DRAFTING WILLS – THE BACK-TO-FRONT METHOD

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When one is asked to undertake to give a talk to an august group, such as this, it always seems like a good idea at the time. The talk is months away, the topic seems broad and you feel it will be all right on the night! Then the engagement approaches and you begin to wonder what can I talk to these people about that will actually be informative and useful?

I realise that a 'nuts and bolts talk' from me, to people like you about will drafting, in a general sense, would be as much use as the spare proverbial in the proverbial. You have heard of the KISS principle which I fully endorse but instead I have decided to turn the topic on it head and get your to try to think in back-to-front way when you come to draft a will.

In other words to direct you mind to the aftermath when the testator has died and see whether the will you have drafted will stand up to 'challenge' in the broadest sense of that word.

To blindly go where the client may lead.

The Supreme Court stated in ***Carroll and another v. Carroll*** [1999] 4 IR 241 said that a solicitor is not a mere conduit for a client's instructions. The role of the solicitor is to advise and bring his or her professional skill to bear on the work being done for the client. While the Carroll case related to a solicitor who did not advise on all aspects of an *inter vivos* transfer. It is a warning that is also directly apposite to the drafting of wills. You role is to advise the client not simply incorporate in to the will what you are asked.

In an English case a solicitor who took at face value the client informing her that property was held under tenancy in common was found liable to a disappointed beneficiary when the property was in fact held as joint tenants and there was nothing by will to bequeath.

The case of ***Corrigan v. Corrigan and others Unreported High Court 2nd November 2007*** is another case in point, the solicitor appears to have accepted that land was zoned for residential and industrial development and a clause was drafted on that basis. The land was zoned agricultural both when the will was made and when the testator died. The clause was found void.

I have noticed, in cases that I have done, that when I might query why a will was drafted in a particular way? Or why a testator made a dramatic change in who might be left the estate? I have been told that the solicitor was just following instructions. In one case the solicitor told me that he believed it was none of his business to ask why a radical change in the disposition of his property as the testator could leave his property to whoever he liked.

However, in that case the beneficiary, under the immediately preceding will, was trying to set up a testamentary contract, which was to some extent corroborated by the earlier will and therefore it would have been of use, in defending the testamentary contract claim, to know what the testator's reason for the change was. There was no information as to why the initial beneficiary benefited under the first will and why he did not benefit (to the same extent) under the second.

The client for whom you draft a will could perhaps fall into two broad categories:

(i) The client you know very well over a long period of years – where you could be lulled into a false sense of security.
(ii) The client who you do not know at all, who instructs you for the first time in relation to his or her will – where you might be in difficulty in relation to what questions to ask.

In the former category you may feel you know all there is to know and indeed that may be the case, but I am reminded of George Brady S.C.'s advice in relation to a statutory provision with which one may be very familiar. Never assume you know what it says if you have to advise, and it is relevant, go back and read it afresh in the light of the facts. Very often you can be very surprised as to its content. Even Laffoy J confessed in Court to being 'gob smacked' by some of the provisions relating to the spousal legal right share when the Section was extensively opened to her.

So don't make assumption ask the awkward or may be even the obvious questions.

If some claim is made against the estate at a later date it is of enormous assistance to be able to show that the matter was considered in the round by the testator when making the will and even further that you advised fully.

In the second category of client you have to go in a fact finding mission before you can start or time does not allow or the will is simply leaving all to a spouse who is the parent of any children that there might be.

It is useful even to ask how the client came to choose you and why?

Like all legal advice it is dangerous to take the person you are advising at face value. I would suggest you might probe the following:

- The freedom of the testator to dispose of his her property as he or she might wish is crucial to consider. Single people may have children.
- You will be familiar with the obligations to a spouse and child.
- However the apparently free testator might conceal hidden difficulties. I would suggest that your enquiry might go further than just asking about a spouse or children. In the case of ***In re ABC, XC & Others v RT & Others 2003 2 I.R. 250*** the Court held that moral obligations to persons other than children may be relevant to the Courts considerations e.g. an obligation to an ill or infirm parent. (See the guidelines set out in full below).
- Particularly in the case of single people the testator might be asked if there has been any promise made to any person vis a vis the disposal or property,
- If persons other than next of kin are to be principal beneficiaries it would be worth probing why that is so? You can get around any reticence by explaining that the purpose for doing so is so that if spurious claims might be made later you want to be in a position to refute them.
- If the person has a carer he or she might be asked if the carer has been remunerated or has any expectation of being looked after in the will? If the carer is getting a benefit in the will which is intended to recompense him or her it would be best that it is stated in the will that the benefit is in gratitude/payment for the services rendered to the testator during his or her life. To prevent any additional claim.
- It may be necessary to tease out with the client what he or she is trying to achieve? Especially where conditions are to be attached to bequests – see below. It may be necessary to investigate in the recent case involving Rosemary Toole there were bequests to organisations and persons involved in ‘assisted suicide’ they were ruled invalid but this incurred costs for the estate.

- Advise whether what the client is trying to achieve is feasible and if not, why not and follow it up with a clear letter of advices.
- Accountants can be wonderful but some of the schemes they suggest for tax planning can require careful scrutiny to see if they are legally permissible or workable. Also have regard to what the testator wants to do not just what may be more tax effective.
- If the testator wishes to impose conditions on bequests one has to tread with great care – they can often lead to constructional problems with wholly unintended or unforeseen results. It will be no defence in s subsequent negligence suit that you were only following the client's instructions – see further below.

So therefore be vigilant. Be curious and ask even awkward questions.

Where there is a will, there is potential for a dispute:

When you come to draft a will you should always have an eye to the potential for a dispute even in the most unlikely of cases. I am not just speaking about an outright challenge to a will. That may be the least of your worries. If a dispute arises you, as the solicitor, will have very crucial evidence to give and the greater your contemporaneous preparation the better.

Disputes on in relation to wills can take many forms:

(i) Outright challenge.

As a solicitor drafting a will, you should have an eye to even unexpected challenges of an outright type i.e. a challenge to the essential validity of the will.

While I believe that each will should be drafted as if the testator may die the next day, it must be borne in mind too that the will may not be proved for some time after it was drafted. Therefore the information you gather and record at the time a will is being drafted may be of considerable significance and help. Further if there is any question as to capacity or due execution it might be better to have the affidavits of attesting witness or mental capacity sworn contemporaneously with the will in case the relevant deponents may not be available/traceable when the will comes to be proved.

As you will know the grounds for challenging a will are:

(a) Lack of observance of the formalities. With a will being made in a solicitor's office it is unlikely that this will ever present a problem of proof. Though it is not unknown. If the signature is enfeebled, is made by mark or the testator is blind, it might be worth having a **contemporaneous** affidavit of attesting witness made dealing with the relevant wrinkle in straightforward due execution. Give as much detail as possible – see precedents in ***Will Irish Precedents and Drafting*** – Spierin. See below also re supervision of due execution.

(b) Lack of capacity. While this is of course connotes a lack of mental capacity that will not allow the testator to know he or she is executing a will; the nature and extent of his or her estate and be able to call to mind the persons who might be expected to benefit from the estate and decide whether or not to benefit them (***Banks v. Goodfellow*** (1870) LR 5 QB 549, ***In re Glynn*** [1990] 2 IR 326, ***O'Donnell v. O'Donnell*** (24th March 1999 Unrep H.C., **(*De Souza Wearen v Gannon and Others* [**Unreported decision of the High Court 20th of February, 2004] **))**.

Of course in the case of elderly or very ill testator you will take the precaution of getting a medical certificate. Aside from cases of dementia or severe mental illness, I have seen wills challenged on the basis that:

(i) The testator was an alcoholic all his or her life.
(ii) The testator suffered from chronic depression
(iii) The testator was terminally ill and due to the level of medication being administered was robbed of capacity.

While these grounds would rarely succeed it does not stop the allegations being made and therefore it would be of use in my view to ask the client their history and about any difficulty they may have suffered and satisfy yourself that the person has capacity so if the allegation is made it can be refuted.

In the **DeSouza-Wearen case** (see above) the testator suffered from very serious delusions. She believed her life was in imminent danger from paramilitaries or other sinister forces, that persons were coming into her house at night and performing domestic chores, that 'they' were listening to her conversations in the street and communicating with her through her radio or television.

The will was upheld because none of the delusions bore on the exclusion of one of her daughters who challenged the will. I believe however that the solicitor's very detailed and graphic account of how he came to make the will was very persuasive. The Solicitor had never met the woman before but her odd insistence that the will had to be done there and then on a Friday evening at 5 0'clock because she might be murdered over the weekend, prompted a full contemporaneous attendance to which he could have regard when giving his testimony was of enormous help.

On the subject of medical reports very often the ones I have seen are inadequate. Two lines saying the testator is capable of managing his or her affairs is not really of great help.

It is better if the medical report states:

- how well the Dr. knows the deceased; what he has being treating the Deceased for and over what period;
- preferably that he or she has examined the Deceased specifically as to testamentary capacity and
- then ideally that the testator satisfies all three limbs of the legal test of testamentary capacity (see above).

As best practice I would suggest that in case where there is real likelihood of a challenge to capacity later that it would be useful for the Dr. to swear a detailed **contemporaneous** affidavit of mental capacity dealing these points that can be left with the will, in case the Dr. is not available when you come to prove the will. Again the affidavit should be detailed – precedents are to be fount in ***Wills Irish Precedents and Drafting* –** Spierin.

(c) The third basis for an outright challenge is duress and undue influence in relation to the making of the will. From some recent experience in fought cases I have come to conclusion that, quite wrongly, the Courts are almost immune to an argument that a will drawn up in a solicitor's office could still be the product of undue influence. Of course if the will is drawn by the Deceased's usual solicitor it makes it much more difficult to challenge it but in an appropriate case the Court should in my view look more closely at what happened.

If the testator is leaving a disproportionate amount of his or her estate to some person, relative or not, I feel that in drafting the will you should ask why?

You should satisfy yourself that the testator is acting freely.

I appreciate that at times the testator may present in the company of the principal beneficiary. Often the testator may insist that the principal beneficiary be present when instructions are taken. If at all possible try to avoid that by telling the beneficiary and the testator that it is as much for the beneficiary's protection as anything else. Because if the will is challenged it will be alleged that the testator was not free from the influence of the beneficiary and your presence as solicitor may not be enough to prevent the allegation of undue influence being made.

In such a circumstance or in any circumstance where you feel that a testator may be influenced or the suggestion of influence made it is crucial to reassure yourself that the testator is acting freely.

If you have misgivings but decide to proceed record those misgivings fully in your attendance.

It sometimes alleged that a physically weakened testator is less able to withstand influence so in cases where the testator is ill, old or dependant be careful to gather material or refute the allegation of undue influence.

To some extent this can be linked into a lack of capacity though they are distinct legal issues.

(ii) Testamentary contract/legitimate expectation.

A **testamentary contract** arises where a testator agrees to leave his or her property to a particular person or persons based on some arrangement between them, usually that the intended beneficiary looks after and cares for the testator. The arrangement is usually private and only comes to light after the testator has died making a will, which it is alleged, in not in compliance with the agreement. In theory if the agreement is one in relation to land the Statute of Frauds (Ireland) 1695 should be complied with i.e. that the contract be evidenced in writing, but almost inevitably it never is and the claimant relies on acts of part performance to set up the contract.

The difficulty in defending this type of claim is that there is rarely any information in relation to the alleged agreement and the one person who can shed light on the matter has gone to his or her eternal reward.

Allied to such claims, and they often run in tandem, is a claim of **legitimate expectation** where a person says that he or she acted to his or her detriment in the belief that he or she would be left a specific asset, usually the principal one.

Still further a person or in addition he or she might allege that they are due money from the estate for services rendered.

The fact of the matter is that the Courts have been inclined to look on such claims benignly and the persons benefiting under the will find themselves fighting a rearguard defence with literally no ammunition.

In my view the decision of the Supreme Court in ***McCarron -v- McCarron*** (unreported decision of the Supreme Court, 13th of February, 1997)is most unfortunate in its vagueness and it has lead to a lot of claims being made, which it is very difficult to defend. No estate wants to go as far as the Supreme Court, with attendant huge costs, to see if the matter might be revisited or clarified.

If therefore you are acting for a person who may in some way appear to be dependant on someone or his or her day to day care or existence it would be important in drafting the will to ask the testator if he or she has made any promises to these persons, to tease out the basis upon which they are looking after him or her and to explain the reasons for your questions to that you will have some way of defending such a claim if it be brought.

It is also important to be alive in such a scenario to undue influence and try to satisfy yourself that the testator is acting freely and voluntarily.

(iii) Disputes about construction.

The one dispute that may arise in relation to a will you drafted that will make your blood. Because the likelihood is that you will end up paying for the party if the matter has to be litigated. A will that seemed perfectly clear on the day you drafted may be difficult to construe when all the pieces of the jig saw fall into place.

As a professional drafting a will you are expected to be able to draft a document that is free from:

(a) textual ambiguity.
(b) Does not conflict with rules of law e.g. not void for uncertainty or does not offend against the rules against perpetuity.

It is useful in the context of this backward approach to drafting wills to have a look at the guidelines suggested by Lowry LCJ in ***Heron v. Ulster Bank Ltd***, [1974] NI 44 which were approved by Carroll J in ***Howell v. Howell*** [1992] I IR 290 and which have been applied repeatedly in constructional cases since.

They are:

> ‘I consider that, having first read the whole will, one may with advantage adopt the following procedure:-
>
> 1. Read the immediately relevant portion of the will as a piece of English and decide, if possible, what it means.
>
> 2. Look at the other material parts of the will and see whether they tend to confirm the apparently plain meaning of the immediately relevant portion or whether they suggest the need for modification in order to make harmonious sense of the whole or, alternatively, whether an ambiguity in the immediately relevant portion can be resolved.
>
> 3. If the ambiguity persists, have regard to the scheme of the will and consider what the testator was trying to do.
>
> 4. One may at this stage have resort to the rules of construction, where applicable and aids, such as the presumption of early vesting and the presumption against intestacy and in favour of equality.
>
> 5. Then see whether any rule of law prevents a particular interpretation from being adopted.
>
> Finally, and I suggest not until the disputed passage has been exhaustively studied, one may get help from the opinion of other Courts and judges on similar words, rarely as binding precedents, since it has been well said that ‘no will has a twin brother’ (*per* Werner J. *in the matter of King* 200 N.Y. 189, 192 [1910]) but more often as examples (sometimes of the highest authority) of how judicial minds nurtured in the same discipline have interpreted words in similar contexts’.

You should bear these guidelines in mind when drafting a will and when your job is done see if your will would require anyone to travel beyond point number 1, if so there is potential for the will having to be construed and litigation when the person dies.

Disputes about construction can arise because the facts when they fall into place do not match the text of the will e.g. ***Corrigan v. Corrigan and another*** (Unreported 2nd November 2007) where the lands were not zoned as the testator thought they were; another case in the Circuit Court which went on appeal to the High Court, where the testator left her estate to grandsons Michael O'Connell and John O'Connell but she has two grandsons of each name. In the circumstances the will should have said son of my son/daughter… so as to identify which grandsons were meant.

Where conditions are attached to bequests, the questions that arise may be:

(a) Whether the condition is drafted with sufficient to avoid uncertainty? – ***Mackessy -v- Fitzgibbon and Others*** [1993] 1 I.R. – reside and live on the farm.
(b) Whether the condition offends public policy? – restraints on marriage; restraints on alienation.
(c) Whether the condition is a condition precedent or subsequent?*
(d) What does the condition mean?

(*If a condition precedent is found void the entire bequest is void. If a condition subsequent is void only the condition is void and the person takes free from the condition and see ***Mackessy v. Fitizgibbon above,*** recently endorsed by Laffoy J (***McGowan v Kelly*** [2007] IEHC 228) where the approach of the court is to hold that the condition is a condition subsequent unless the opposite conclusion is unavoidable.)

Conditional bequests give rise to more constructional litigation than almost anything else. So if at all possible they are best avoided.

It is interesting that it has been said that it is possible to draft conditions with sufficient precision that they will work and be applied but in the majority of the cases they fail.

I remind you of the warning of the Supreme Court in the ***Carroll case***, you have a duty to advise so if the testator is absolutely insistent that a condition be imposed despite your advise make sure that you have recorded your advice in an attendance and preferably with a follow up letter to the client explaining why you consider it unwise to impose the condition.

When drafting a will remember too the strictures on the admissibility of extrinsic evidence i.e. evidence from outside the four corners of the will. To be admissible **TWO** conditions must **BOTH** be satisfied:

(a) There must be an ambiguity or contradiction on the face of the will i.e. it can not be admitted to remedy a straightforward mistake ***In re Collins Deceased O'Connell and Another v. The Governor and Company of the Bank of Ireland*** (infra)or to get around some rule of law that renders a bequest inoperative.

And

(b) It must be necessary to ascertain the intention of the testator.

See ***Rowe v. Law*** [1978] IR 55, ***In re Collins Deceased O'Connell v Governor and Company and the Bank of Ireland*** [1998] 2 IR 596

To some extent it might be said there is only one condition because if there is an ambiguity or contradiction it will *ipso facto* be necessary to ascertain the intention of the testator.

While you attendance and correspondence may save you from negligence but may not be admissible in a construction suit.

If you are drafting a will that is other than straightforward, I would suggest that you have a colleague to read it over after it is drafted to see if he or she can see any ambiguity or lack of clarity.

The problem often is that the pieces only fall into place when the testator dies and then the shortcomings in the drafting becomes obvious.

For instance I have seen recently many gifts or gifts over to grandchildren of a testator but remember if that the class of children includes sons that that the class of grandchildren will not close till the last son dies.

Therefore it is better to make clear it is grandchildren living at the death or to use some formula by which the class will close.

(iv) Section 117 claims (with perhaps a element of Section 121)

When drafting a will for anyone, including single people, you must be alive to the possibility of children in being or who may come into being in the future.

In the case of a childless person, who may have children in the future, it is important to advise that in that event the will should be immediately revisited.

In the case of any testator with a child you must fully advise in relation to Section 117. If the children are the principal beneficiaries or if the estate is being left to the parent of the child then the position is less acute.

Remember however that Barron J in ***In Re JH [1984]*** IR 599 stated that leaving the property equally between children equally will not always fulfil the moral duty because depending on the needs of the children 'equality may perpetuate inequality'.

The needs of each child needs to be evaluated. In this context like the guidelines suggested in constructional cases it is useful to have to the fore of your mind the guidelines in Section 117 cases recently distilled by Kearns J in ***In re ABC, XC & Others v RT & Others 2003 2 I.R. 250***

They are:

> **'(a)** The social policy underlying s. 117 is primarily directed to protecting those children who are still of an age and situation in life where they might reasonably expect support from their parents against the failure of the parents who are unmindful of their duties in that area.
>
> (b) What has to be determined is whether the testator at the time of his death owes any moral duty to the children and if so, whether he has failed in that obligation.
>
> (c) There is a [relatively] high onus of proof placed on an applicant for relief under s. 117 which requires the establishment of a positive failure in moral duty.
>
> (d) Before a court can interfere, there must be clear circumstances and a positive failure in moral duty must be established.
>
> (e) The duty created by s. 117 is not absolute.
>
> (f) The relationship of parent and child does not itself, and without regard to other circumstances, create a moral duty to leave anything by will to the child.

(g) S. 117 does not create an obligation to leave something to each child.

(h) The provision of an expensive education for a child may discharge the moral duty as may other gifts or settlements made during the lifetime of the testator.

(i) Financing a good education so as to give a child the best start in life possible and providing money which if properly managed should afford a degree of financial security for the rest of one's life, does amount to making 'proper provision'.

(j) The duty under s.117 is not to make adequate provision but to provide proper provision in accordance with the testator's means.

(k) A just parent must take into account not just his moral obligations to his children and to his wife, but also his moral obligations e.g. to aged and infirm parents.

(l) In dealing with a s.117 application the position of an applicant child is not to be taken in isolation. The court's duty is to consider the entirety of the testator's affairs and to decide upon the application in the overall context. In other words while the moral claim of a child may require a testator to make particular provision for him, moral claims of others may require such provision to be reduced or omitted altogether.

(m) Certain circumstances giving rise to a moral duty may arise if a child is induced to believe that by, for example, working in a farm he will ultimately become the owner of it, thereby causing him to shape his upbringing, training and life accordingly.

(n) Another example of special circumstances might be a child who had a long illness or an exceptional talent which it would be morally wrong not to foster.

(o) Special needs would also include physical or mental disability.

(p) Although the court has very wide powers as to when to make provision for an applicant child and as to the nature of such provision, such powers must not be construed as giving the court power to make a new will for the testator.

(q) The test to be applied is not which of alternative courses open to the testator, the court itself would have adopted if confronted with the same situation but, rather, whether the decision of the testator to opt for the course he did, of itself and without more, constitutes a breach of moral duty to the Plaintiff.

The court must not disregard the fact that parents must be presumed to know their children better than anyone else.'

The Court also considered whether there was anything in the conduct of the testator,which cried out for the Court's intervention.

Remember that the circumstances are judged as of the date of death and therefore the testator should be encouraged to keep the will under review.

It is important to demonstrate that the testator considered his or her moral duty and made his or her will in the light of that.

I see many attendances which may not refer to Section 117 at all or say something like 'Section 117 was discussed', but there is nothing to flesh that out.

Please set out in full the advice given.

In dealing with a Section 117 claim it is vitally important to be able to show the testator's thought process – because the Courts say that parents must be presumed to know their children best and the Court will ask itself is there anything in the conduct of the parent 'that cries out for the court's intervention.'

If a child or children is being excluded or benefited only nominally I suggest that is advisable that an affidavit might be sworn by the testator setting out why this is so. Its admissibility later might be argued over but it would be a powerful instrument to deflect a Section 117 claim.

Be very careful if the testator is motivated by ill- feeling because the Supreme Court has stated in ***In Re IAC*** [1990] 2 IR 143 that where a marked hostility from parent to child is proved the onus of proof on the part of the claiming child is reduced.

In this contest certain testators might be better to die testate e.g. testator in second marriage wants to benefit primarily second spouse, has children by each union, if dies intestate second spouse will get at least 2/3rds of the estate with the children sharing a third between them. This will have the virtue of limiting their entitlement and court cannot intervene in intestacy unless there is a disposition to which Section 121 applies in which case a Section 117 claim will arise (see ***MPD v MD*** [1981] ILRM 179)

Section 121* applies to disposition made within three years of death and which was made for the purpose of :

(i) diminishing the legal right share or
(ii) The estate available to make provision under Section 117

(*The section is knotty and requires careful consideration and analysis)

If the court makes an Order under Section 121 the disposition is not set aside but it is deemed to have the effect of a bequest or devise and to have no other effect.

The result is that is comes back in to the reckoning for the purpose of Section 117 (or the legal right share) and because it is deemed to be a 'bequest' Carroll J held in ***MPD*** that an intestate testator could be deemed to have died testate and allow children to bring a Section 117 claim.

Therefore when drafting a will ask your client (if he has a spouse or children – who might not be doing well) if he or she has made any dispositions and examine them to see if they might be susceptible to an Order of Section 121.

Note: If acting for a claimant under Section 117 consider whether relief should be sought under Section 121 and if in doubt seek it because the same ***six month*** time limit applied i.e. six months from the date of first raising representation to the estate.

(v) Claims to a legal right share, the entitlement to which may be disputed.

I suppose the classic case in this regard in ***O'Dwyer and others v. Keegan and others*** [1997] 2 I.R. 585.

In that case there were no unhappy differences between the spouses. The wife was ill and it was anticipated she might die first. Neither will made any provision for the other spouse. The husband's estate was worth roughly ten times that of the wife. The husband died first. The wife was in coma. It was argued by the husband's executors (who were also the wife's executors) that the wife had to do something to claim her legal right share. Kelly J agreed in the High Court but was unanimously reversed on appeal. The Supreme Court holding that as the wife had been left nothing the legal right share vested in her automatically and therefore she did not need to do anything to claim her entitlement and her estate was therefore entitled to half the estate of the husband (there were no children). If the wife had been left even 5 euro the right of election would have arisen and as she could not exercise it then her estate would not have taken the half.

With second and subsequent marriages or marriage breakdown you need to be alive to potential disputes in this regard.

If there is a separation agreement or relevant Court Order you need to see it before you draft the will do no accept at face value what you have been told and even if you acted in the separation go back to the agreement and see precisely what it says.

Note: If you are acting for someone that is divorcing/separating it is essential that your client make a new will. Divorce does not revoke a will and neither does a separation agreement so it is imperative that a new will be put in place. In the case of a client is divorcing you should also advise that any subsequent marriage will revoke any will made before or after the divorce automatically.

vi. Specific devises and ademption.

When drafting a will by which in particular real or leasehold property is left by way of specific bequest one should warn the testator that should he or she sell or dispose the particular item specifically bequeathed the will may need revision. Of course the testator should be advised that he or she is free to deal with his or her property while he or she is alive, but if an item specific item is disposed of then the benefit will be adeemed and the beneficiary will not be entitled to the proceeds of the disposition or any other property acquired with the proceeds of the disposition.

I have encountered a number of cases where the same solicitor has acted in making a will and in relation to a disposition without advising a revision of the will and it might be possible for a disappointed beneficiary might successfully sue in negligence. Remember that in drafting the will you owe a duty not just to the testator but also the intended beneficiaries.

vii. Supervising due execution.

I have already stated that a will drawn up in a solicitors office will normally be property executed but I take the view that is part of the solicitor's retainer to ensure that the will is properly executed and that means supervising its due execution.

My blood had run cold on occasion in a will challenge where the will is sent out to a testator with instructions on how to execute it. The capacity for error is huge and if the will is not properly executed liability will almost certainly attach.

One firm in the context of a lost will, which was in the custody of the testator has sent out the will to be executed by the testator without supervision. When the will was lost one of the necessary proofs is that the will is properly executed. Luckily the witnesses swore up but if they had not the will would have been incapable of proof. Further the original had remained in the custody of the testator and was not forthcoming after he died. There was therefore a presumption that it has been destroyed with *animus revocandi*. This would have been disastrous because a valuable family business was left to the sons of the testator and if the will fell two-thirds would pass to his second wife and their stepmother.

The said firm could see nothing wrong in the *modus operandi.*

So please ensure that you supervise if not actually attest the execution of the will.

Remember your witnessing a will will invalidate a charging clause, where one is included. (*In Re Barker* [1886] 31 Ch. D 665) This position has been changed by Statute in England and Wales and I feel the Law Society or STEP should be lobbying for a similar change here.

Vii Legally qualified personnel only please.

I have come across cases recently where well-meaning unqualified 'legal executives' are drafting wills with no supervision. I take the view that they should not be doing it at all and it seems to me that if a constructional problem arises or a will otherwise fails that a suit in negligence would be unanswerable. If the client retains a solicitor to act for him or her he or she is entitled in my view to have a solicitor look after him.

Sadly with some 'legal executives' a little knowledge is a dangerous thing, so do not permit them to draft wills.

Brian E. Spierin S.C.
November 2007.