). To gross up a net sum where tax has been deducted, simply multiply the sum actually received by

*Example*

**7.32** Sam made a lifetime transfer of £400,000 to a discretionary trust on January 1, 2006 when the nil-rate band was £275,000. He had made previous lifetime chargeable transfers of £200,000 and had exhausted his annual exemptions. The trust paid the IHT (so no grossing up was required). The tax payable by the trust was 20 per cent on the excess over the available nil-rate band, i.e. on £325,000.

$$\frac{20}{100} \times £325{,}000 = £65{,}000$$

(Had the transfer been made on death, the property would have been taxed as part of the death estate before being transferred to the trustees of the settlement.)

Where a transfer is made to a discretionary trust, there is no reduction in the amount of tax if the settlor or their spouse is one of the discretionary beneficiaries since a discretionary beneficiary has no interest in the trust property for tax purposes. If the settlor is included in the class of beneficiaries, this will amount to a reservation of benefit leading to a possible charge on their death (see para.7.49, below).

**7.33** It is necessary for the trustees to know the settlor's cumulative total at the time of the transfer as it will form part of the cumulative total of the settlement for all future transfers. It is beneficial for the future taxation of the settlement if it is created at a time when the settlor has a low cumulative total. The settlor should avoid making other settlements on the same day (other than charitable ones) as they will be classified as "related settlements". The value of the property transferred to the related settlement on creation will be added to the value of the settlement being taxed and will increase the rate of tax paid.

It is only settlements created on the same day which are related. In *Rysaffe Trust Company (CI) v IRC* (2002) a settlor signed five identical discretionary settlements on the same day. His solicitors dated them on different days. He sent a cheque for £50 to his accountants who credited £10 to each settlement. At a later date he transferred five parcels of shares in the same company to the five trusts. HMRC argued that the initial creation of the settlements and the subsequent transfers were associated operations and, therefore, there was one settlement not five separate settlements. The taxpayer successfully appealed. As a matter of general trust law there were five separate settlements not one. Although they were initially identical, they each contained powers of appointment and powers to appoint new trustees so that eventually they might be very different. The associated operations rules were held to be inapplicable.

## *IHT chargeable after creation of relevant property settlements*

**7.34** After creation, there are three possible occasions of charge to IHT:



(a) when property ceases to be "relevant property" between creation and the first 10-year anniversary;

(b) on each 10-year anniversary; and

(c) when property ceases to be "relevant property" between 10-year anniversaries.

**7.35** (a) Property ceasing to be relevant property before the first 10-year anniversary. A charge is imposed on the value of the property ceasing to be relevant property (s.65). Property will cease to be relevant property when the trustees appoint capital to a beneficiary, an "exit" charge. Prior to March 22, 2006 property would cease to be relevant property if the trustees created an interest in possession in some or all of the trust property but after the changes introduced in Finance Act 2006 this ceased to be the case.

The charge is always based on lifetime rates. The actual rate of tax charged is 30 per cent of those rates as applied to a hypothetical chargeable transfer.

*Step one* is, therefore, to calculate the hypothetical chargeable transfer.

For exits in the first 10 years the hypothetical chargeable transfer is calculated by adding together the following:

- the value of relevant property in the settlement immediately after commencement;
- value of subsequent additions (at time added); and
- value of property in a related settlement (immediately after it commenced; subsequent increases in value are ignored).

*Step two* is to calculate the tax at lifetime rates on the hypothetical chargeable transfer by joining the table of rates at the point reached by the settlor in the seven years before the creation of the settlement. Other chargeable transfers made on the same day are ignored (s.68(4)). The settlor's cumulative total remains relevant to the rate of tax charged on the settlement throughout its life so as a matter of tax planning settlors should create relevant property settlements at a time when they have a full nil-rate band available. No account is taken of any earlier transfers from the settlement.

*Step three* is to convert the tax calculated into an average rate (equivalent to an estate rate). The relevant property in the settlement is charged to tax at 30 per cent of that average rate. This is referred to as the "settlement rate".

*Step four* is to calculate what proportion of the settlement rate will be applied to the transfer. One-fortieth of the settlement rate is charged for each complete successive quarter that has elapsed from creation of the settlement to the date of the transfer. This is referred to as the "effective rate". There is no charge if property ceases to be relevant property in the first quarter.

## Limited, conditional and substitutional appointments

**8.15** Most wills appoint one or more persons to act as executor for the whole of the deceased's estate and without limit as to time. However, an appointment may be limited, for example an appointment may:

(a) be limited in time (the appointment may, for example, appoint one person until another person reaches the age of majority);

(b) be limited to certain property (for example, one executor may be appointed to deal with the deceased's general estate and another to deal with business property or literary effects); and

(c) be limited as to purpose (for example, to conduct litigation).

Limited grants are dealt with in more detail in paras 8.41–8.52, below.

An appointment may also be conditional. For example, "I appoint A to be my executor provided he is a partner in the firm of A, B and Co at the date of my death."

A will may also validly provide for a substitutional appointment. For example, "I appoint A to be my executor but if he is unable or unwilling to act then I appoint B." B may take out a grant once A has renounced probate or died.

## Effect of grant of probate

### *Conclusive proof of content and execution of will*

**8.16** A grant of probate in respect of a particular will is conclusive evidence as to the terms of the will of the deceased and that it was duly executed. If a will is found to be invalid (for example, because it is found not to have been properly executed or a later will is discovered) after a grant of probate, the probate must be revoked (see paras 8.59–8.61, below).

### *Confirmation of executors' authority*

**8.17** A grant of probate merely confirms the authority of the executor conferred by the will. The authority derives from the will. An executor may, therefore, deal with the estate of the deceased without first taking out a grant (see para.11.07, below). However, a grant is in practice necessary to prove to other people that the executor has authority to deal with the property of the deceased and to pass a good title to any land in the estate.



## Executor de son tort

**8.18** The term executor *de son tort* means literally executor as a result of his or her own wrong. The expression is unfortunate since the noun is wholly misleading and the adjectival phrase almost as much so. An executor *de son tort* is a person who deals with the estate of a deceased person by intermeddling with it as if he or she were an executor or administrator. Acts which have been held to amount to intermeddling include selling property, paying debts, collecting debts and carrying on the business of the deceased. However, acts of charity, humanity or necessity are not sufficient. Thus, arranging the deceased's funeral, ordering necessary goods for the deceased's dependents and protecting the deceased's property by moving it to a safe place have been held not to amount to intermeddling. In *Pollard v Jackson* (1995) it was held that a tenant of part of the deceased's house, who kept the parts formerly occupied by the deceased clean and who burnt rubbish found there was not an executor *de son tort*. The steps he had taken could not be regarded as characteristic of executorship.

An executor *de son tort* has no authority to act in the estate of the deceased and can obtain no rights by intermeddling. However, a person who is in fact the deceased's executor and who intermeddles loses the right to renounce probate and so can be cited to take a grant (see paras 10.71–10.72, below).

**8.19** The effect of being an executor *de son tort* is that such a person becomes liable to the creditors and beneficiaries to the extent of the real and personal estate coming into his or her hands as if he or she were an executor (Administration of Estate Act 1925 s.8). He or she is also liable for inheritance tax to the extent of such property.

An executor *de son tort* can bring his or her liability to creditors and beneficiaries to an end by delivering the assets received (or their value) to the lawful executor or administrator before the creditors or beneficiaries bring an action against them.

## Power reserved to prove at a later date

**8.20** A will may appoint several people to act as co-executors. It is unnecessary for them all to join in taking the grant if they do not wish to. Those who do not take the grant may renounce their rights but if they prefer not to renounce they may have power reserved to them to take the grant at a later date if it proves desirable. Where an application for probate is made and power is to be reserved to some executors to prove at a later date, notice of the application must be given to the non-proving executors. The oath for executors, filed when the application for the grant is made, must state that this notice has been given unless the court otherwise orders (1987 Rules r.17(1)), (r.13(1) of the new Draft Probate Rules). Where the other executors are not named in the will and are partners in a firm of solicitors with the proving executors, the persons to whom power is reserved need not be given notice (1987 Rules r.17(1A)), (r.13(2) of the new Draft Probate Rules).

## *Low value estates and exempt estates*

**10.45** These are similar. Both must fulfil the following conditions:

(a) The deceased died on or after April 6, 2004 domiciled in the United Kingdom.

(b) The deceased's estate consists wholly of property passing by will or intestacy, under a statutory nomination, under a single settlement in which he was entitled to an interest in possession in settled property, or by survivorship in a beneficial joint tenancy.

(c) Of the deceased's estate no more than £150,000 was immediately before death settled property and not more than £100,000 was immediately before death situate outside the United Kingdom.

(d) The deceased made no lifetime chargeable transfers other than specified transfers not exceeding £150,000. Specified transfers are transfers made within seven years of death of cash, personal chattels, quoted shares, and land or interests in land provided they are not gifts with reservation. Business and agricultural reliefs are ignored when determining the value of specified transfers, as are transfers which are exempt under the normal expenditure from income exemption if they exceed £3,000.

(e) The deceased had no interest in an alternatively secured pension.

If those conditions are fulfilled:

(a) An estate will be excepted from the need to deliver an IHT 400 as a low value estate if the gross value of the estate plus specified transfers and before deducting IHT exemptions does not exceed the nil-rate threshold. For deaths before April 6, 2011 the nil-rate threshold was a single nil-rate band. For deaths on or after that date the threshold can be increased by 100 per cent where the deceased inherited a full nil-rate band from a predeceased spouse or civil partner. In the interests of simplicity HMRC does not allow the shorter IHT 205 to be used where the estate is below the nil-rate threshold as a result of inheriting a portion of a nil-rate band.

(b) An estate will be excepted from the need to deliver an IHT 400 as an exempt estate low value estate if the gross value of the estate plus specified transfers and before deducting IHT exemptions does not exceed 1£m and the net value of the estate after deducting liabilities and spouse and charity exemptions does not exceed the nil-rate threshold. As for low value estates the nil-rate threshold gain can be increased by 100 per cent where the deceased died on or after April 6, 2011 and inherited a full nil-rate band from a predeceased spouse or civil partner for deaths on or after that date the threshold.



## *Foreign domiciliary estates*

**10.46** These are estates where the deceased was never domiciled in any UK jurisdiction. And the UK assets consist only of cash, quoted shares or securities passing by will, intestacy or survivorship with a gross value not exceeding £150,000 and HMRC has a useful checklist on its website for decididng whether an estate is excepted. See *http://www.hmrc.gov.uk/inheritancetax/iht-probate-forms/excepted-estates.htm* [Accessed April 2014].

An estate won't be an excepted estate if any of the following is true about the deceased:

- The deceased left an estate worth more than the Inheritance Tax threshold (£325,000 in 2014/2015) or an estate worth more than £1 million to a spouse, civil partner or "qualifying" charity.
- The deceased left an estate worth more than twice the Inheritance Tax threshold (£650,000 in 2014/2015 tax year) when 100 per cent of the unused Inheritance Tax threshold could be transferred from a late spouse or civil partner.
- The deceased's estate needs a transfer of unused Inheritance Tax threshold from a late spouse or civil partner to avoid paying Inheritance Tax and less than 100 per cent is available to transfer even if the full 100 per cent isn't needed.
- The deceased had a permanent home outside the United Kingdom when they died but had a permanent home within the United Kingdom at one time.
- The deceased had assets in a trust valued at more than £150,000 or held more than one trust.
- The deceased had assets worth more than £100,000 outside the United Kingdom.
- The deceased made gifts within seven years before they died and the value of the gifts was more than £150,000 after deducting any Inheritance Tax exemptions.
- The deceased made gifts into trusts.
- The deceased continued to benefit from a gift they had made to someone else, such as their house or car (known as a "gift with reservation of benefit"—see more on this in the link below).
- The deceased had a life insurance policy that paid out to someone else—but not to their spouse or civil partner—and they had also bought an annuity (see more about insurance policies in the link below).
- The deceased had a personal pension from which they had not taken their full retirement benefits, and when they were terminally ill or in poor

of purposes in connection with the administration; for example, the payment of funeral, testamentary and administration expenses, inheritance tax, debts and pecuniary legacies. Deciding *which* assets to sell is a complex decision and the personal representatives have to consider a number of matters; for example, which assets have been specifically given to beneficiaries, which assets occur first in the statutory order for property available for payment of debts (see paras 15.11 et seq, below), which assets will fetch the best price and which assets will attract the least liability to tax for the estate and for the beneficiaries. These matters are discussed more fully in Ch.12.

## Power to appropriate

**11.10** Section 41 of the Administration of Estates Act 1925 gives the personal representatives power to appropriate any part of the estate in or towards satisfaction of any legacy or interest or share in the estate of the deceased, provided that such an appropriation does not prejudice any specific beneficiary.

**11.11** *Example*

> T leaves X a pecuniary legacy of £1,000 and the residue of the estate to Y. The residue includes a clock valued at £750. The personal representatives may let X take the clock in partial satisfaction of the legacy.

**11.12** An appropriation can only be made by the personal representatives if the appropriate consents are obtained. There are two situations to consider.

(a) *If the beneficiary is absolutely and beneficially entitled to the legacy* the consent required is that of the beneficiary or, if the beneficiary is a minor or lacks capacity to manage his or her own affairs, the consent must be that of the beneficiary's parent or guardian or receiver.

(b) *If the legacy is settled* the consent must be that of the trustees (provided they are not also the personal representatives) or of the person for the time being entitled to the income provided such a person is of full age and capacity. If the personal representatives are the only trustees and there is no person of full age or capacity for the time being entitled to the income then no consents are required. However, in this case the appropriation must be of an investment authorised by law or by the will. This limitation as to the type of property appropriated does not exist in other cases.

The asset is valued at the date of the appropriation, not at the date of death (*Re Collins* (1975)); if the asset is rising in value, therefore, a pecuniary legatee will be anxious that the appropriation be made as quickly as possible. The personal representatives will have to ascertain and fix the value of assets for this purpose as they see fit but must strive to be fair to all beneficiaries. A duly qualified valuer should be employed where necessary. Thus, in *Re Bythway* (1911) it was held that an executrix was not entitled to appropriate to herself shares in an unquoted company at her own valuation. It is possible for the will to provide that the personal representatives are to have power to appropriate at death value rather than at the date of the appropriation.



If the asset is worth more than the legacy to which the beneficiary is entitled it would appear that the power granted by s.41 cannot be exercised since in such a case the asset cannot be said to be appropriated "in or towards satisfaction" of the legacy (*Re Phelps* (1980)). The personal representatives can, however, exercise their power of sale under s.39 of the Administration of Estates Act 1925 to sell the asset to a beneficiary in consideration of a part payment of cash and the satisfaction of the legacy.

**11.13** Stamp duty used to be an important consideration in relation to appropriations but this is no longer the case. Because of the consent required by s.41, HMRC regard an appropriation as a "conveyance or transfer on sale". Instruments giving effect to the appropriation, therefore, attracted ad valorem stamp duty (*Jopling v IRC* (1940)). For that reason it was common for wills to provide that the personal representatives need not obtain the consent of a legatee to an appropriation.

Stamp duty was abolished by Finance Act 2003 s.125 except in relation to instruments relating to shares and the acquisition of certain partnership interests.

Finance Act 1985 s.84 removed ad valorem stamp duty from appropriations in satisfaction of a pecuniary legacy or in satisfaction of any interest of a surviving spouse or civil partner in an intestate's estate. Appropriations in favour of residuary legatees who received no more than their entitlement were regarded by HMRC as outside the scope of ad valorem duty although they were subject to fixed duty. Finance Act 2008 s.99 abolished fixed duty in relation to such appropriations for instruments executed on or after March 13, 2008 except in relation to land transactions. Prior to that date it was normally possible to to certify the instrument as exempt from stamp duty in accordance with the Stamp Duty (Exempt Instruments) Regulations 1987.

**11.14** In relation to land transactions stamp duty was replaced by stamp duty land tax as from December 1, 2003. However, Finance Act 2003 Sch.3 para.3A(1) provides that stamp duty land tax does not apply to the acquisition of property in or towards satisfaction of an entitlement under a will or on intestacy (unless the person acquiring the property gives any consideration for it, other than the assumption of secured debt) .

Stamp duty and stamp duty land tax are, therefore, normally not an issue in relation to appropriations.

Where a personal representative sells an asset to a beneficiary partly in consideration or satisfaction of a legacy and partly in consideration of an additional cash payment it would appear that ad valorem stamp duty may have to be charged on any instrument effecting the transaction. This is because it cannot be said in such a case there has been an appropriation *in or towards* satisfaction of a legacy. Such a transaction may be regarded as a sale for other tax purposes—for example, capital gains tax (*Passant v Jackson* (1986)).

which should be drawn to a client's attention but the following are among the most important:

(a) Jointly held property will pass to the surviving joint tenant even if the will says otherwise.

(b) If dependants and certain relatives are not provided for family provision claims may be made.

(c) Gifts of specific items will be adeemed if the items are sold or changed in substance unless specific provision is made.

(d) Unless contrary provision is made most types of gift will lapse (and fall into residue or pass on intestacy) if the donee predeceases. A gift will, however, take effect if the beneficiary survives for even a very short time or is deemed to survive under s.184 of the Law of Property Act 1925. This may not correspond with the client's wishes so that a survivorship clause should be considered.

(e) Unless contrary provision is made in the will, a person taking a property charged with a debt takes it subject to that debt (s.35 of the Administration of Estates Act 1925). Check the testator's wishes in relation to a specific gift of an asset which is (or may be at the time of death) charged with a debt.

Be particularly careful where there is life assurance linked to the debt. Make sure that there is no ambiguity as to where the proceeds of the policy are going. Normally the testator will want the person who is responsible for the debt to take the benefit of the policy so as to have funds available. This may require careful drafting.

(f) Payments from pension funds and insurance policies may be payable to beneficiaries independently of the terms of the will. In the case of pension schemes where lump sums are payable at the discretion of the trustees of the scheme, it is usually possible for an employee to leave a statement of his wishes for the destination of the sum payable. Such a statement is not binding on the trustees but will be considered by them. A client who has the benefit of such a scheme should be advised to make a statement.

## 3. Duties Relating to the Execution of the Will

### The solicitor must offer to oversee the execution of the will

13.16 The case of *Esterhuizen v Allied Dunbar* (1998) suggests that a solicitor must make the following offer:

- the solicitor will attend the client at home and supervise execution;
- the client can come to the solicitor's office and have execution overseen; or



- if the client prefers he or she can execute the will at home without supervision.

If the client executes the will without supervision the solicitor should send a letter explaining exactly how to execute the will.

### The solicitor must offer to check the will after the execution

13.17 In *Ross v Caunters* (1980) the solicitor sent the testator a letter with the will saying that attestation was required by "two independent witnesses". When the will was returned to the solicitor, one of the witnesses had the same surname as one of the beneficiaries. The solicitors did not query this. The witness was married to the beneficiary who, therefore, lost her entitlement. Megarry VC found that the solicitor had been negligent because he had failed:

- to warn the testator that a spouse of a beneficiary should not witness;
- to check whether the will was properly attested;
- to observe that the attesting witness was the spouse of a beneficiary; and
- to draw this to the attention of the testator.

In *Gray and Others v Richards Butler (A Firm)* (2000) the judge accepted that a solicitor owes a duty to a testator, at execution *and also when the will is returned after execution*. (See also the cases referred to in para.13.04, above)

### If instructed to attend a client, keep the appointment

13.18 In *Hooper v Fynmores (A Firm)* (2002) a solicitor prepared a will for an elderly client, in early September 1997, increasing the claimant's share in residue by £40,000. The solicitor who prepared the will wrote to the client asking if he would like him to bring it out for signature.

The client went into hospital and arranged that the solicitor would visit him on October 13. However, the solicitor himself went into hospital and cancelled the appointment. He did not arrange a new appointment and did not discuss the possibility of sending a substitute. The client died on October 21 without executing the will. The Court of Appeal found that the solicitor had been negligent.

Solicitors have a duty to satisfy themselves that a delay in executing a will resulting from the cancellation of an appointment will not be disadvantageous to the client. If necessary, the solicitor should appoint a substitute. An appointment with an elderly client in hospital should not to be cancelled unless the client is agreeable to it.

Sometimes clients are unwilling to execute a will. A solicitor is not required to ensure that a client executes a will. There may be circumstances where continuing to press a client could amount to undue influence. It will normally be

after the will is made. It may, therefore, be preferable simply to point out to the client the importance of reviewing the will periodically so that it can be changed if an asset specifically given is sold, destroyed or substantially changed.

It may be possible to word the gift so that the precise property is to be ascertained at the date of death (as suggested in para.16.20, above) or to give a pecuniary legacy in substitution for a legacy failing by reason of ademption.

In cases where a testator is not irretrievably wedded to making specific gifts, it may be more satisfactory to give shares of residue.

### *Sales on behalf Sales by attorney in behalf of donors who lack capacity to manage their property and financial affairs*

**16.23** The Mental Capacity Act 2005 gives the court and deputies appointed by it wide powers to deal with the affairs of persons who do not have capacity to manage their own property. There is a danger that assets will be dealt with in a way inconsistent with the terms of a will made before the loss ofcapacity. Schedule 2 of the Mental Capacity Act 2005 contains provision to ensure as far as possible that ademption of gifts in such a will does not occur. The schedule provides that (in so far as circumstances allow) testamentary beneficiaries shall take the same interest in substituted property as they would have taken in the original property. This makes it unnecessary for a new will to be made by the court.

However, there is no corresponding provision for dealings by an attorney acting under an enduring or lasting power of attorney. Hence a sale will result in ademption. The dangers of such ademption were illustrated in *Re Dorman, Smith National Childrens Home* (1994), although on the particular facts of the case the court was able to find that ademption had not taken place because the asset was replaced by another so similar that there was merely a change of form not substance. In *Banks v National Westminster Bank* (2005), however, the gift of a house sold by the attorney was adeemed.

In *Re DP (Revocation of Lasting Power of Attorney)* (2014) Senior Judge Lush described the law regarding ademption where an attorney sells an asset as "a minefield" due to conflicting judgments in different common law jurisdictions over the last twenty years.

If the attorney is aware of the terms of the will, and if estate is large enough to justify the cost, the attorney should make an application to the Court of Protection for a statutory will to provide for the disappointed beneficiary.

### *Beneficiary predeceases testator*

**16.24** **Introduction** In order to take a gift under a will a beneficiary must survive the testator. If the beneficiary predeceases the testator a legacy will lapse and fall into residue or if it is a residuary gift will pass under the intestacy rules. A beneficiary need only survive for a very short period—a minute or a second will suffice.



If a gift is to joint tenants or is a class gift, it will not lapse unless all the joint tenants or members of the class predecease the testator; if one joint tenant or class member survives the testator, that one person takes the whole gift. If a gift is to tenants in common, the share of any tenant who predeceases the testator will lapse.

A testator cannot exclude the doctrine of lapse by declaring that it is not to apply. A testator can, however, include a substitutional gift providing that if the beneficiary predeceases, the property is to pass to another person.

**16.25** A solicitor should always point out to a client the possibility that a beneficiary may predecease so that the client can consider including a substitutional clause. It is also common to include a survivorship clause in a will. A survivorship clause states that a beneficiary is only to take a benefit under the will if the beneficiary survives the testator for a stated period (usually 28 days). The effect is to prevent a beneficiary who only survives the testator by a very short period from benefiting under the will. The importance of such a clause is obvious when it is remembered that a beneficiary may be *deemed* to survive under the Law of Property Act 1925 s.184 (see para.16.26, below). Without a survivorship clause, the testator's property would pass under the terms of the beneficiary's will or to the beneficiary's next of kin under the intestacy rules. Such a devolution of property might be contrary to the testator's wishes.

Substitutional and survivorship clauses may alter the inheritance tax payable on an estate by substituting a non-exempt for an exempt beneficiary, or vice versa. Since the introduction of the transferable nil-rate band, it is not always advisable to include them in wills made by married couples or civil partners. For a fuller discussion of this topic see paras 22.58 and 22.59, below.

### *Where the order of deaths is uncertain*

**16.26** **The statutory presumption** It can sometimes happen that there is no evidence as to the order in which people have died, for example where two people die in a car accident. In such a case, s.184 of the Law of Property Act 1925 provides that for the purposes of succession to property the deaths are presumed to have occurred in order of seniority so that the elder is presumed to die first. The section applies equally on intestacy (with one exception which will be considered later).

**16.27** *Example*

| Mother | | Mother |
|---|---|---|
| \| | | \| |
| Harold 30 | = | Winifred 29 |

The question of the extent to which realty is available will only rarely be of any importance.

For example, if residuary realty is given to one person, R, and residuary personalty to another person, P, R will obviously want to insist that legacies be paid exclusively from personalty (P will be equally anxious that realty be made available).

## Undisposed of property

**16.67** The Trusts of Land and Appointment of Trustees Act 1996 amends the Administration of Estates Act 1925 s.33 to read as follows:

"(1) On the death of a person intestate as to any real or personal estate, that estate shall be held in trust by his personal representatives with the power to sell it.

(2) The personal representatives shall pay out of—

(a) the ready money of the deceased (so far as not disposed by his will, if any); and

(b) any net money arising from disposing of any other part of his estate (after payment of costs),

all such funeral, testamentary and administration expenses, debts and other liabilities . . . and out of the residue of the said money the personal representative shall set aside a fund sufficient to provide for any pecuniary legacies bequeathed by the will (if any) of the deceased."

The effect of the amended s.33(2) is, therefore, to make undisposed-of property primarily liable for payment of pecuniary legacies. Ready money will be used first but thereafter it is irrelevant whether the undisposed-of property is realty or personalty.

**16.68** *Example*

> T's will leaves a pecuniary legacy of £6,000 to L and the residue to A and B in equal shares. A predeceases T and the gift to him lapses. The estate amounts to £20,000. There are no debts. Since s.33(2) expressly directs that pecuniary legacies be paid from money arising from disposing of *any* part of the estate as to which the deceased was intestate, the pecuniary legacy will be paid from the lapsed share of residue irrespective of whether it is realty or personalty. Therefore B gets £10,000 and A's lapsed share of £10,000 is used to pay L's legacy of £6,000. The balance of £4,000 left after payment of the pecuniary legacy will pass under the intestacy rules to T's next-of-kin.



## Are there any circumstances in which s.33(2) does not apply?

**16.69** Before s.33 was amended by the Trusts of Land and Appointment of Trustees Act 1996 it was clear that the direction to pay pecuniary legacies contained in s.33(2) related only to the proceeds of the *statutory* trust for sale imposed by s.33(1). The statutory trust for sale could not apply if a will imposed an *express* trust for sale because there cannot be two trusts for sale, one statutory and one express, applying to the same property (*Re McKee* (1931)). The express trust took precedence over the statutory trust imposed by s.33(1). If s.33(1) did not apply then neither did s.33(2) which deals with the proceeds of sale arising under the statutory trust.

**16.70** *Example*

> A testator died before January 1, 1996 leaving a pecuniary legacy of £6,000 to L and directing that the residue was to be held *on trust for sale* for A and B in equal shares. A predeceased T and the gift to him lapsed. The estate amounted to £20,000.

**16.71** Since the testator had imposed an express trust for sale on the residue there was no room for a statutory trust for sale to apply to the residue. If s.33(1) did not apply to the undisposed-of property, neither did s.33(2). The question then arose of what property was to be used to provide for the payment of the legacy to L. Unfortunately the answer was by no means certain.

There were several conflicting cases—*Re Midgley* (1955); *Re Beaumont's Will Trusts* (1950) and *Re Taylor's Estate* (1969). The better view was that when s.33(2) did not apply, the payment of legacies was still governed by the pre-1926 rules. The result was that legacies were not payable primarily from undisposed of property.

**16.72** However, since the Trusts of Land and Appointment of Trustees Act 1996, it seems to the writers that in the amended s.33 the link between the two subsections is broken. Pecuniary legacies are to be paid from cash in the estate at death or produced by the sale of *any* part of the estate and, therefore, it is irrelevant whether the undisposed-of property is held on a statutory or an express trust.

If this interpretation of the new section is correct it removes an area of unnecessary complexity and uncertainty from the administration of estates. Where the will makes no special provision for the payment of pecuniary legacies, they will always be paid from cash either contained in the estate at death or resulting from the disposal of any part of the estate as to which the deceased was intestate.

## Will drafting

**16.73** Despite the probable simplification of the law it is clearly desirable when drafting wills to state expressly what property is to be used for payment of pecuniary legacies. For example, a testator may leave residue "subject to payment of

such accretions and conversely if legal proceedings are brought or claims made against the estate the personal representatives must deal with them on behalf of the estate.

## Comparison with trustees

**18.14** A personal representative may be a trustee of property left by will or passing under the intestacy rules. This may be because:

(a) the testator expressly appointed the personal representative as trustee; or

(b) the testator left property on trust but did not expressly appoint trustees; or

(c) a trust arises under the intestacy rules (although there is some doubt as to whether administrators become trustees in such a case).

Even where a personal representative is not also a trustee there are certain similarities between personal representatives and trustees:

(a) Personal representatives, like trustees, are in a fiduciary position. They must act with the utmost good faith and must not profit from their position.

(b) The provisions of the Trustee Act 1925 apply equally to personal representatives where the context admits.

**18.15** However, there are also important differences:

(a) The function of a personal representative is to wind up the estate and distribute the assets, whereas the function of a trustee is to hold assets for the beneficiaries.

(b) Executors (and probably administrators) have joint and several authority to deal with *personalty* (they must act jointly if they are to convey *land* although one personal representative can enter into a contract for sale binding on any other personal representatives *Fountain Forestry Ltd v Edwards* (1975)). Trustees must always act jointly.

(c) A sole personal representative may give a good receipt for money for the sale of land whereas at least two trustees (or a trust corporation) are required.

(d) The period of limitation is 12 years against a personal representative but only six years against a trustee.

(e) If a sole personal representative dies without having completed the administration there will either be transmission of office under the chain of executorship or a grant *de bonis non administratis* must be taken out by the person entitled under the Non-Contentious Probate Rules 1987. If, however, a sole or last surviving trustee dies the trust property devolves on the trustee's personal representatives.



(f) A trustee has power to appoint additional or substitutional trustees. A personal representative has normally no power to appoint additional or substitutional personal representatives (although a person entitled to administration may nominate another administrator in certain cases where two administrators are needed because of a minority or life interest).

(g) Personal representatives owe their duty to the estate as a whole, trustees to the individual beneficiaries (*Re Hayes Will Trusts* (1971)).

(h) When personal representatives transfer assets to a "legatee" there is no gain or loss for capital gains tax (CGT) purposes. The legatee takes over the acquisition value of the personal representatives (together with any expenses of transfer). When a beneficiary of a trust becomes absolutely entitled as against the trustee there is a deemed disposal and may be a charge to CGT. Where the will directs that the personal representatives are to hold on trust, the beneficiary may become absolutely entitled before the personal representatives have assented the assets to themselves as trustees. In such a case the beneficiary takes as legatee and not as trust beneficiary.

In view of such differences it is obviously important where a personal representative is also a trustee to ascertain at what point the personal representative ceases to hold assets as personal representative and starts to hold them as trustee.

## Transition from personal representative to trustee

### *Intestacy*

**18.16** Under the Administration of Estates Act 1925 undisposed-of property may have to be held on trust either for a spouse for life or on the statutory trusts until a beneficiary achieves a vested interest. There is some doubt as to whether administrators on intestacy ever become trustees in the true sense or whether they continue to hold property as administrators. The better view would seem to be that they do not become trustees. However, Romer J in the case of *Re Yerburgh* (1928) stated that administrators become trustees as soon as all liabilities have been discharged and the amount of residue to be held on trust has been ascertained. Romer J went on to state that the administrators ought to mark the moment when residue was ascertained by making an assent to the property vesting in themselves as trustees. It is unclear whether the judge meant that the assent was essential in order to vest the property in the administrators in their capacity as trustees or whether he meant that the assent was merely desirable

the relationship between the claimant and the deceased was not unequivocally displayed to the world as the equivalent of a marital relationship. The court rejected this argument on the basis that there was a stable, sexual relationship between the claimant and the deceased and that she did in fact live with him and largely at his expense.

It was not the intention of Parliament that the Act should apply to same sex partners. When Lord Mackay introduced the Bill, he said "living as husband and wife appears to us, as the law stands, to apply to partners of opposite sexes and not to partners of the same sex". However, social conditions change and the law changes with them. In *Ghaidan v Mendoza* (2004) the House of Lords decided that a same sex partner was entitled to succeed to a secured tenancy in the same way that a heterosexual cohabitant would have. In *Saunders v Garrett* (2005) a same sex cohabitee was held to be eligible to apply under s.1A of the Inheritance (Provision for Family and Dependants) Act 1975 as a person living as husband or wife of the deceased. The Civil Partnership Act 2004 introduced a new category of applicant for deaths occurring on or after December 5, 2005 (see below).

**20.15** Section 1(1B) *A person who has lived with the deceased in the same household as civil partner for two years.* During the whole period of two years ending immediately before the death of the deceased the person must have been living:

(i) in the same household as the deceased; and

(ii) as the civil partner of the deceased.

The same points are relevant as for applications under s.1(1A).

**20.16** Section 1(1)(c) *A child of the deceased.* This category includes a child of a non-marital relationship, a legitimated or adopted child and a child *en ventre sa mere.* A child who has been adopted is no longer eligible to make a claim as a child of the *natural* parent (*Re Collins (Deceased)* (1991)).

There is no distinction between sons and daughters and neither age nor marriage are automatic disqualifications. However, the courts do not look sympathetically at applications by able-bodied adults capable of earning their own living.

In *Re Coventry* (1980), for example, the Court of Appeal quoted with approval the statement by Oliver J at first instance that

> "applications under the Act of 1975 for maintenance by able-bodied and comparatively young men in employment and able to maintain themselves must be relatively rare and need to be approached . . . with a degree of circumspection".

It used to be said that adult able-bodied children had to show an additional "threshold" requirement of a special obligation owed to them by the deceased (see *Goodchild v Goodchild* (1997)). The Court of Appeal has expressly rejected



this in a number of cases (*Re Hancock* (1998); *Re Pearce* (1998); *Espinosa v Bourke* (1999) and *Ilott vMitson* (2011)).

The approach now is that the court will consider all the circumstances in reaching its decision and try to balance all factors. An adult able-bodied child who cannot produce any argument to buttress a claim beyond being badly off is still unlikely to be successful. In *Espinosa v Bourke* the applicant (the deceased's daughter) had behaved badly and had already received some benefit from the deceased during his lifetime. However, this did not outweigh the factors in her favour. These included:

- her poor financial position;
- the substantial size of the estate;
- the fact that the only beneficiary of the will was her son who was at university starting his career without compelling needs;
- the applicant had taken her father into her home and cared for him, at least to a degree, for seven years, thus providing some return for the financial provision he made for her during his lifetime; and
- the deceased had an obligation to the applicant in that he had promised her mother to pass on the mother's share of the paternal grandmother's portfolio of shares to her.

As Butler-Sloss P said: "*An adult child is, consequently, in no different position from any other Applicant who has to prove his case.*" This applicant had done so. **20.17**

In both *Myers v Myers* (2004) and *Gold v Curtis* (2005) applications by adult children were successful and the court referred to the fact that parents have obligations and responsibilities to their children. However, in *Garland v Morris* (2007) an adult daughter's claim to provision from her father's estate failed despite her poor financial position. Counting against her were the following: the estate was not large, she had inherited from her mother and, to some extent, her misfortunes were of her own making. She had not been in contact with her father for many years before his death. In *Ilott v Mitson* (2011) the testatrix and her daughter had been estranged throughout the daughter's married life. The testatrix left everything to charity. The trial judge made a small award to the daughter because of her poor financial circumstances. The Court of Appeal found that the trial judge had addressed the right question: "had reasonable financial provision been made" and there were no grounds for interfering with his value judgement that it had not.

**20.18** Section 1(1)(d) *A person (not being a child of the deceased) who is treated by the deceased as a child of the family in connection with a marriage or civil partnership to which the deceased was a party.* The concept of "a child of the family" is imported from family law (Matrimonial Causes Act 1973 s.52(1) although under that Act the child must have been treated as a child of the family by *both* parties to the marriage). In *Re Callaghan* (1984) and in *Re Leach*