

ALTERNATIVES TO A CONTENTIOUS PROBATE CLAIM

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Whatever the outcome of any dispute over the validity of a will it is important to bear in mind that there are frequently a range of alternative arguments that may be deployed to achieve broadly the same result that may have been sought in attacking the will.

Claims in trust and proprietary estoppel and under the Trusts of Land and Appointment of Trustees Act 1996

1. Quite apart from the terms of the will or any claim under the Inheritance (Provision for Family and Dependants) Act 1975 it may be possible to bring a claim in trust and to seek an order for sale in order to realise any interest in a property under the Trusts of Land and Appointment of Trustees Act 1996.

The starting point – legal ownership

Sole legal ownership

2. Where the deceased was the sole legal owner of real property at the date of his death there is a presumption that he was the sole beneficial owner of the property. Accordingly, in Tackaberry v. Hollis ([2007] EWHC 2633 (Ch)) Evans-Lombe J. held that where land is acquired in the sole name of an acquiring party, the burden of proof rests on a non-acquiring party to show that there was some agreement between the parties (whether express or inferred), that the beneficial ownership of the property was to be shared between them. If that burden of proof is not met, the property will form part of the deceased's estate alone.

(ii) Joint legal ownership

3. Where the property is in joint names, the effect of the death of a co-owner depends upon the manner in which the property was held.
4. A deceased's personal estate does, of course, devolve upon his personal representative. By section 1(1) of the Administration of Estates Act 1925 it is provided that any real estate to which a deceased was entitled for an interest that did not cease on his death will devolve from time to time on his personal representative in the same way as chattels real previously devolved (i.e. under the pre-1925 law). "Real estate" for this purpose includes every interest in or over land to which a deceased person was entitled at the time of his death (see section 3(1)(i) of the 1925 Act).
5. If property is held under a tenancy in common then the deceased's interest will devolve upon his personal representatives and form part of the deceased's estate.
6. Conversely, the interest of a person under a joint tenancy (i.e. where another joint tenant survives the deceased) is deemed to be an interest ceasing on the deceased's death as section 3(4) of the 1925 Act expressly states:

"3(4) The interest of a deceased person under a joint tenancy where another tenant survives the deceased is an interest ceasing on his death."

7. It follows that such an interest does not devolve on the deceased's personal representative. The law is succinctly stated in Williams, Mortimer & Sunnucks at paragraph 42-31:

"Where a person is a co-owner of property, his interest in that property might be as a joint tenant or as a tenant in common...[If] it was as a joint tenant, then on his death that interest would cease (to the benefit of the surviving joint tenant or tenants) and would not devolve on his representative..."

8. Halsbury's Laws Vol. 39(2) at para. 195 states the law as follows:

"The death of one joint tenant creates no vacancy in the seisin or possession. His interest is extinguished. If there were only two joint tenants, the survivor is now seised of the whole..."

9. You may, of course be approached by clients who assert that although they held as tenants in common, they paid more than their fair share. To illustrate:

Arthur and Brian purchased property 20 years ago and did so expressly as tenants in common in equal shares. When they bought the property it was intended that they should both pay half of the mortgage. Brian, however, was unemployed for the last ten years and so paid nothing. Brian has died and Arthur now wishes to claim a three quarter interest in the property commensurate with his contribution.

10. Following Goodman v. Gallant [1986] Fam 106 (as approved by the House of Lords in Stack v. Dowden ([2007] 2 A.C. 432 at paragraph 49)) any declaration of trust will generally be conclusive "unless varied by subsequent agreement or affected by proprietary estoppel". The estate would therefore still take in accordance with the defined proportions under the tenancy in common although a co-owner who has serviced the mortgage for both may have a claim for an equitable account.
11. Broadly, the combined effect of the statutory effect of death, the right of survivorship in relation to joint tenants and the conclusive effect of declarations of trust, will mean that it will generally only be where the legal title to property is held in a sole name that arguments based upon constructive trust will be encountered or relevant in probate disputes.
12. Finally, it should be appreciated that things may not always be as they at first appear. Joint ownership with what is ostensibly a joint tenancy may, in fact, have become a tenancy in common. This is particular the case if there has been severance of the joint tenancy. This can be effected in one of seven ways. Namely, (i) by statutory notice in writing; (ii) by an act operating on a joint tenant's share; (iii) by mutual agreement; (iv) by mutual conduct; (v) by court order; (vi) by homicide; and (vii) by merger.

Establishing a constructive trust

The core elements

13. In order to establish that the property is held on trust, the key elements of a constructive trust must be established. These are broadly threefold:
- "bargain" (or common intention)
 - "change of position" (or detrimental reliance)
 - "equitable fraud" (or unconscionable denial of rights).

The irrelevance of timing

14. A constructive trust can be founded on a bargain or common intention formed after the legal owner's acquisition of title. In Austin v. Keele ((1987) 10 NSWLR 283) the Privy Council indicated that there is no reason in principle why the doctrine should be limited to an intention formed at the time of the first acquisition of the property. In Lloyds Bank Plc. v. Rosset ([1991] 1 AC 107) it was suggested that only "exceptionally" could a constructive trust be founded upon an express agreement reached at some date later than that of acquisition although that restrictive note is not generally echoed in the case law. Most recent, in James v. Thomas ([2007] EWCA Civ 1212) Sir John Chadwick stated that if the circumstances so demand, a constructive trust can arise some years after the property has been acquired by one party who (at the time of acquisition) was, beyond dispute, the sole beneficial owner.

Two types of constructive trust

15. The primary or threshold question is whether the party claiming against the estate of the legal owner can establish that there was a common intention that she (it is usually the female partner who is omitted from the legal title) should have a beneficial interest in the Property (per Oxley v. Hiscock ([2004] 3 WLR 715). That common intention may be express. Alternatively, it is open to the court to infer the existence of a common intention for some kind of shared beneficial ownership if such intention is plainly evidenced by the conduct of the parties.

(a) Express bargain constructive trusts

16. In order to establish an express bargain constructive trust, a claimant must adduce clear evidence that she and the legal owner “orally declared themselves in such a way as to make plain their common intention that [the claimant] should have a beneficial interest in the property” (per Nourse LJ in Stokes v. Anderson [1991] 1 FLR 391 at 398A). She would need to establish that there was “some agreement, arrangement or understanding reached between them that the property was to be shared beneficially” (Lloyds Bank v. Rosset [1991] AC 107 at 132E) albeit that it is not necessary that there should have been express agreement as to the size of the share (Oxley v. Hiscock [2004] 3 WLR 715).

17. More recently it has been said that the court looks, in effect, for exchanges between the parties “of a consensual character falling not far short of an enforceable contract” Chan Pui Chun v. Leung Kam Ho ([2003] 1 FLR 23).

18. Where one of the parties is dead, it can be expected that the court will scrutinise this surviving claimant’s evidence with particular care. Broad expressions like “this is your home” are unlikely to suffice.

19. If an express common intention can be established, the range of material “changes of position” or detriment that the court can consider is extremely broad. It is likely, as suggested by Browne-Wilkinson V-C in Grant v. Edwards ([1986] Ch 638 at 657) that “any acts done by [the claimant] to her detriment relating to the joint lives of the parties...is sufficient...The acts do not have to be inherently referable to the house”.

20. Quantification of the interest depends on whether agreement was reached as to shares:

- (i) Where the parties have demonstrably formed some express agreement about the quantum of their respective beneficial entitlements, the court may depart from the agreement “only if there is very good reason for doing so” (Mortgage Corporation v. Shaire ([2001] Ch 743 at 750 per Neuberger J (as he then was)).
- (ii) Where the parties’ express agreement did not specify the shares, the court must attempt to quantify these shares in accordance with “what the parties must, in the light of their conduct, be taken to have intended”. The test, following Stack v. Dowden, is essentially two stage. First, the court must survey the whole course of dealing between the parties and, secondly, it must take account of all conduct which throws light on the question of what shares were intended.

“If the question really is one of the parties’ ‘common intention’, we believe that there is much to be said for adopting what has been called a ‘holistic approach’ to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended.”

Accordingly:

“...the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended... it does not enable the court to abandon that search in favour of the result which the court itself considers fair.”

(b) Implied bargain constructive trusts

21. Even where there has been no express common intention or agreement that the claimant should have an interest in the deceased's property, the court may yet imply such a bargain.
22. To understand the state of the present law it is necessary to consider two House of Lords' decisions. Namely, Lloyds Bank v. Rosset ([1991] 1 AC 107) and Stack v. Dowden. In the much cited seminal passage from Lord Bridge's judgment in Rosset the law was summarised in the following terms:

"In sharp contrast with this situation [i.e. express agreement constructive trusts] is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an agreement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do." [emphasis added]

23. That passage was obiter and not consistent with previous observations of the House of Lords' in Gissing v. Gissing ([1971] AC 886) but it nonetheless came to represent the law. The inequity caused by that somewhat arbitrary refusal to take account of indirect contributions to the family economy in cases of so-called implied bargain constructive trusts is obvious. Hudson on Equity & Trusts (10th Ed) illustrates the problem thus:

"Suppose the following situation:

A and B are a married couple. They acquire a freehold house by means of a mortgage. It is agreed that A will be the sole mortgagor and entirely responsible for the repayments. They have a child who requires special needs education. It is only possible for them, let us suppose, to obtain that special needs education by buying it privately. It is agreed that B will go to work and that she will be entirely responsible for paying for the special needs education. Let us suppose further that the cost of the education matches exactly the cost of the mortgage and also that it would have been impossible for A to pay both for the education and the mortgage.

A strict application of the Rosset test would deny B any interest in the property on the basis that B had not contributed directly to the purchase price or the mortgage repayments...All this despite the necessity of B's contribution to familial expenses to make it possible for A to discharge all of the mortgage expenses."

24. In Stack v. Dowden Baroness Hale conceded that there was an argument that Rosset set the hurdle "rather too high". Lord Walker stated:

"Lord Bridge's extreme doubt "whether anything less will do" was certainly consistent with many first-instance and Court of Appeal decisions, but I respectfully doubt whether it took full account of the views (conflicting though they were) expressed in Gissing (see especially Lord Reid [1971] AC 886 at 896G - 897B and Lord Diplock at 909 D-H)...Whether or not Lord Bridge's observation was justified in 1990, in my opinion the law has moved on, and your Lordships should move it a little more in the same direction, while bearing in mind that the Law Commission may soon come forward with proposals which, if enacted by Parliament, may recast the law in this area."

25. The question this begs, however, is when the court will imply a constructive trust in the absence of direct contributions. Following Stack v. Dowden the whole course of the parties' conduct in relation to the deceased's property may justify the inference of a constructive trust even in the absence of direct contributions to the purchase price. What the authorities leave uncertain is when.
26. Baroness Hale returned to this topic in the Privy Council case of Abbott v. Abbott ([2007] UKPC 53). The facts of that case mean that observations on the need (or otherwise) for direct financial

contributions were again obiter. Significantly, however, having cited Lord Walker's observations, she reiterated that the search is to ascertain the parties' shared intentions with respect to the property "in the light of their whole course of conduct in relation to it". Read in context, those observations appear to clearly anticipate that a common intention constructive trust can be inferred from something less than direct contributions to the initial purchase price or mortgage instalments.

27. In James v. Thomas ([2007] EWCA Civ 1212) a constructive trust claim was advanced on the basis that such a trust could be inferred from the conduct of the parties (it was not alleged that there had been any express agreement or understanding that the property in question would be shared). In dismissing Miss James' appeal, Sir John Chadwick held that:

"...in the absence of an express post-acquisition agreement, a court will be slow to infer from conduct alone that parties intended to vary existing beneficial interests established at the time of the acquisition."

28. He went on to criticise the trial judge's observation that Miss James could not rely on indirect contributions to the mortgage from the fruits of her labour in the couple's business since "...as a matter of law, a common intention that Miss James should be entitled to a beneficial share in the property might be inferred from evidence of the parties' conduct during the whole course of their dealings in relation to the property." Significantly, however, her "Herculean labours" working without remuneration, digging trenches and driving dumper trucks were not apt to give rise to an inference that the parties had agreed that she was to have a share in the property because those labours were explicable on other grounds.

29. In Morris v. Morris ([2008] EWCA Civ 257) May L.J. endorsed the observations noted above from James v. Thomas and added (at para. 36):

"...for the purpose of constructive trust – at least since Stack v. Dowden... - in the absence of an express post-acquisition agreement, a court will be slow to infer from conduct alone that parties intended to vary existing beneficial interests established at the time of acquisition."

30. Sir Peter Gibson arguably went still further when he observed (at paragraph 23) that the authorities make clear that a common intention constructive trust based only on conduct "*will only be found in exceptional circumstances*".

31. On the state of the present authorities, therefore, the position is arguably as follows. Absent an express agreement, direct contributions to the acquisition cost of the property will readily justify the inference of a common intention constructive trust (i.e. in favour of the non-legal owner). Absent either an express agreement or a direct contribution to the purchase price, the whole course of the parties' conduct in relation to the property may yet justify the inference of a constructive trust. In Morris v. Morris counsel were unable to identify a single case in which a variation of the beneficial interests had been held to have occurred based on conduct alone. The most obvious case in which such an inference is possible, however, is where contributions by one partner effectively free up the resources of the deceased partner in order to facilitate payment of the mortgage or where, as in Fowler v. Barron, the decision about who pays for what in meeting family outgoings is arbitrary and makes no real difference to the parties.

Orders for sale

32. If the court finds that there was a constructive trust, the beneficiary will be entitled to apply for an order for sale under section 14 of TLATA. Usually, however, it will be the personal representatives who wish to sell the property and realise the estate's interest in a property.
33. Not infrequently, this can raise particular problems where the deceased and his co-habitant were joint owners. To illustrate:

Chris and Doris were joint legal owners and beneficial tenants in common in half shares. Chris has died and his personal representatives wish to realise his interest in the property. Although they held the property as tenants in common, their express intention when they purchased was that they would live in the property until the end of their days. That intention is not recorded in any trust.

34. Because the legal title can only be held a joint tenants, the survivor becomes the sole legal owner but holds the property on trust for the survivor and the personal representatives under a trust of land. As beneficiaries under that trust, the personal representatives have locus to apply for an order for sale under section 14 of the 1996 Act.
35. In deciding whether to make an order for sale under section 14 of TLATA, the court must have regard to the matters listed in section 15. These include:
 - (a) the intentions of those who created the trust;
 - (b) the purposes for which the property subject to the trust is held;
 - (c) the welfare of minors;
 - (d) the interests of creditors.
36. In *Stott v. Ratcliffe* ((1982) 126 Sol Jo 310), a case necessarily decided under the predecessor provision of section 30 of the Law of Property Act 1925, two elderly people purchased a property as tenants in common with the original purpose that it provide a home for them during their joint lifetimes and thereafter for the surviving co-owner. On the death of one of the co-owners, the Court of Appeal declined to order sale at the behest of the personal representatives of the deceased tenant in common where the explicit object of the acquisition of the co-owned property had been to secure a home for the survivor. This is to be contrasted with *Grindal v. Hooper* (The Times, 8 February 2000) where an order for sale was made in the absence of convincing evidence of an intention to house the survivor.

Summary on constructive trusts claims

37. When advising clients who wish to bring a claim that they have an interest in the deceased's property a useful checklist is accordingly as follows:
 - (i) Was the deceased the sole legal owner? If not, was the property held under a joint tenancy so that rights of survivorship apply or was it held as tenants in common either by express declaration of trust or following severance of the joint tenancy?
 - (ii) Regardless of legal ownership, did the deceased and the proposed claimant reach an express agreement that the claimant would have a beneficial interest in the property and, if so, did they agree the quantum of the shares? Did the claimant act on that agreement at all?
 - (iii) If not, can a common intention be inferred from the whole course of dealing with the deceased and, in particular, did the claimant at least make some contribution to the family economy?
 - (iv) Regardless of how legal title was held, can the surviving beneficial joint owner resist an order for sale based on any agreement that had been reached with the deceased?

Claims under the Inheritance (Provision for Family and Dependents) Act 1975

The statute

38. The court has broad powers to make orders for provision out of an estate under section 2 of the 1975 Act. To seek such an order, however, the Claimant must be able to bring themselves within the provision of section 1 of the Act. That provides:

1 (1) Where after the commencement of this Act a person dies domiciled in England and Wales and is survived by any of the following persons:—

(a) the spouse or civil partner of the deceased;
(b) a former spouse or former civil partner of the deceased, but not one who has formed a subsequent marriage or civil partnership;
(ba) any person (not being a person included in paragraph (a) or (b) above) to whom subsection (1A) or (1B) below applies;
(c) a child of the deceased;
(d) any person (not being a child of the deceased) who, in the case of any marriage or civil partnership to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage or civil partnership;
(e) any person (not being a person included in the foregoing paragraphs of this subsection) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased;
that person may apply to the court for an order under section 2 of this Act on the ground that the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is not such as to make reasonable financial provision for the applicant.

(1A) This subsection applies to a person if the deceased died on or after 1st January 1996 and, during the whole of the period of two years ending immediately before the date when the deceased died, the person was living—

(a) in the same household as the deceased, and
(b) as the husband or wife of the deceased.

(1B) This subsection applies to a person if for the whole of the period of two years ending immediately before the date when the deceased died, the person was living—

(a) in the same household as the deceased, and
(b) as the civil partner of the deceased.

(2) In this Act "reasonable financial provision"—

(a) in the case of an application made by virtue of subsection (1)(a) above by the husband or wife of the deceased (except where the marriage with the deceased was the subject of a decree of judicial separation and at the date of death the decree was in force and the separation was continuing), means such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his or her maintenance;

(aa) in the case of an application made by virtue of subsection 1(a) above by the civil partner of the deceased (except where, at the date of death, a separation order under Chapter 2 of part 2 of the Civil Partnership Act 2004 was in force in relation to the civil partnership and the separation was continuing), means such financial provision as it would be reasonable in all the circumstances of the case for a civil partner to receive, whether or not that provision is required for his or her maintenance;

(b) in the case of any other application made by virtue of subsection (1) above, means such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance.

(3) For the purposes of subsection (1)(e) above, a person shall be treated as being maintained by the deceased, either wholly or partly, as the case may be, if the deceased, otherwise than for full valuable consideration, was making a substantial contribution in money or money's worth towards the reasonable needs of that person.

39. The section central to most disputes is section 3 which provides as follows:

3(1) Where a application is made for an order under section 2 of this Act, the court shall, in determining whether the disposition of the deceased's estate effected by his will or the law relating to intestacy, or the combination of his will and that law, is such as to make reasonable financial provision for the applicant and, if the court considers that reasonable financial provision has not been made, in determining whether and in what manner it shall exercise its powers under that section, have regard to the following matters, that is to say:-

- (a) *the financial resources and financial needs which the applicant has or is likely to have in the foreseeable future;*
- (b) *the financial resources and financial needs which any other applicant for an order under section 2 of this Act has or is likely to have in the foreseeable future;*
- (c) *the financial resources and financial needs which any beneficiary of the estate of the deceased has or is likely to have in the foreseeable future;*
- (d) *any obligations and responsibilities which the deceased had towards any applicant for an order under section 2 or towards any beneficiary of the estate of the deceased;*
- (e) *the size and nature of the net estate of the deceased;*
- (f) *any physical or mental disability of any applicant for an order under the said section 2 or any beneficiary of the estate of the deceased;*
- (g) *any other matter, including the conduct of the applicant or any other person, which in the circumstances of the case the court may consider relevant.*

(2) This subsection applies, without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of section 1(1)(a) or (b) of this Act.

The court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to-

- (a) *the age of the applicant and the duration of the marriage or civil partnership;*
- (b) *the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.*

In the case of an application by the wife or the husband of the deceased, the court shall also, unless at the date of death a decree of judicial separation was in force and the separation was continuing, have regard to the provision which the applicant might reasonably have expected to receive if, on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce.

In the case of an application by the civil partner of the deceased, the court shall also, unless at the date of the death a separation order under Chapter 2 of Part 2 of the Civil Partnership Act 2004 was in force and the separation was continuing, have regard to the provision which the applicant might reasonably have expected to receive if on the day on which the deceased died the civil partnership, instead of being terminated by death, had been terminated by a dissolution order.

(2A) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of subsection 1(1)(ba) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to-

- (a) *the age of the applicant and the length of the period during which applicant lived as the husband or wife or civil partner of the deceased and in the same household as the deceased;*
- (b) *the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.*

(3) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of subsection 1(1)(c)...the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to the manner in which the applicant was being or in which he might expect to be educated or trained, and where the application is made by virtue of section 1(1)(d) the court shall have regard –

- (a) *to whether the deceased had assumed any responsibility for the applicant's maintenance and, if so, to the extent to which and the basis upon which the deceased assumed that responsibility and to the length of time for which the deceased discharged that responsibility;*

- (b) to whether in assuming and discharging that responsibility the deceased did so knowing that the applicant was not his own child;
- (c) to the liability of an other person to maintain the applicant.

(4) Without prejudice to the generality of paragraph (g) of subsection (1) above, where an application for an order under section 2 of this Act is made by virtue of subsection 1(1)(e) of this Act, the court shall, in addition to the matters specifically mentioned in paragraphs (a) to (f) of that subsection, have regard to the extent to which and the basis upon which the deceased discharged that responsibility.

(5) In considering the matters to which the court is required to have regard under this section, the court shall take into account the facts as known to the court at the date of the hearing.

(6) In considering the financial resources of any person for the purposes of this section the court shall take into account his earning capacity and in considering the financial needs of any person for the purposes of this section the court shall take into account his financial obligations and responsibilities.”

Recurring issues under the 1975 Act

40. It is not possible in these notes to do justice to all of the intricacies and nuances of the 1975 Act. In practice, however, there are a number of issues that arise time and again. These include the following:

- (I) Who is eligible to bring a claim?
- (II) What is the test for recovery under the Act in practice?
- (III) When is a life interest appropriate?
- (IV) What are the material limitation periods under the Act and how do they operate?
- (V) How do claims under the 1975 Act interrelate with trust claims?

Is the client in one of the class of eligible claimants?

41. A claim can only be brought if the client can bring themselves within the classes of claimant listed in section 1(1) above. Broadly, these are as follows:

- (i) a spouse or civil partner;
- (ii) a former spouse or civil partner who has not remarried etc.;
- (iii) a child or the deceased;
- (iv) a person who was treated as a child of any marriage or civil partnership e.g. potentially a step-child or even grandchild;
- (v) cohabittees with a qualifying period of co-habitation;
- (vi) a person who was maintained by the deceased.

What is the test for provision?

42. The Court have repeatedly emphasised that it is no part of the court’s role under the Act to re-write testamentary dispositions. As was said in In re Coventry at p. 474:

“It is not the purpose of the Act to provide legacies or rewards for meritorious conduct. Subject to the court’s powers under the Act and to fiscal demands, an Englishman still remains at liberty at his death to dispose of his own property in whatever way he pleases or, if he chooses to do so, to leave that disposition to be regulated by the laws of intestate succession.”

43. There are two different tests under the Act as to whether the deceased has made “reasonable financial provision” for the claimant:

- A spouse or civil partner is entitled “to such financial provision as it would be reasonable in all the circumstances of the case” to receive “whether or not that provision is required for his or her maintenance”.

- In all other cases reasonable financial provision is limited to “maintenance”.
44. For claims by a spouse it can be all too easy to slip into an argument that the spouse does not “need” the money. That is not the test and the maintenance threshold is expressly disapplied. The yardstick is, instead, the style of living before death. As Francis: Inheritance Act Claims states:
- “The style of living prior to death may be used as a “benchmark” or “yardstick” which can be met if the net estate can sustain it. The claimant cannot expect an exact match to the previous style of life. “Financial needs” in s. 3(1)(a) will take their tone from the circumstances of and the manner in which the claimant has led his life with the deceased.”* (para. 11[12]).
45. Section 3(2) also requires specific regard to be had to a “deemed divorce test”. Broadly this would usually mean an equal division of the assets of the partnership (equality is at least a yardstick). Further, a widow is entitled to have an expectation that her standard of living will not revert to what it had been before her marriage. This is, however, just one of the section 3 factors which also expressly requires the court to take into account the facts known to the court at the date of the hearing.
46. For those falling outside the spouse/civil partner class, the court will objectively consider what financial provision it would be reasonable in all the circumstances of the case for the applicant to receive for her maintenance. The classic definition given in Re Duranceau was that maintenance was “sufficient to enable the dependant to live neither luxuriously nor miserably, but decently and comfortably according to his or her station in life”. Maintenance does not mean provision at a level of luxury but nor does it mean provision to sustain only a “breadline” existence.
47. Maintenance has been determined to be somewhere in the middle of “not just enough to enable a person to get by; on the other hand it does not mean anything which may be regarded as reasonably desirable for [the claimant’s] general benefit or welfare” (Re Coventry [1980] Ch. 461). Further, the payments required will be assessed by reference to those which “direct or indirectly, will enable [the claimant] in the future to discharge the cost of his daily living at whatever standard of living is appropriate to him” (Re Dennis [1981] 2 All ER 140).

When is a life interest appropriate?

48. All claims inevitably turn on their own facts. Nonetheless, a life interest alone will often suffice as adequate maintenance in those classes of claim excluding spouses or civil partners and, in particular, where the claimant is old and the estate is small (particularly if the main asset is the deceased’s modest former home) – see, for example, Re Krubert ([1997] Ch 97).

What limitation periods apply?

49. There are two limitation periods in particular to which the practitioner must have special regard.

50. First, section 4 of the Act provides as follows:

“An application for an order under section 2 of this Act shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased was taken out.”

51. The court has a discretion to disapply the limitation period. Guidance on when this will be appropriate is to be found in Re Salmon (deceased) ([1981] Ch. 167) where Sir Robert Megarry set out the following guidelines:

- (i) The section 4 discretion is unfettered.
- (ii) The onus is on the Claimant to establish sufficient grounds for disapplying the six month time limit.

(iii) It is material to consider how promptly and in what circumstances the claimant has sought the permission of the court. This includes the reasons for the delay but also the promptitude with which the claimant gave warning of her claim.

(iv) The timing of negotiations between the parties may also be relevant.

(v) It is relevant to consider whether or not the estate has been distributed before a claim has been made or notified.

(vi) Would a refusal to extend time leave the claimant without redress against anybody?

52. It is also material to consider what the overall merits of the claim are.

53. The second material limitation period that tends to catch practitioners out is that in section 9 of the Act:

“(1) Where a deceased person was immediately before his death beneficially entitled to a joint tenancy of any property, then, if, before the end of the period of six months from the date on which representation with respect to the estate of the deceased was first taken out, an application is made for an order under section 2 of this Act, the court for the purpose of facilitating the making of financial provision for the applicant under the Act may order that the deceased’s severable share of that property, at the value thereof immediately before his death, shall, to such extent as appears to the court to be just in all the circumstances of the case, be treated for the purposes of this Act as part of the net estate of the deceased.

(2) In determining the extent to which any severable share is to be treated as part of the net estate of the deceased by virtue of any order under subsection (1) above, the court shall have regard to any capital transfer tax payable in respect of that severable share.

(3) Where an order is made under subsection (1) above, the provisions of this section shall not render any person liable for anything done by him before the order was made.

(4) For the avoidance of doubt it is hereby declared that for the purposes of this section there may be a joint tenancy of a chose in action.”

54. This essentially gives a claimant the incentive to bring a claim even where an estate would otherwise be technically insolvent because the effect of survivorship and the basis upon which the property was jointly held will not be allowed to frustrate a meritorious claim. Unlike section 4, the six month time limit in section 9(1) cannot be extended.

55. In exercising the section 9 discretion (NB: Not a discretion to extend time), the court will have regard to the circumstances of the co-owner and this clearly includes consideration of whether an order against the deceased’s share would mean that the survivor would have to sell her property to realise that share.

Should the client bring claims both under TLATA and the 1975 Act?

56. Claims under the 1975 Act and claims in trust are generally brought in tandem and should be brought together. It should be appreciated, however, that a successful trust claim may render further provision from the estate unnecessary under the 1975 Act.

Rectification under the Administration to Justice Act 1982

57. Under the equitable doctrine of rectification the courts have long had power to rectify written instruments which do not accurately record what was agreed or intended. It generally became accepted, however, that the equitable doctrine of rectification did not apply to wills (see Hawkins on the Construction of Wills (2nd Ed.) at paragraph 1-01).

58. The probate court has always had the power, when admitting a will to probate, to exclude from it any words which were inserted by fraud or which, for some other reason, were inserted without

the testator's knowledge and approval. This, in effect, amounted to a very limited form of rectification. Where a testator died before 31 December 1982 there was otherwise no power to rectify the will. This was addressed when Section 20 of the Administration of Justice Act 1982 came into force on 1 January 1983. The section provides as follows:

"20. Rectification.-

(1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence-

(a) of a clerical error; or

(b) of a failure to understand his instructions,

it may order that the will shall be rectified so as to carry out his intentions.

(2) An application for an order under this section shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out..."

59. There are still very few reported cases on the application of the section but in Re Segelman (dec'd) ([1996] Ch. 171) Cadwick L.J. suggested that section 20(1) requires the court to examine three questions:

- (i) First, what were the testator's instructions with regard to the dispositions in respect of which rectification is sought.
- (ii) Secondly, whether the will is so expressed that it fails to carry out those intentions.
- (iii) Thirdly, whether the will is expressed as it is in consequence of either (a) a clerical error or (b) a failure on the part of someone to whom the testator has given instructions in connection with his will to understand those instructions."

60. In order to answer the first of those questions the court must admit extrinsic evidence (i.e. evidence from outside the will) of the testator's intentions with regard to the relevant dispositions. The second question then becomes one of construing the terms of the will to see whether they carry out those intentions. If they do not, the third question is whether the failure is in consequence of a clerical error or a failure to understand the testator's instructions or for some other reason.

61. Finally, it should be noted that the standard of proof is a high one:

"...Although the standard of proof required in a claim for rectification made under s.20(1) of the 1982 Act is that the court should be satisfied on the balance of probabilities, the probability that a will which a testator has executed in circumstances of some formality reflects his intention is usually of such weight that convincing evidence to the contrary is necessary." (per Chadwick J. in Re Segleman at p. 184)

Construction

62. A final alternative to all of the foregoing may rest simply in raising arguments based upon the construction of the will itself. This is necessarily too broad a topic to be properly addressed in these notes and reference should be made to the practitioner texts on this specific area alone (particularly Hawkins on the Construction of Wills and Williams on Wills).

63. A few general points tend to crop up with regularity, however.

The basic rule

64. The object of the court is to ascertain the testator's intention as expressed in the will. In other words the court is simply concerned to determine the meaning of the words written. The court will not speculate as to what the testator's real intention might have been. Words will be given their ordinary meaning.

Extrinsic evidence and Section 21 of the Administration of Justice Act 1982

65. The general rule is that the court construes the words in the will and will not admit extrinsic evidence of the testator's intention. Extrinsic evidence is admissible in three limited circumstances at common law and also under statute:

- (i) Under "the armchair principle".
"You may place yourself, so to speak, in [the testator's] armchair, and consider the circumstances by which he was surrounded when he made his will to assist you in arriving at his intention" (per James L.J. Boyes v. Cook ((1880) LR 14 Ch. D. 53 CA)

In Thorn v. Dickens ([1906] W.N. 54), for example, the testator left "all to mother" but his mother was dead when he made the will. Extrinsic evidence of the testator's circumstances was admitted to show that he was in the habit of calling his wife "mother". Had the testator's mother been alive no extrinsic evidence would have been admitted.

- (ii) Where there is a latent ambiguity.

Where there is an ambiguity which does not become apparent until an attempt is made to give effect to dispositions in the will extrinsic evidence may be admitted to overcome that ambiguity. E.g. A gift of "my horse" when the testator owned two horses will fail for uncertainty unless extrinsic evidence is admitted as to which horse was intended to be the gift.

- (iii) Certain equitable presumptions may be rebutted by extrinsic evidence.

- (iv) Under section 21 of the Administration of Justice Act 1982.

"21. Interpretation of wills-general rules as to evidence.-

(1) *This section applies to a will-*

(a) *In so far as part of it is meaningless;*

(b) *In so far as the language used in any part of it is ambiguous on the face of it;*

(c) *In so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.*

(2) *In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist interpretation"*

The date from which a will speaks

66. Section 24 of the Wills Act 1837 provides that every will:

"shall be construed with reference to the real estate and personal estate in it to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention shall appear in the will."

67. Depending on the terms of the will this may mean that certain gifts will be adeemed. The disposition of property in which the testator had an interest but which he has since disposed of in his lifetime may well fail for example.

Gifts of property to several persons concurrently

68. Where property is given to several persons concurrently, the question whether those persons take as joint tenants or tenants in common depends on the context of the will as a whole. Prima facie they in fact take as joint tenants but anything in the slightest degree indicating an intention to divide the property negatives the idea of joint tenancy (see Williams on Wills (9th Ed.) at para. 86.2 and para. 86.5). In Re Davies ([1950] 1 All ER 120), for example, the words "in equal shares" were held to signify a tenancy in common.

The effects of marriage

69. This is not so much a construction issue as an issue of whether the will continues to have any legal effect.
70. Section 18 of the Wills Act 1837 (as substituted by the Administration of Justice Act 1982) provides that the marriage of the testator automatically revokes any will made before marriage. Section 18B has exactly the same effect in relation to the formation of a civil partnership. There are 3 exceptions to this rule:
- (i) Where it appears from a will that at the time it was made the testator was expecting to be married or to form a civil partnership with a particular person and he intended that the will should not be revoked by the marriage or civil partnership, then the will shall not be revoked.
 - (ii) Where it appears from a will that at the time it was made the testator was expecting to be married or to form a civil partnership with a particular person and that he intended that a disposition in the will should not be revoked by the marriage or formation of the civil partnership:
 - (a) that disposition shall take effect notwithstanding the marriage or civil partnership; and
 - (b) any other disposition in the will shall take effect also, unless it appears from the will that the testator intended the disposition to be revoked by the marriage or civil partnership.
 - (iii) The exercise of a power of appointment by will remains effective notwithstanding a subsequent marriage or the formation of a civil partnership.

SUMMARY JUDGMENT AND COMPROMISE IN CONTENTIOUS PROBATE CLAIMS

Default Judgment, Trial on Paper and Summary Judgment

71. A probate claim must be issued using the CPR Part 7 procedure (see CPR r. 57.3(b)). Ordinarily that would mean that judgment in default of a defence could be obtained under CPR Pt. 12. CPR r. 57.10, however, expressly provides that default judgment is not in fact available in probate claims. This leaves two alternative options.

(i) Trial on written evidence

72. If no defendant acknowledges service or files a defence then the claimant may, after the time for acknowledging service or for filing a defence has expired, apply to the court for an order that the claim is to proceed to trial (under CPR r. 57.10(3)). When doing so, a claimant must file written evidence of service. When the court makes an order under CPR r. 57.10(5), it may direct that the claim be tried on written evidence. In short, this is the closest thing to default judgment in a probate claim.

(ii) Summary Judgment

73. Curiously, Part 57 does not exclude summary judgment applications. Indeed, the effect of CPR r. 24.3 is that summary judgment is expressly available in a probate claim. Accordingly, if the other side's case has "no real prospect of success" and there is "no other compelling reason why the case or issue should be disposed of at trial" the court may give summary judgment under CPR r. 24.2.

Compromise

74. Compromising a probate claim is not straightforward because of the quasi-inquisitorial function of the court, the need in many cases to have a proof in solemn form, and the necessity to make sure that all are bound by the compromise.

75. It has accordingly been suggested that the only ways in which a probate claim may be compromised are those enumerated in paragraph 6 of the CPR Pt. 57 Practice Direction. Namely:

- (i) by discontinuance or dismissal under r. 57.11;
- (ii) trial of the claim on written evidence;
- (iii) by application under the Administration of Justice Act 1985 section 49.

76. Section 49 of the Administration of Justice Act 1985 provides as follows:

"49(1) *Where on a compromise of a probate action in the High Court-*

- (a) *the court is invited to pronounce for the validity of one or more wills, or against the validity of one or more wills, or for the validity of one or more wills and against the validity of one or more wills; and*
- (b) *the court is satisfied that consent to the making of the pronouncement or, as the case may be, each of the pronouncements in question has been given by or on behalf of every relevant beneficiary,*

the court may without more pronounce accordingly.

(2) *In this section-*

"probate action" means an action for the grant of probate of the will, or letters of administration of the estate, of a deceased person or for the revocation of such grant or for a decree pronouncing for or against the validity of an alleged will, not being an action which is non-contentious or common form probate business-

"relevant beneficiary", in relation to a pronouncement relating to any will or wills of a deceased person, means-

- (a) *a person who under any such will is beneficially interested in the deceased's estate; and*
- (b) *where the effect of pronouncement would be to cause the estate to devolve as on an intestacy (or partial intestacy), or to prevent it from so devolving, a person who under the law relating to intestacy is beneficially interested in the estate."*

77. Section 49, in effect, permits a compromise to be effected without a full trial with the court nevertheless making an order in solemn form for or against the validity of a will. Applications under section 49 must be supported by written evidence identifying the relevant beneficiaries for the purposes of subsection 49(2) and exhibiting the written consent of each of them (see CPR Pt. 57PD Para. 6.2). The written evidence of testamentary documents required by rule 57.5 will also still be necessary.

78. The consent to the compromise must be given "by or on behalf" of all of the named parties to the action and this must be established by written evidence exhibiting the written consent of each of them.

INSOLVENT ESTATES AND JOINT TENANTS

79. With the economic downturn there are likely to be an increasing number of insolvent debtors. As often as not they hold property under a joint tenancy and when they die the creditors are left looking for a means by which to recover the debt.

80. One of the legal effects and benefits of survivorship for joint tenants is that, subject to the Insolvency Act 1986, its operation leaves the surviving joint tenant immune from unsecured debts incurred independently by the deceased joint tenant during his lifetime. The common law position has, however, been substantially abrogated by section 421A of the Insolvency Act 1986 (as amended).

81. Section 421A of the Insolvency Act 1986 provides as follows:

"421A(1) This section applies where-

- (a) *an insolvency administration order has been made in respect of an insolvent estate of a deceased person,*
- (b) *the petition for the order was presented after the commencement of this section and within the period of five years beginning with the day on which he died, and*
- (c) *immediately before he died he was beneficially entitled to an interest in any property as joint tenant.*

(2) For the purpose of securing that debts and other liabilities to which the estate is subject are met, the court may, on an application by the trustee appointed pursuant to the insolvency administration order, make an order under this section requiring the survivor to pay to the trustee an amount not exceeding the value lost to the estate.

(3) In determining whether to make an order under this section, and the terms of such an order, the court must have regard to all the circumstances of the case, including the interests of the deceased's creditors and of the survivor; but, unless the circumstances are exceptional, the court must assume that the interests of the deceased's creditors outweigh all other considerations.

(4) The order may be made on such terms and conditions as the court thinks fit.

(5) Any sums required to be paid to the trustee in accordance with an order under this section shall be comprised in the estate.

(6)...

(7) In this section, "survivor" means the person who, immediately before the death, was beneficially entitled as joint tenant with the deceased..."

(8)...

(9) In this section-

"insolvency administration order" has the same meaning as in any order under section 421 having effect for the time being,

"value lost to the estate" means the amount which, if paid to the trustee, would in the court's opinion restore the position to that which, if paid to the trustee, would in the court's opinion restore the position to what it would have been if the deceased had been adjudged bankrupt immediately before his death"

82. The effect of this section, in short, is that a surviving joint tenant can be ordered to pay value to the estate (albeit there is no transfer of property rights as such). The court has a discretion but as in insolvency generally the interests of creditors prevail unless the case is exceptional. In many respects this may be viewed as a sister provision to section 9 of the 1975 Act, operating to unpick the usual effect of the death of a joint tenant.

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11 December 2008

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