DYING WELL – THE GUILDHALL WAY

Malcolm D Warner

Guildhall
CHAMBERS

Best Practice – or how to avoid criticism

1. Obtain last/former wills & codicils
2. Accepting instructions
3. Instructions on:
    - 3.1 Family tree & calls on their bounty
    - 3.2 The estate being disposed of
    - 3.3 Checklist of nooks and crannies (later)
3. Capacity and undue influence
4. Potential Inheritance Act claims & tax
5. The will and putting their affairs in order.

Guildhall
CHAMBERS

Accepting Instructions

- The obligations of the solicitors are critically dependant on what the solicitors is retained to do i.e. what he accepts he will be doing.
- In a dispute as to what the retainer encompasses the client's word is to be preferred – Griffiths v Evans [1953] 1 WLR 1424. Hence a clear a/n is essential. With a will there may be no loss until the death of the client but the client should be warned that he can change or update the will at any time.
- If the solicitor decides not to accept instructions (e.g. because of concerns about capacity) he must inform the client Feltham v Bouskell [2013] WTLR 1363 and also consider whether a statutory will might be the way forward.

Guildhall
CHAMBERS

The Family Tree – The shadows

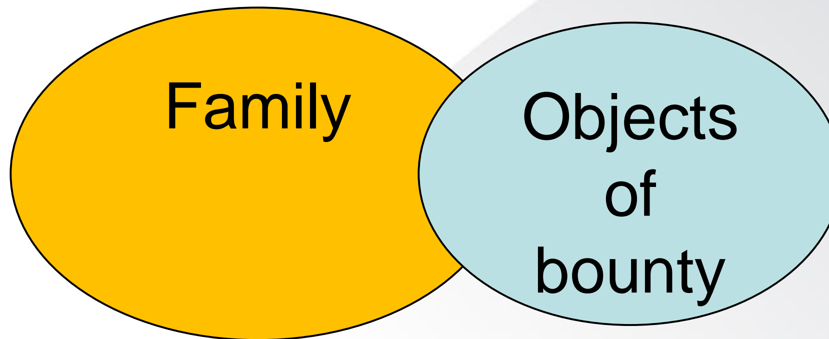
An ancient body surrounded by his caring family is hardly likely to reveal his long concealed love child to you in their presence.

Then there are those family skeletons long buried so as not to trouble the lives of the happy family now – especially the younger generations.

That is quite apart from the mistress(es), the other family, the cursed Egyptian relics etc.

Moral; certainly take instructions with whoever comes along amongst the nearest and dearest, but make sure at the end you have 10 minutes along to double check for gaps in the narrative (and note this extra period on the a/n).

Calls on Bounty



Possibilities and hence a need to probe:

1. Friends
2. Assistants/carers/staff
3. Religious bodies
4. Charities generally
5. Promisees various

Guildhall
CHAMBERS

The Estate

Residuary gifts and the experience of charities – such gifts often very generous. This suggests a failure of solicitors to probe and lay out properly to the testator what in fact they are disposing of.

The commonplace is the value of the testator's home and a local solicitor will have a rough idea – admittedly not as a valuer.

Being aware of the property they have available to dispose of does involve reviewing the worth of its constituent parts – "*gift of my diamond earrings and my paste earrings*".

Life cover and stocks and shares may need careful probing.

The a/n ought to have a spreadsheet of some sort to include the "zero returns".

The Checklist

There are standard checklists e.g. ECFP V 42(1) [3501]– not that I can recall seeing one having been used in practice – which may illustrate their effectiveness at avoiding disputes!

As the law and social mores evolve so your checklist must be updated. I suggest the following miscellany:

1. Have you ever agreed to share any of your property
2. Have you made any promises to anyone about your property
3. Are you morally beholden to anyone
4. Have you ever had a relationship which might have made the other person feel they have a claim on you.
5. Do you have any assets which could be said to belong to somebody else. Etc.

Guildhall
CHAMBERS

Capacity

In a sense you owe it to your client to able to robustly defend the capacity you believe they had if you are making a will for them.

Even in clear cases – such as making a will for a 40 year old business person – a brief note to the effect that you reviewed them in capacity terms is appropriate along with any stand out points.

If following a checklist you should have by the answers a good start to assess capacity by appropriate and detailed responses.

The Banks v Goodfellow test is being updated – see for instance Key v Key [2010] EWHC 408 where a will failed because of the lack of decision making powers of the testator. In any event see S3 of the Mental Capacity Act 2005 for post 1st April 2007 wills.

Guildhall
CHAMBERS

Capacity (Cont.)

Note Re Ashkettle [2013] EWHC 2125 – the views of an experienced solicitor as to capacity should be based on a proper assessment of all the facts and fully accurate information.

The a/n should have all this in it to protect the best interests of the testator.

If capacity might be in question then:

1. Golden rule – seek an immediate assessment by a consultant with appropriate skills.
2. Lesser alternative - seek results of mini mental scores or Clifton tests and/or consult medical staff and carers.
3. Remember – there is always the fall back of a statutory will.

Guildhall
CHAMBERS

Knowledge and Approval

- Changes from previous will – why are they being made?
- Is the person procuring the will organising it?   If so take especial care.
- Read the will over out loud to the testator before they execute it.
- In extreme circumstances have the reading over and execution on DVD or have it executed and then have a DVD of a discussion and approval of it by the testator (2nd best).

Guildhall
CHAMBERS

Undue Influence

Theobald 17th Ed 3-030:

At one extreme there may be violence to, or imprisonment of, the testator. At the other the pressure exerted by talking insistently to a weak and feeble testator in the last days of his life may so fatigue his brain that he may be induced, for quietness' sake, to give way to the pressure.

Some forms may be virtually impossible to detect – "potatoes on the plate".

Some comfort may be taken from the thought that a testator without guile may easily disclose that "matron really wants me to make a will".

Again careful questioning is key where you as solicitor may not see the client for very long in a consultation.

Lloyds Bank Ltd. and the agreeable client example.

Proprietary Estoppel and Constructive Trust

Farmers, heads of firms and the paterfamilias are all persons to probe about such claims as being a possibility.

In fact with farmers you should probably assume that promises were made to the younger generation to come into farming until you have reason to believe otherwise!

If promises were or might have been made you should advise protective measures** are taken (save where the will is in conformity with the promises – in which case a recital may be a good idea to this effect).

** Seek Counsel's advice

1975 Act Claims

Ilott v The Blue Cross [2017] UKSC 17 has increased uncertainty as regards children's claims but it emphasises the desirability of testator's leaving the best evidence of why a person was cut out of a will. At para. 46 Lord Hughes said:

More critically, the order under appeal would give little if any weight to the quarter of a century of estrangement or to the testator's clear wishes.

So explanation is the first step.

Secondly there should be an exploration with the testator as to what claims there might be and how they might be headed off. For instance by making some provision expressly for maintenance or of a nature which will provide it e.g. purchase of an annuity. Another route is to make a gift conditional on there being no claim under the Act.

The possibility of change of domicile may open up possibilities.

Guildhall
CHAMBERS

Tax

- Tax on particular gifts or falling onto residue should be carefully thought about – a not uncommon source of complaint.
- Use of the nil rate band is a commonplace of will drafting.
- Take accountancy advice – sometimes wills are seen which seek to avoid tax impositions which in fact are not live issues.

Guildhall
CHAMBERS

The will and putting affairs in order

- There is a presumption that a will in the testator’s hands but lost by date of death has been revoked by destruction – so keep it yourself and send only a copy to the client if the client agrees.
- If the will is collected advise about its care and revocation by destruction.
- Given the advances in medical skills many people have ample and fairly accurate forewarning of their demise – allowing them to put their affairs in order and executing an LPA.
- If your partners are named as executors (and in any event) the more the testator puts their affairs in order the better and a brief guide to this may be appreciated e.g. cashing in policies, disposing of plant/hobby collections, surplus clothing etc. to charity shops. It can be cathartic for some people.
- Lifetime gifts – Re Beaney [1978] 1 WLR 770.

Probate Fees

- The proposed hike in fees was lost with the election but may be re-introduced.
- The flaw is that an executor (but not an administrator) has wide powers without a grant. Williams Mortimer & Sunnucks on Executors Administrators & Probate 20th Ed. 5-03:

Because an executor's title is derived from the will he may, before he proves the will, do almost all acts which are incident to his office, except some that relate to litigation. He may seize and take into his hands any of the testator's effects, or take release of debts owing from the estate…So he may…sell or otherwise deal with the testator's undisposed goods. However the executor will not be registered at H M Land Registry as the proprietor of registered land…

- You will be asked as solicitors whether the probate fee of £5k, £10k or £20k must be incurred and the honest answer may be that it is not – albeit you automatically seek probate now.

- Similarly you should consider advising testators to add the name of one of their executor's onto the title to their land – albeit there are pros and cons to this.

Guildhall
CHAMBERS

The Holistic Approach

- The experienced solicitor used to the vagaries of what clients want, what they think they want and with a knowledge of human nature is impeccably placed to draft a will. A will writing course cannot compare.
- Like a marriage it is not an exercise to be entered into casually.
- The start is a checklist and at the end there should be a will and some detailed attendance notes (and the check list) together in the file all ready for a Larke v Nugus request.
- Some parts of the exercise overlap and there is an a la carte feel to part of what is undertaken by the solicitor.
- Your premiums will suffer if the file is a scruffy piece of paper with a few manuscript notes dotted around – and your conscience should not be clear as you have not done your best to protect what your client paid you good money to do for them whilst putting their faith in your professional skills.

Guildhall
CHAMBERS

Conclusion

- Obviously most wills carry out the maker's wishes.
- Counsel see the ones that go wrong.
- Some circumstances have, for you, trouble written all over them. If so, you can always seek advice (promptly).
- Commonly things go wrong when there is:
  - (i) A rush or delay
  - (ii) Inexperience
  - (iii) Lack of organisation e.g. no checklist or a/n's.
  - (iv) Concern about the effect on a client's family

The remedies are obvious!

Guildhall
CHAMBERS