Probate Practical Tips

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DRAFTING

- Considered drafting;
- The use of pro forma precedents
- The cut and paste approach
- When you have received an instruction, act quickly .

A smooth administration?

- Clarity of will
- Relevance of will
- Capable executor?
- Scope of will?
- Revocation?
- Execution
- Capacity

Every Will should have the following elements.

- Revocation of previous Wills and Testamentary Dispositions.
- By marriage (unless made in contemplation of that marriage).
- By another Will or codicil, containing a revocation clause.
- By writing, declaring an intention to revoke.
- By destruction of the Will, by the Testator, or at his direction (but always in the physical presence of the Testator)
- Beware of foreign wills and revocation.

Applicable legislation

- **Section 85**
- (1) *A will shall be revoked by the subsequent marriage of the testator, except a will made in contemplation of that marriage, whether so expressed in the will or not*.
- (2) *Subject to subsection (1), no will, or any part thereof shall be revoked except by another will or codicil duly executed, or by some writing declaring an intention to revoke it and executed in the manner in which a will is required to be executed, or by the burning, tearing, or destruction of it by the testator or by some person in his presence and by his direction, with the intention of revoking it.*
- **Section 87**
- *No will or any part thereof, which is in any manner revoked, shall be revived otherwise than by the re-execution thereof or by a codicil duly executed and showing an intention to revive it; and when any will or codicil which is partly revoked, and afterwards wholly revoked, is revived, such revival shall not extend to so much thereof as was revoked before the revocation of the whole thereof, unless an intention to the contrary is shown.*
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Appointment of Executors

- **Common errors**

1. A situation can arise where a testator does not give sufficient attention to the suitability of the persons that they wish to be appointed as executors; perhaps the proposed executor is too elderly.

1. A testator can unwittingly impose too heavy a burden on an executor, Always be aware of the possibility of a conflict of interest should an executor also be a beneficiary in an estate or where an executor is appointed wearing too many hats, such as an appointment as a trustee or guardian. Conflict of interest particularly important where the executor might be a debtor of the estate or a potential litigant against the estate.

Common errors

1. If an executor is not able to act, there is also the possibility of encouraging an executor to appoint a substitute executor. Do not appoint an alternative executor i.e. A or B.

2. Problems can arise if too many executors are appointed. Note there is no limit on the number of executors that can be appointed but have regard to Order 79 Rule 5(14) which states *"No Grant of Administration shall be made jointly to more than three persons unless the Probate Officer otherwise directs"* .There are obvious reasons against appointing a minor as an executor although a minor can act but a Grant will issue to the guardian of the child until such time as the child reaches the age of 18.

3. When appointing a Solicitor as an executor, many Solicitors forget to insert a charging clause; the result is you are not entitled to charge a professional fee without the consent of those entitled to the estate.

4. TIP (SHOULD solicitors be acting as executors?)

- From a practical point of view, always encourage the testator to ask a person whether or not they are willing to act as an executor rather than to land an executor with the role on the death of the testator, which may be renounced

Appointment of Trustees

- The third essential element in any Will is to consider the requirement for trustees. Trustees may be required in a number of instances and may be needed for various reasons.
- Where minors are expected to inherit, individuals can be appointed trustees for the purpose of Section 57 and Section 58 of the Succession Act. These trustees can be the same individuals as the executor but it is advisable to state in any draft *"I appoint X and X to be trustees for the purposes of Section 57 and Section 58 of the Succession Act"*.
- The most important provisions in the Succession Act relating to powers of trustees in relation to infants are contained in Section 58. Section 58 also contains a special provision for land passing to an infant on intestacy.
- **(TRAPS: appointment of conflicted or unsuitable trustees, failure to fully consider powers that might be necessary)**

Appointment of Guardians

- **Appointment of Guardians**
- Where a testator has minor children, it is extremely important to insert a proper provision appointing a guardian.
- In any case where a testator wishes for another person to be appointed as guardian, such guardian must be appointed under Section 7 of the Guardianship of Infants Act. This provides:
- Subsection 1,
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- 1. *"The father of an infant may by Deed or Will appoint a person or persons to be guardian or guardians of the infant after his death"*
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- 2. *"The mother of an infant may by Deed or Will appoint a person or persons to be guardian or guardians of the infant after her death"*

3. *"A testamentary guardian shall act jointly with the surviving parent of the infant, so long as the surviving parent remains alive, unless the surviving parent objects to his so acting".*

Executors

- If a partner in a firm of Solicitors is being appointed as an executor, in the absence of any provision to the contrary, the partners, as at the date the Will is made, are the relevant individuals. This is an exception to the rule that a Will speaks from the date of death. If a testator wishes to appoint the partners as at the date of death of the testator which would be advisable, or wishes to appoint named individuals, this needs to be specifically referred to. If only one or two partners intend to extract a Grant, as would be the norm, a resolution of the partnership needs to be passed indicating which partners will so act. Again this resolution will need to be exhibited in the Oath.

- If an executor is appointed who is outside the jurisdiction, it can be difficult to administer the estate from a practical point of view. An attorney in this jurisdiction can be appointed which usually gets around this problem.

Specific/pecuniary bequests.

- **TRAPS (by far the most common trap to fall into is to fail to identify a situation where section 98 applies and the estate is administered in an incorrect manner)**
- *Section 98 provides as follows; Where a person being a child or any other issue of the testator to whom any property is given (whether by a devise or bequest or by the exercise by will of any power of appointment and whether as a gift to that person as an individual or a member of a class) for any estate or interest not determinable at or before the death of that person , dies in the lifetime of the testator leaving issue and any such issue of that person are living at the time of the death of the testator, the gift shall not lapse but shall take effect as if the death of that person had happened immediately after the death of the testator , unless a contrary intention appliers from the will.*
- Will should make provision for what will happen, have clarity in the construction.

Section 98 Example 1

- **EXAMPLE 1.1**

- Mary Fahy dies on the 1.01.2019 a widow who had three children, Sam, Lucy and Tom. By her Will Mary left her estate equally to her three children At the time of her death Sam and Tom were living but Lucy died in 2016. Mary did not update her will. At the time of Lucy's death Lucy did not have issue.
- Mary's estate will be divided as to one third to Sam, one third to Tom and one third will go on intestacy (to Sam and Tom)

Section 98 Example 2

- **EXAMPLE 1.2**
- The same facts as above but in this example Lucy was survived by one child Eamonn who is now aged 4.

Section 98 applies. Mary's estate will be divided as to one third to Sam, one third to Tom and one third will transfer to Lucy's estate (not necessarily to Eamonn as her child) as Lucy is deemed to survive Mary. For receipt purposes a grant to Lucy's estate will be needed.

Section 47

- An area where difficulties can arise is where the subject matter of a devise or bequest is charged with the payment of money whether by way of legal or equitable mortgage or charge or otherwise.

- In this instance Section 47 of the Succession Act applies and it essentially provides under Subsection 1

- *“Where a person dies possessed of, or entitled to, under a general power of appointment, by his Will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of a legal or equitable mortgage or charge or otherwise (including a lien for unpaid purchase money,) and the deceased person has not by will, deed or other document signified a contrary or other intention, the interest so charged shall as between the different persons claiming through the deceased person, be primarily liable for the payment of the charge and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof”. FAIR DEAL !!!*

The Establishment of a Trust

- The establishment of a trust must be clearly identified. This may be a trust of a specific item or sum of money or it may be a trust of the residue or part of the residue of the estate.

- The actual or substantive trust may be no more than a couple of lines. It is when the identification of the actual trust provisions becomes lost in other provisions in the Will that difficulties can apply in practice.

Dealing with the Residue of the Estate

- The next important matter to address in the drafting of a Will is to deal with an effective disposition of the residue of the estate. It is important to explain to a testator that the residue will catch all estate not otherwise specifically disposed of by Will or Codicil. The law always presumes a residue and even if the testator has given away every penny in a will, the Will speaks from the date of death and will catch all assets at that stage.
- It is important to note that in the event of a residuary benefit lapsing, it will go on intestacy unless it has otherwise been specifically provided for under the terms of the Will.
- There is no need for complicated residuary provisions where a simple solution will suffice. If you have a straightforward situation, where, for example, a number of children who are of full age are expected to benefit under the terms of the residue, in my view there is no need to go into a complicated trust scenario unless the taxation position otherwise directs.
- It should also be explained to a testator that if residuary benefit is left to a number of people jointly, that in the event of the death of any one of those persons, that as they receive as joint tenants the survivor will receive. If however words of severance such as “in equal shares” or “between” are used, this can result in a partial intestacy should anyone of the beneficiaries predecease.

Enabling Clauses; advancement, appropriation, apportionment, miscellaneous

- **Advancement**

- Where children are concerned, it is important to obtain instructions from a testator as to whether they wish for their children to start off with a clean slate on death or whether they wish for previous gifts or advancements to the child to be taken to into account. You need to seek specific instructions as to whether any capital advances, for instance cash advances, shares in the family business or transfers of property should be taken into account in the ultimate distribution on death.

- **Appropriation**

- Under Section 55 of the Succession Act, the personal representatives may appropriate any part of the estate of a deceased person in its actual condition and state of investment at the time of appropriation in or towards satisfaction of any share in the estate whether settled or not according to the respective rights of the person interested in the estate. The power of appropriation is strictly limited by Section 55.

SIGNATURE OF WITNESSES

- Section 78 Subsection 2 *"Such signature shall be made or acknowledged by the testator in the presence of each of two or more witnesses, present at the same time, and each witness shall attest by his signature the signature of the testator in the presence of the testator, but no form of attestation shall be necessary nor shall it be necessary for the witnesses to sign in the presence of each other".*

- The following clauses are in order

1. Signed by the testator in our presence and signed by us in the presence of him and of each other"
2. Signed by the said testator as and for his last Will and Testament in the presence of us who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

Powers of Trustees

- After the residuary benefits it is then possible to insert in a schedule, the additional powers of the trustees. Wording such as the following can be used *"In addition to all statutory powers which my trustees may have they shall have the following powers;* (And then insert in numerical order all the powers which you consider may be required for the trustees to administer the trust. By keeping the powers in a schedule you are keeping the drafting tight).

- Be familiar with the Trustee legislation, the powers of trustees in the 1893 Act and the 2009 Act and what needs to be extended or inserted in the Will. This is where you need to "read around" the issue and not just import a precedent. Understand the why and wherefore of each clause used.

Date of Will

- It is surprising how often a simple matter such as the date of the Will can be overlooked. The date can either be inserted at the top of the Will or the foot of the Will just above the signature. I personally prefer for the Will to contain the date just before the signature so that it is less likely to be overlooked in the act of execution. In the event of the Will being undated, you will require an Affidavit from an attesting witness confirming the date of the execution of the Will and this can cause delays and difficulties further along the line.

Signature of Testator

- I have come across situations in practice where a Will which has been sent out to a testator for execution has been dated and signed by the witnesses but the testator has failed to sign same. Obviously if a testator is signing in your office, the question of the signature of the testator should not arise but do be particularly careful if Wills are sent out by post or executed outside of the office that when it is returned that you do check for the essential elements – insertion of date, insertion of signature and signature of two witnesses. Do not presume that the execution has been attended to correctly regardless of the instructions that you gave to the testator when sending it out.

- In a case where a signature is weak, the Probate Office may require further evidence as to the execution of same and if you consider that it might be necessary for an Affidavit of due execution to be made and left with the Will it could be advisable for this to be done at the outset.

Attestation Clause

- The final element in any Will (and it should always be the final element in that no further writing should be inserted after the signature) is the attestation clause. It is interesting to note that there is nothing in the Succession Act which requires a form of attestation to any Will and the absence of an attestation clause in itself is not fatal to a Will.

- Note however the rules of the Superior Court Order 79 Rule 6 which states *"If there be no attestation clause to a Will presented for probate, or administration with Will annexed, of the attestation clause thereto be insufficient, the Probate Officer shall require an Affidavit from at least one of the surviving witnesses, if they or either of them be living, to prove that the statutory provisions in reference to the execution of Wills were in fact complied with. A note signed by the Probate Officer shall be made on the engrossed copy Will annexed to the probate or administration to the effect that Affidavits of due execution, or as the case may be, have been filed".*

ATTENDANCES AND INSTRUCTIONS

- ATTENDANCE

- INSTRUCTION

Testamentary Capacity/Test in Banks v Goodfellow

- When attending an elderly client or a client who has suffered a serious illness, the “golden rule” which should always be observed is: have a medical practitioner who satisfies himself of the capacity and understanding of the testator, witness or approve the making of the Will. Record and preserve his examination and findings.

- The testator must understand that he or she is making a Will, a document that will dispose of assets on death. The testator however need not understand the precise legal effect of the provisions in the Will.

- 2. The testator must be capable of knowing the nature and extent of his or her estate.

- 3. The testator must be able to give consideration to those persons who might be expected to benefit from his or her estate and decide whether or not to benefit them.

The Surviving Spouse

- **The Position of the Surviving Spouse on Intestacy**
- **The Position of the Surviving Spouse where there is a Will**
- **The Legal Right Share**

(1) If the testator leaves a spouse (Civil partner) and no children, the surviving spouse (Civil partner) shall have a right to one half of the estate.

(2) If the testator leaves a spouse (Civil partner) and children, the spouse (Civil partner) shall have a right to one third of the estate."

- **Renunciation of the Legal Right**
- Section 113 "*The legal right of a spouse may be renounced in an ante nuptial contract made in writing between the parties to an intended marriage or may be renounced in writing between the parties to an intended marriage or may be renounced in writing by the spouse after marriage and during the lifetime of the testator."*

Second spouses; what to consider

- This is very common with second relationships where the legal right share is usually considered to provide for first families. The issues to consider include;

- Pensions,
- Joint property;
- Sufficiency of assets and income for the surviving spouse.
- The family home.
- The need for full disclosure of assets by both parties so that a full and informed decision can be made re any renunciation.

Foreign property

TRAP;

Failing to think of scope of the legal right share,

It does not apply to foreign immoveable property. Do not compute same!

Notifying the spouse or civil partner

- 115(4) *"*It shall be the duty of the personal representatives to notify the spouse (civil partner) in writing of the right of election conferred by this section. The right shall not be exercisable after the expiration of six months from the receipt by the spouse (civil partner) of such notification or one year from the first taking out of representation of the deceased's estate, whichever is the later.

- In any instance where the question of election arises it is vital to ensure that the surviving spouse obtains independent legal advice, to ensure that he or she is fully aware of what is involved in such an election.

- **Legal Right Share – An absolute interest in property arising on death**

- The nature of the legal right share was considered in detail in the Supreme Court decision, *In the matter of the Estate of Thomas Cummins deceased. John O' Dwyer v. Keegan, Barron J.* - Judgment delivered 8 May 1997.

Qualifying partner?

- **Effect of Death on Co Habitants;**

- Part 15 of the Civil Partnership Act deals with the rights of co habitants. For the purposes of succession, co habitants constitute another layer of possible entitlements in an estate. They do not have the same rights and protections as a spouse or a civil partner and their rights can be prescribed by contracts or agreements entered into by them during the lifetime of the testator.

- If a person does not make a will, their non-martial co habitee, has no automatic rights to claim from the estate. The making of a will should be strongly encouraged to all persons in such a relationship.

Definition of cohabitant

- *(1) "For the purposes of this Part, a cohabitant is one of 2 adults (whether the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other.*
- *(2) In determining whether or not 2 adults are cohabitants the court shall take into account all the circumstances of the relationship and in particular shall have regard to the following:*
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(a) the duration of the relationship

(b) the basis on which the couple live together

(c) the degree of financial dependence of either adult on the other and any agreements in respect of their finances

(d) the degree and nature of any financial arrangements between the adults including any joint purchase of an estate or interest in land or joint acquisition of personal property

(e) whether there are one or more dependant children

(f) whether one of the adults cares for and supports the children of the other; and

(g) the degree to which the adults present themselves to others as a couple

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Qualifying cohabitant

- A qualified co habitant is defined in section 172 (5) as follows.

- *“ for the purposes of this Part, a qualified co habitant means an adult who was in a relationship of cohabitation with another adult and who immediately before the time that that relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period –*

(a) of 2 years or more in the case where they are the parents of one or more dependant children and

(b) of 5 years or more in any other case.

- The position will be that qualified co habitants will be entitled after the death of a co habitant, (but not more than 6 months after the grant) to apply for an order under section 194 for provision out of the net estate. (194(1))

Foreign divorces.

- When the Irish Courts grant a decree of divorce, the divorced spouses' marriage is dissolved and their legal status as each other's 'spouse' ends. Where you have an Irish Divorce, the situation is usually straightforward.

- The point that I would like to emphasise at this stage is the question mark over certain foreign divorces and the effect of such a divorce on basic succession rights

Recognition of foreign divorces.

- Only a Judge has jurisdiction to make a determination regarding foreign divorces, whether in the EU or not. The Probate Officer does not enjoy the breadth of powers, which would enable him to conduct a line of inquiry to make a determination regarding recognition of a foreign divorce.

O’Donohue v O’Donohue [2011] IEHC 511

- The poet and author Dr John O’Donoghue died in 2001, having left a one-page Will that he drafted himself. His case went to The High Court to clarify the terms of the will.
- Mr. Justice Paul Gilligan ruled that Dr O ’Donoghue’s will was void due to the uncertainty of its terms and meaning. This meant that the whole of his €2 million estate would pass to his mother under the rules of intestacy.
- Justice Gilligan said he was “unable to decipher the exact meaning” of the will and said O’Donohue had “unfortunately provided an illustration of exactly how a person should not make a will”. He had his mother and brother witness the Will meaning that they could no longer be beneficiaries of his estate as the law states that a witness to a will cannot be a beneficiary.
- Justice Gilligan described this as a “classic error”.
- In his judgment, Justice Gilligan said that a last will and testament is one of the most important documents a person will ever have made, but is too often approached without due consideration. A correctly drafted Will can ensure that a person’s wishes are met and avoid any uncertainty.

Why must accounts be done?

Administration accounts

In the Oath which your legal personal representative has sworn, be he an Executor or an Administrator, the following phrase will occur:

"...will exhibit a true inventory of the said estate and render a true account thereof, whenever required by law so to do..."

Further section 64 of the Succession Act 1965 imposes a duty as follows:

"The personal representatives of a deceased person shall, when lawfully required to do so, exhibit on oath in the court a true and perfect inventory and account of the estate of the deceased, and the court shall have power to require personal representatives to bring in inventories."

Content of Administration accounts

(i) the value of the estate as of the date of death in the SA2

(ii)The linking of same to the grant of probate figures.

(iii)The identification of all streams of income correctly and allocated to the correct beneficiaries

(iv)The identification of disposals and possible tax issues.

(v)The abatement of legacies.

(vi)Dealing with advancements

(vii)The distribution of assets

What is in the accounts?

1. They need to be approved and passed by the legal personal representative as a true and accurate account of the administration.

2. They may well form the basis of essential information in the future for individual beneficiaries from a taxation point of view, particularly with regard to aggregation for Capital Acquisitions Tax purposes.

3. They may well form the basis of essential information in the future if necessary to defend the personal representative, or yourself, in the administration of the estate if any dispute arises with any beneficiary or third party.

4. The income element will be very important from the point of view of the income tax liability of the estate. It can be very reassuring to look at a set of accounts and pick out the income element at a glance.

Who receives the accounts

- They are normally prepared at least in duplicate and a correct copy should be kept on your file for the reasons outlined above and the original should be sent to the legal personal representative and signed by him. A copy of same may be needed for the Inspector of Taxes where any of the beneficiaries are residing outside the jurisdiction as, in this case, the legal personal representative is liable for income tax up to the date of distribution.

- A copy is normally sent to the residuary beneficiaries under a will and those entitled to share in the estate on intestacy, when they are signing a final receipt, as obviously they are entitled to know how their benefit was arrived at. This also applies to beneficiaries of a Discretionary Trust. See *Chaine-Nixon v Bank of Ireland* (1976) IR 393. This case involved a discretionary trust in which the beneficiaries only held a potential interest. The Trustees (Bank of Ireland) maintained that as the beneficiaries were all only "potential" beneficiaries and did not have a fixed interest in the trust assets, they were not entitled to any information relating to the management of the trust. Kenny J disagreed and ruled in favour of the potential beneficiaries. He ruled that while their interest in the Trust assets was not fixed, they did have a right to the information despite their status on the basis that otherwise the result would be that the Trustees were not accountable to anyone for the management of the trust.

Rules as to the application of assets

PART I

Rules as to payment of debts where the estate is ***insolvent****.*

1. The funeral, testamentary and administration expenses have priority.

2. Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities, respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt.

3. In the application of the said rules the date of death shall be substituted for the date of adjudication in bankruptcy.

PART II

*Order of application of assets where the estate is **solvent**.*

1. Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies.

2. Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.

3. Property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts.

4. Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for, the payment of debts.

5. The fund, if any, retained to meet pecuniary legacies.

6. Property specifically devised or bequeathed, rateably according to value.

7. Property appointed by will under a general power, rateably according to value.

8. The following provisions shall also apply—

(a) The order of application may be varied by the will of the deceased.

(b) This Part of this Schedule does not affect the liability of land to answer the death duty imposed thereon in exoneration of other assets.*

Clearances

- Department of Social Welfare
- Income tax pre death Revenue
- CGT pre death pre death Revenue
- CGT on any disposals post death by Per Rep
- HSE Fair Deal
- HSE Clearance (even when no Fair Deal)
- CAT for non resident beneficiaries.

Who pays the CAT?

- The beneficiary is the taxable person and is accountable for filing the return and paying CAT on gifts and inheritances. CAT will arise where the value of the benefit taken exceeds that person's tax-free threshold (Group Threshold). Under sections 45AA and 48(10) of the Capital Acquisitions Tax Consolidation Act 2003 (CATCA) an Irish resident personal representative taking out a Grant of Probate or Letters of Administration is appointed as an "agent" of any non-resident beneficiary entitled to a benefit exceeding €20,000. Under these provisions the agent will be responsible for the Inheritance Tax obligations of the non-resident beneficiary/beneficiaries.

Apply for CAT clearance via My enquires under section 48(10) once CAT return filed and tax paid

Response from Revenue will be

If after 30 days you have not received a response with regard to your request for clearance under Section 48(10) Capital Acquisitions Tax Act 2003, as amended, you may distribute benefits to the non-resident beneficiary(ies).