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Avoiding professional negligence wills, trusts and probate





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The duty to disappointed or intended beneficiaries

Julian Reed



Negligent preparation of a will

- In the majority of instances of negligence, the loss to the estate will be minimal. That is because the breach of duty will have frustrated the testator's testamentary intentions rather than caused him or his estate, pecuniary loss.
- The law recognises the right of a beneficiary (or an intended beneficiary) under a will to bring a claim against a firm of solicitors which had acted for the testator. *Ross v Caunters [1980] Ch 297* first recognised such claims.

White v Jones [1995] 2 AC 207 HL

- Established that the assumption of responsibility by a solicitor towards his client should be held in law to extend to the intended beneficiary, who the solicitor can foresee may, as a result of the solicitor's negligence, be deprived of his intended legacy.
- Lord Goff at 260D:

“(3) There is a sense in which the solicitors' profession cannot complain if such a liability may be imposed upon their members. If one of them has been negligent in such a way as to defeat his client's testamentary intentions, he must regard himself as very lucky indeed if the effect of the law is that he is not liable to pay damages in the ordinary way. It can involve no injustice to render him subject to such a liability, even if the damages are payable not to his client's estate for distribution to the disappointed beneficiary (which might have been the preferred solution) but direct to the disappointed beneficiary.”

Developments in the authorities

- The courts have emphasised solicitors should not run the risk of incurring “double liability” in respect of the same loss - ***Carr-Glynn v Frearsons (a firm)*** [\[1998\] 4 All ER 225](#), CA Chadwick LJ at 234.
- Where the solicitor is instructed to prepare a will and is aware of the urgency of the situation he is liable in negligence to the intended beneficiaries if he fails to ensure that the will is duly executed before the death of the testator - ***Smith v Claremont Haynes & Co*** (1991) Times, 3 September.
- Where solicitors have failed to include a specific devise in a will, the disappointed beneficiary must bring rectification proceedings and exhaust that remedy before suing for negligence - ***Walker v Geo H Medlicott & Son (a firm)*** [\[1999\] 1 All ER 685](#).

The Scope of the duty

- The beneficiary under the ***White v Jones*** principles must establish i) that the testator intended to confer on him a particular testamentary benefit of which he has been deprived, and ii) that his failure to receive that benefit was the foreseeable result of the solicitor's negligence.
- The extent of the duty of a solicitor to a beneficiary or intended beneficiary is subject to four limitations - ***Clark v Bruce Lance & Co (a firm) and others [1988] 1 WLR 881***, CA Balcombe LJ at 888–889.
- ***i) Proximity***
- ***ii) Object of the transaction***
- ***iii) Class of potential beneficiaries***
- ***iv) No other remedy***

Damages – general principles

- A disappointed beneficiary deprived of his inheritance due to a defect in the will, may claim for the benefit under the will to which he would have been entitled if the testator's instructions had been carried out correctly.



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Thank you for listening and watching

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Damage Limitation

Humans make mistakes; lawyers are human...

By Amy Berry



10 ways to avoid professional negligence claims

1. Write down the facts:
 - i. Are they disputed?
 - ii. What is common ground?

Factual matrix

Background

Contextualisation



2. Highlight assumptions made in writing
 - i. Evidence
 - ii. Corroboration

Don't make an "ass" out of "u" or me



3. Make sure clients know what you need and when:

- i. Timeframes (7)
- ii. Expectation management (8)
- iii. Correspondence
- iv. Cost implications
- v. Third party involvement
- vi. Applications for disclosure

4. Paper trail and chronology:
 - i. Chronologies – facts, key dates, litigation conduct, costs arguments
 - ii. Dramatis personae
 - iii. Contemporaneous evidence
 - iv. Show your decision and thought processes
 - v. Detailed attendance notes; as contemporaneous as is possible.

5. File management, risk assessment:
 - i. If you've done 1 – 4 much easier
 - ii. Find a method that works for you; if your firm/department doesn't have a proforma create one
 - iii. Spend time on risk assessment – improved; honed?
 - iv. SRA & Law Society guidance and requirements – e.g. conflict of interests



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6. Skill set; don't step out of your comfort zone
 - i. Professional negligence is based on work outside of the range of normal.
 - ii. Easier to stay in range of normal if this is what you do everyday
 - iii. Mitigation



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7. Know and diarise the time limits, jurisdiction limits, deadlines
 - i. 2 years date of death
 - ii. 6 months grant of probate
 - iii. Executors year
 - iv. Civil Procedure Rules
 - v. Non-Contentious Probate Rules (amended)



8. Expectation management

- i. Applies to clients and staffs (junior and senior)
- ii. Don't underestimate price or possible delays
- iii. Avoid overpromising and under delivering
- iv. Trust and confidence



9. Keep your knowledge up to date
 - i. Have a good library – electronic and hard copy subscriptions; reference/university libraries
 - ii. Attend webinars
 - iii. Join practice groups and societies
 - iv. Carry out research
 - v. Use third parties



10. Professional indemnity insurance

- i. Get a copy; read it
- ii. Know when you are required to report something
- iii. Know when it is advisable to report something
- iv. Know where the boundaries are

Its gone wrong... 10 ways of remedying wills, trusts and deeds

1. Mitigation:

- i. If the disgruntled client ought reasonably to have avoided a loss (caused by professional negligence) by accepting a remedy offered, then an award of damages can be mitigated.
- ii. Proving that it was unreasonable to refuse a remedy offered is not straightforward as lawyers suffer from the disadvantage that it is being advanced by the guilty lawyer.
- iii. Fresh litigation - the duty to mitigate “does not go so far as to oblige the injured party, even under an indemnity, to embark on a complicated and difficult piece of litigation against a third party” [Pilkington v Wood [1953] Ch 770]

2. Alteration, erasure, correction, construction and rectification
 - i. Subject to tax advice, these are the methods of trying to make a will, trust or deed say what the testator, settlor or donor intended.
 - ii. *Graham v Lynch* [2020] EWHC 986 (Ch)
 - iii. Be inventive and creative; avoid litigation

Another will, trust or deed...

3. Statutory wills and codicils

- i. Loss of capacity = application to court of protection
- ii. Tax planning in court of protection happens
- iii. Has capacity = codicil or new will



4. Variations and disclaimers

- i. Post death = variations (s.142 IHTA 1984 & s.62 TCGA 1992)
- ii. Post death = disclaimers
- iii. Tax planning: use the residence NRBs and/or 36% rate IHT on taxable estate

Increase inheritance pot...

Charity	% of taxable estate	Taxable	Rate	
£12,000	4	288,000	40%	497,800
£15,000	5	285,000	40%	496,000
£18,000	6	282,000	40%	494,200
£21,000	7	279,000	40%	492,400
£24,000	8	276,000	40%	490,600
£27,000	9	273,000	40%	488,800
£30,000	10	270,000	36%	497,800

Other avenues...

5. Declarations of beneficial ownership to third party & Trust of Land and Appointment of Trustees Act 1996
6. Appointments under discretionary trust
7. Short term trusts
8. Claims under the Inheritance (Provision for Family and Dependants) Act 1975



9. s. 15 Trustee Act 1925

permits personal representative(s), or two or more trustees, or sole acting trustee **where authorised by the instrument creating the trust or by statute**, to:

“(a)accept any property, real or personal, before the time at which it is made transferable or payable; or

(b)sever and apportion any blended trust funds or property; or

(c)pay or allow any debt or claim on any evidence that he or they think sufficient; or

(d)accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed; or

(e)allow any time of payment of any debt; or

(f)compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator’s or intestate’s estate or to the trust;

and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them if he has or they have discharged the duty of care set out in section 1(1) of the Trustee Act 2000.”



10. s. 57 Trustee Act 1925

“Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income”



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Navigating the Administration Avoiding and Managing Risk

Simon Lane



The Principal Risks for firms when acting as or on behalf of a PR

- Having to compensate the trust whether actions have caused loss to estate;
- Liability for penalties and costs which cannot be recovered from the assets of the estate perhaps long after the assets have been distributed
- Damage to professional reputation and client relations

Risk Management

- Structural / Firm Wide approach to risk management rather than simply on a case by case basis
 - Can separate types of risk into 3 types
 - (1) Those inherent in being in business as a professional;
 - (2) As PR with responsibility as legal owner of asset/ assets;
 - (3) Those risks specific to being PR or Trustee

Risk Management

- 1. General business risks
 - - The general law, civil and criminal
 - - Professional obligations and regulatory requirements;
 - - Competition
 - - Data protection and management
 - - Disaster management
 - - Employment and vicarious liability
 - - Financial management

- 2. PR's Risks as as legal owner of asset/ assets
 - Legal responsibility for the safety of others including occupiers, employees and visitors – not limited to Health & Safety, could include environmental considerations
 - Regulation of sale and purchase of assets, including the general law, insider trading, taxation;
 - Responsibility for continued ownership – enforcement of title – possession etc;
 - Landlord and Tenant;
 - Insurance and risks

Risk Management

- 3. Those risks specific to being PR or Trustee
 - Law specific to being a PR or Trustee;
 - Taxation;
 - Negligence;
 - Conduct of litigation;

Risk Management

- Planned Approach to risk management
 - This will include:
 - Policies;
 - Control structures
 - Training; and
 - Compliance
- Without these in place, it becomes more difficult to anticipate, avoid and deal with risk when dealing with particular estates;
- The plan will be disclosable
- Lack of or inadequacy of a plan will point to negligence it will also increase risk

Taking on New Business

- Competence is the starting point
- The SRA code of conduct for firms provides as follows:
 - [4.2] You ensure that the service you provide to clients is competent and delivered in a timely manner, and takes account of your client's attributes, needs and circumstances.
 - [4.3] You ensure that your managers and employees are competent to carry out their role, and keep their professional knowledge and skills, as well as understanding of their legal, ethical and regulatory obligations, up to date.
 - [4.4] You have an effective system for supervising clients' matters.

Risk Management

- Standardised approach
 - Pro-Forma
 - Checklists
 - Asking the right questions
 - Compliance with policies
 - Opportunities to identify risk
 - Still plenty of opportunity to provide a bespoke service whilst maintaining minimum standards

Standard Procedures

- Issues that need to be covered
 - The deceased
 - Domicile
 - Personal details including marital or civil partnership status;
 - Trusteeships, receiverships, powers of attorney, whether they were a deputy
 - whether they themselves may have been an executor or PR and the effect on the chain of representation

Particular Issues Continued

- The family and beneficiaries
 - Personal details including a family tree dealing with divorces adoptions, dependants and the like;
 - This may identify any potential claims or inconsistencies when compared to the Will and whether potential beneficiaries have died

Particular Issues Continued

- Death Certificate
 - Accident/ injury / illness – potential claims/ statutory schemes
 - Suicide – effect on insurance policies;
 - Homicide – forfeiture issues
- Assets
 - Extent of the assets and registration/ title
 - Investment Risk vs the potential benefit for the estate

Particular Issues Continued

- Assets Cont'd
 - Imminent investment decisions
 - Availability of the Assets and their security
 - Insurance
 - Nature of the assets and whether the firm is competent to deal with this and the availability / cost of advice/ management – there may be industry specific issues ranging from Japanese Knotweed or other contamination, agricultural land, perhaps compulsory purchase or other planning issues affecting the land

Particular Issues Continued

- Assets Cont'd
 - Location of the assets might be important - - jurisdictional issues, foreign property and or assets.
 - Liquidity of the estate
- Debts
 - Size and extent, establishing solvency
 - Nature of debts, such as credit cards and the like, along with nursing home fees

Particular Issues Continued

- Debts Cont'd
 - Are these debts truly debts of the estate if incurred by others?
 - Order of priority, which should and can be paid first
 - Funding the payment of debts if there is a single or principle asset such as a house/ farm/ business premises

Particular Issues Continued

- The Will
- Validity – checking formal validity and in the context of what is known about the deceased
 - capacity issues;
 - Marriage/ divorce
 - Subsequent issue
- Subsequent wills/ codicils

Particular Issues Continued

Litigation

- Review of existing litigation (whether claimant or defendant)
- Obtaining advice about the same, whether there should be settlement, approach, tactics
- Funding
- Viability in the absence of the deceased's evidence;
- Conflicts of interest in particular the litigation is being conducted by the firm already;
- -Claims arising during the course of the administration, such as under the Inheritance (Provision for Family and Dependents) Act 1975;
- Duty of neutrality as between beneficiaries

Particular Issues Continued

Lifetime dealings with the estate which may affect the IHT

- Gifts and other dispositions;
- Availability of relief
- Tax planning
- Deceased's tax returns
- Consideration of deeds of variation

Particular Issues Continued

- The Retainer
 - Take into account the risks;
 - Allow termination in absence of proper instructions or obstruction in carrying out certain duties

Thank you for listening and watching

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