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Will Drafting: Avoiding Posthumous Problems and Litigation

INTRODUCTION

The task of providing estate planning advice and obtaining and collating a client's instructions into a testamentary document capable of validity is not insignificant and is fraught with professional risk. This paper is focused on alerting the practitioner to the issues and themes that should be considered and discussed with prospective testators when deciding how to order their affairs.

This paper is not a 'nuts and bolts' approach to will drafting, it aims to alert the practitioner to potential problems that may arise post death and to give consideration to such issues at the time that instructions are taken and the will is drafted. You must spend ample time with the client when taking such instructions and discuss in detail all relevant issues, even those issues not contemplated by the client, and if necessary follow up inquiries regarding some of the instructions.

In addition, the importance of making comprehensive contemporaneous notes when taking instructions from a client in respect of a Will cannot be over-emphasised.

Actions involving (i) the construction of wills; (ii) claims seeking a legal right share; (iii) the capacity of the testator; or (iv) section 117 of the Succession Act 1965, are all too commonplace.

The common denominator in all of these actions is the significance of making comprehensive contemporaneous notes when taking instructions from a testator. This may seem like a statement of the obvious, however, it is not uncommon for attendance notes to contain little or no information; or in some cases for there to be no attendance notes at all.

Generally, it can be said that the client for whom you draft a will is either: (i) a client that you have known for a period of time; or (ii) a new client. In relation to the former, there is a risk that the practitioner may (wrongly) assume that they are aware of the client's affairs and with a new client, there may be a reluctance to ask probing questions.

The Supreme Court in *Carroll v Carroll*[1] took the view that a solicitor is not a mere conduit for a client's instructions. Baron J. stated:

> *"…a solicitor or other professional person does not fulfil his obligation to his client or patient by simply doing what he is asked or instructed to do. He owes such person a duty to exercise his professional skill and judgment and he does not fulfil that duty by blithely following instructions without stopping to consider whether to do so is appropriate. Having done so, he must then give advice as to whether or not what is required of him is proper. Here his duty was to advise the donor to obtain independent advice."*

Like any legal advice, it may be dangerous to take the client at face value. Therefore, as a practitioner, you cannot make assumptions and you must be vigilant and curious and even ask awkward questions, where necessary. In addition to this paper, I have prepared a (i) checklist for taking instructions for a will; and (ii) checklist for a simple will. It is hoped that by using these checklists, the practitioner can ensure that all of the clients' needs are met and that the relevant questions are asked, so as to ensure (insofar as possible) that:

(i) The will is a reflection of the client's instructions.

[1] [1999] 4 IR 241.

(ii) The practitioner will be armed with the necessary instructions so as demonstrate post death, should such questions be raised, that the will is valid.

(iii) That the will is unambiguous and not lacking in clarity.

I suggest that the following issues be considered.

DOES THE CLIENT HAVE TESTAMENTARY CAPACITY?

The most common basis for an allegation that a will is invalid is that the testator did not possession the requisite testamentary capacity.

Section 77(1)(b) of the 1965 Act requires that in order to be valid, a will shall be made by a person who is of sound disposing mind. As to determining whether a person was "of sound disposing mind" when making or purporting to make a will (which requirement has been consistently applied in this jurisdiction), Cockburn C.J. in *Banks v Goodfellow*[2] sets out that:

> *"It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."*

The within test is essentially a three-fold test, requiring satisfaction of all of the constituent elements which may be paraphrased as follows:

(i) The testator must understand the nature of the act and its effects, i.e. know that they are executing a will, a document that will dispose of their assets;
(ii) The testator must know the nature and extent of the property of which he is

[2] (1870) L.R. 5 Q.B. 549 at 565. See also: *In Re Flannery—Flannery v Flannery* [2009] IEHC 317; *In Re Glynn* [1990] 2 I.R. 326; *Curtin v O'Mahony* [1991] 2 I.R. 562; *Parker v Felgate* (1883) 8 P.D. 171; *Perrins v Holland* [2010] EWCA Civ 840; *O'Donnell v O'Donnell*, unreported, High Court, Kelly J., March 24, 1999; *Duffy v Kearney and Duffy*, unreported, High Court, O'Hanlon J., August 10, 1994; *Blackall v Blackall (In Re Helena Blackall Deceased)*, unreported, Supreme Court, O'Flaherty J., April 1, 1998.

disposing;

(iii) Did the testator call to mind all those persons who might be expected to benefit and then decide whether or not to benefit those persons?

The burden of proof in relation to testamentary capacity is subject to the following[3]:

(i) While the burden starts with the propounder of a will to establish capacity, where the will is duly executed and appears rational on its face, then the court will presume capacity.

(ii) In such a case the evidential burden then shifts to the objector to raise a real doubt about capacity.

(iii) If a real doubt is raised, the evidential burden shifts back to the propounder to establish capacity none the less.

In *Scally v Rhatigan*,[4] Laffoy J. endorsed what has become known as the *"Golden Rule"* as being the law in this jurisdiction. In referring to the judgment of Briggs J. in *In Re Key, Deceased*,[5] where the court stated that:

> *"The substance of the golden rule is that when a solicitor is instructed to prepare a will for an aged testator, or for one who has been seriously ill, he should arrange for a medical practitioner first to satisfy himself as to the capacity and understanding of the testator, and to make a contemporaneous record of his examination and findings …"*

However, Briggs J. went on to say at 2023:

> *"Compliance with the golden rule does not, of course, operate as a touchstone of the validity of a will, nor does non-compliance demonstrate its invalidity. Its purpose, as has repeatedly been emphasised, is to assist in the avoidance of disputes, or at least in the minimisation of their scope."*

Laffoy J. went on to comment that:

> *"Irrespective of whether the golden rule or best practice was followed in a particular case, it is a question of fact, which is to be determined having regard to all of the evidence and by applying the evidential standard of the balance of probabilities, whether a testator was of sound disposing mind when the testamentary document which*

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3 *Scally v Rhatigan* [2011] 1 I.R. 639 at 646.
4 *Scally v Rhatigan* [2011] 1 I.R. 639.
5 [2010] EWHC 408 (Ch); [2010] 1 W.L.R. 2020 at 2022 and 2023.

is being propounded was executed."

Practitioners must, in light of the decision of Laffoy J., put themselves in a positon to satisfy themselves as to the question of the client's capacity where they are aged or serious ill.

It is clear from the decision of the Supreme Court in *In Re Glynn*[6] that the test of capacity is a *legal* test and not a *medical* test. Therefore, any medical evidence, whilst valuable, must be treated as being supplemental to, and not a substitute for, the legal tests for capacity.

When a Solicitor is instructed to prepare a will for a client where there is a doubt about their testamentary capacity (however small), a medical report from the client's GP or treating doctor must be obtained. Best practice dictates that the doctor should swear a contemporaneous affidavit of mental capacity, especially if there is likely to be a later challenge to capacity. However, as a minimum the doctor should state (in whatever form is obtainable):

(i) How well they know the client; what they are being treated for; and for how long.
(ii) That they have examined the client specifically to ascertain testamentary capacity.
(iii)That the client has satisfied all three limbs of the legal test (as set out above).

If the practitioner comes to the conclusion that the client does not have testamentary capacity, it goes without saying that they should not have him or her execute a will and record the reasoning for same in an attendance note. The attendance note will be invaluable if an expectant, but disappointed beneficiary, questions why the will was not drafted nor executed. Attendance notes will also be of great assistance if the testator's death certificate records some form of mental incapacity or where they died in a psychiatric institution.

In the absence of medical evidence, the Probate Officer may be satisfied by the evidence as to testamentary capacity from the solicitor who took the instructions. Therefore, the preparation of robust attendance notes may be invaluable when it comes to defending an allegation of lack of testamentary capacity and/or avoiding problems when it comes to proving the will.

[6] [1990] 2 I.R. 326.

The question of adherence to the 'golden rule' is also most relevant to the question of costs. The Supreme Court in *Elliot v Stamp*[7] decided that where the challenger to a will is furnished with information which should allay their fears in relation to capacity, that proceeding may put them at risk on costs. Therefore, arming oneself in order to meet any claim that the deceased did not possession the requisite testamentary capacity cannot be understated.

HAS THE CLIENT BEEN UNDULY INFLUENCED?

It has been stated by Irvine J. in the High Court decision of *Darby v Shanley and others*[8] that there exists an obligation on the practitioner to ensure that the client was not being unduly influenced into executing their will:

> *"On the basis of the case law referred to earlier, the Court must conclude that the defendants in the present circumstances did owe a duty of care not only to the testatrix but also to the intended beneficiaries named in her Will. They were obliged to act prudently to ensure that her wishes as expressed in her Will were not frustrated. To the forefront of those obligations, having regard to circumstances in which they were asked to prepare Bridie Bird's Will, was a requirement that they would seek to satisfy themselves that her instructions had been given to them independently of any influence that might have been exerted upon her by those who were to be the beneficiaries under her intended Will."*

Though implied, the Succession Act does not expressly state the necessity for a valid will to be the product of a testator acting freely and of their own volition, without being subjected to undue influence. In *Lambert and Another v Lyons and Others*, Murphy J. stated:

> *"Irish law, accordingly, recognises a distinction between the proof of undue influence in the context of wills and in the context of transactions inter vivos. In the case of undue influence in the context of wills, the burden of proof is on the plaintiffs and there is no presumption of undue influence arising from special relationships."*

[7] [2008] 3 IR 387.

[8] [2009] IEHC 459.

The principles of law applicable in cases of undue influence were considered in *The Goods of John Corboy Deceased, Leahy v Corboy* with the Supreme Court holding that the heavy burden of proof, which the law imposed on the legatee named in the Codicil in that case, had not been discharged and in particular there was no satisfactory evidence to show that the changes to be affected by the Codicil emanated from the mind of the Deceased and there was no evidence that the effect of those changes had been explained to him carefully.

In *The Goods of Patrick Kavanagh Deceased, Healy v MacGillicuddy and Lyons*, Costello J in condemning a Will on the grounds of undue influence held that as a person instrumental in framing the Will under which he received a benefit, the Defendant had not discharged the onus of proving that the Testator knew and approved of its contents. Costello J referred to *Hall v Hall* in which Sir JP Wilde pointed out that persuasion is not unlawful "*but pressure of whatever character if so exerted as to overpower the volition without convincing the judgement of the Testator, will constitute undue influence, though no force is either used or threatened".*

If the client has been introduced to the firm by a potential beneficiary or a relation of a potential beneficiary under the Will, then an assessment ought to be made about whether or not the Testator is acting freely and voluntarily. If the practitioner has any misgivings that the client may have been unduly influenced, it is crucial that the practitioner reassures themselves that the client is acting freely. Any views in this regard ought to be recorded.

Does the firm hold an existing Will? Alternatively is there a previous Will being held by a different firm, and, if so, obtain a copy of it and ask why the provisions of the earlier Will are being changed, particularly if there is a radical change in the provisions of the new Will and record the reasons in writing. The existence of a radical change in the will (for example from the estate being divided as between all children to just one child) often gives rises to an allegation of undue influence and although there may be no substance to such an allegation, this does not prevent proceedings from being issued and possibly resulting in adverse costs implications for the estate.

IS THE WILL EXECUTED IN ACCORDANCE WITH THE SUCCESSION ACT 1965?

In order for a will to be valid, section 77(1) of the 1965 Act requires that the testator:

(a) has attained the age of eighteen years or is or has been married,[9] and

(b) is of sound disposing mind.

Although there is a minimum age limit specified by the 1965 Act, old age presents no bar to executing a will, and a valid will can be executed by an elderly testator, provided always that he or she is of sound disposing mind.

Once the above criteria are satisfied, s.78 of the 1965 Act provides for the following conditions:

> To be valid a will shall be in writing and be executed in accordance with the following rules:
>
> 1. It shall be signed at the foot or end thereof by the testator or by some person in his presence and by his direction.
>
> 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.
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> 3. So far as concerns the position of the signature of the testator or of the person signing for him under rule 1, it is sufficient if the signature is so placed at or after, or following, or under, or beside, or opposite to the end of the will that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his will.
>
> 4. No such will shall be affected by the circumstances—
>
> (a) that the signature does not follow or is not immediately after the foot or end of the will; or
>
> (b) that a blank space intervenes between the concluding word of the will and the

[9] Also it should be noted that the exception to this minimum age requirement for married persons is now redundant by virtue of s.31 of the Family Law Act 1995, which stipulates 18 years of age as the minimum age for a valid marriage.

signature; or

(c) that the signature is placed among the words of the testimonium clause or of the clause of attestation, or follows or is after or under the clause of attestation, either with or without a blank space intervening, or follows or is after, or under, or beside the names or one of the names of the attesting witnesses; or

(d) that the signature is on a side or page or other portion of the paper or papers containing the will on which no clause or paragraph or disposing part of the will is written above the signature; or

(e) that there appears to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature;

and the enumeration of the above circumstances shall not restrict the generality of rule 1.

5. A signature shall not be operative to give effect to any disposition or direction inserted after the signature is made.

When a will is made in a solicitor's office, it is highly likely that it will comply with section 78, however, when preparing a will, practitioners should be mindful that the position and quality of the testator's signature is of significance. Section 78 of the 1965 Act does not set out what constitutes a valid signature and it appears that a testator (or witness) may sign his name, use his initials or simply make his mark. In *In the Goods of Blewitt*,[10] the court relied on the *dicta* of the Lord Chancellor in *Hindmarsh v Charlton*,[11] who was of the opinion that:

> *"The only question, then, is, whether the signature and subscription by initials only are sufficient. A mark is sufficient though the testator can write … Initials, if intended to represent the name, must be equally good. The language of the Lord Chancellor in Hindmarsh v. Charlton, seems equally applicable to the testator's signature as to the witnesses' subscription: 'I will lay down this as to my notion of the law that to make a valid subscription of a witness there must either be the name or some mark which is intended to represent the name;' and Lord Chelmsford says, 'The subscription must mean such a signature as is descriptive of the witness, whether by a mark or by initials, or by writing the name in full.'"*

[10] (1880) L.R. 5 P.D. 116.
[11] (1861) 8 H.L. 160 at 167.

The Probate Officer may not allow probate of the will or administration with the will annexed, of any blind or illiterate person, to issue, unless he is satisfied by evidence on affidavit, that the will was read over to the testator before its execution, or that the testator had at such time knowledge of its contents.[12]

It is noteworthy that section 78(2) of the 1965 Act does not require a specific form for the attestation clause, and indeed the entire omission of an attestation clause from a will does not necessarily render the will invalid. This situation is provided for by Order 79 rule 6 of the Rules of the Superior Courts:

> *If there be no attestation clause to a will presented for a probate, or administration with will annexed, or if the attestation clause thereto be insufficient, the Probate Officer shall require an affidavit from at least one of the subscribing 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.*

IS THE CLIENT MARRIED OR IN A CIVIL PARTNERSHIP?

If the client is married or in a civil partnership and they wish to leave less than (i) one third (if children) or (ii) one half (if not children) they must be advised about Part IX of the Succession Act 1965.

The rights conferred under Part IX of the Succession Act 1965 only arise where a person dies wholly or partially testate. This part of the 1965 Act curtails the testamentary freedom of married persons or persons who enter into civil partnerships. It is important to consider the rights of a spouse or civil partner in conjunction with section 56 of the 1965 Act, which provides for the appropriation of the dwelling in which the spouse or civil partner was ordinarily resident at the date of death.

Application of Part IX

Section 109 provides that:

> (1) Where, after the commencement of this Act, a person dies wholly or partly testate

[12] Order 79 r.63 of the Rules of the Superior Courts.

leaving a spouse [or civil partner] or children or both spouse [or civil partner] and children, the provisions of this Part shall have effect.[13]

(2) In this Part, references to the estate of the testator are to all estate to which he was beneficially entitled for an estate or interest not ceasing on his death and remaining after payment of all expenses, debts, and liabilities (other than estate duty) properly payable thereout.

Right of surviving spouse and civil partner

Sections 111 and 111A state that:

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

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

Section 111A[14]:

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

(2) Subject to section 117(3A), if the testator leaves a civil partner and children, the civil partner shall have a right to one-third of the estate.

Priority of legal right share

Section 112 provides:

The right of a spouse under section 111 [or of a civil partner under section 111A][15] (which shall be known as a legal right) shall have priority over devises, bequests and shares on intestacy.

[13] As amended by s.80 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
[14] As inserted by s.81 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
[15] As inserted by s.82 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

Renunciation of legal right share

Sections 113 and 113A:

> 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 by the spouse after marriage and during the lifetime of the testator.
>
> The legal right of a civil partner may be renounced in an ante-civil-partnership-registration contract made in writing between the parties to an intended civil partnership or may be renounced in writing by the civil partners after registration and during the lifetime of the testator.

Effect of devise or bequest

Section 114 provides:

> (1) Where property is devised or bequeathed in a will to a spouse [or civil partner][16] and the devise or bequest is expressed in the will to be in addition to the share as a legal right of the spouse [or civil partner], the testator shall be deemed to have made by the will a gift to the spouse [or civil partner] consisting of—
>
> (a) a sum equal to the value of the share as a legal right of the spouse [or civil partner], and
> (b) the property so devised or bequeathed.
>
> (2) In any other case, a devise or bequest in a will to a spouse [or civil partner] shall be deemed to have been intended by the testator to be in satisfaction of the share as a legal right of the spouse [or civil partner].

Provision in satisfaction of legal right

Section 116 provides:

> (1) Where a testator, during his lifetime, has made permanent provision for his spouse, whether under contract or otherwise, all property which is the subject of such

[16] As inserted by s.84 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

provision (other than periodical payments made for her maintenance during his lifetime) shall be taken as being given in or towards satisfaction of the share as a legal right of the surviving spouse.

(2) The value of the property shall be reckoned as at the date of the making of the provision.

(3) If the value of the property is equal to or greater than the share of the spouse as a legal right, the spouse shall not be entitled to take any share as a legal right.

(3) If the value of the property is less than the share of the spouse as a legal right, the spouse shall be entitled to receive in satisfaction of such share so much only of the estate as, when added to the value of the property, is sufficient, as nearly as can be estimated, to make up the full amount of that share.

(5) This section shall apply only to a provision made before the commencement of this Act.

If the client has been married and is now separated, any settlement agreement or court order should be checked in order to ascertain whether or not succession rights were extinguished. Furthermore, if the client is divorcing or separating it is essential that a new will is made as neither divorce nor legal separation revokes an earlier will. It should also be remembered that any subsequent marriage (or civil partnership) will revoke an earlier will.

When giving estate planning advice, the practitioner should be acutely aware of the marital status of the testator, including the dissolution of any previous marriages in the State, or in other jurisdictions.

Right of Appropriation

In addition to the legal right share, section 56 confers on the surviving spouse a right to require an appropriation to be made under s.55, which provides that the personal representatives may, subject to the provisions of this section, appropriate any part of the estate of a deceased person in its actual condition or 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 persons interested in the estate.

Once a surviving spouse has applied for the appropriation of the dwelling in satisfaction of her claim against the estate, an equity arises immediately in the spouse's favour that can be enforced by their personal representative in circumstances where the surviving spouse dies prior to the appropriation being completed.[17]

Restrictions on appropriation

It is important to note that rights provided for by s.56 do not apply to a dwelling:

- where the dwelling forms part of a building, and an estate or interest in the whole building forms part of the estate;
- where the dwelling is held with agricultural land, an estate or interest in which forms part of the estate;
- where the whole or a part of the dwelling was, at the time of the death, used as a hotel, guest house or boarding house;
- where a part of the dwelling was, at the time of death, used for purposes other than domestic purposes.[18]

Unworthiness to Succeed

Section 120 of the 1965 Act governs the circumstances upon which a spouse, civil partner or child may be excluded from inheriting on intestacy. It provides that:

> (1) A sane person who has been guilty of the murder, attempted murder or manslaughter of another shall be precluded from taking any share in the estate of that other, except a share arising under a will made after the act constituting the offence, and shall not be entitled to make an application under section 117.
>
> (2) A spouse against whom the deceased obtained a decree of divorce *a mensa et thoro*, a spouse who failed to comply with a decree of restitution of conjugal rights obtained by the deceased and a spouse guilty of desertion which has continued up to the death for two years or more shall be precluded from taking any share in the estate of the deceased as a legal right or on intestacy.

[17] *Re Hamilton, Hamilton v Armstrong* [1984] I.L.R.M. 306.
[18] Section 56(6) of the Succession Act 1965. See *H v H* [1978] I.R. 138.

[(2A) A deceased's civil partner who has deserted the deceased is precluded from taking any share in the deceased's estate as a legal right or on intestacy if the desertion continued up to the death for two years or more.][19]

(3) A spouse who was guilty of conduct which justified the deceased in separating and living apart from him shall be deemed to be guilty of desertion within the meaning of subsection (2).

[(3A) A civil partner who was guilty of conduct which justified the deceased in separating and living apart from him or her is deemed to be guilty of desertion within the meaning of subsection (2A).][20]

(4) A person who has been found guilty of an offence against the deceased, or against the spouse [or civil partner][21] or any child of the deceased (including a child adopted under the Adoption Acts, 1952 and 1964, and a person to whom the deceased was *in loco parentis* at the time of the offence), punishable by imprisonment for a maximum period of at least two years or by a more severe penalty, shall be precluded from taking any share in the estate as a legal right or from making an application under section 117.[22]

(5) Any share which a person is precluded from taking under this section shall be distributed as if that person had died before the deceased.

Practitioners will most commonly have to deal with this section when a claim is made by the deceased's spouse or civil partner. If the estate can prove that the spouse or civil partner has deserted the deceased for a period of at least two years immediately preceding the date of death, they may be precluded from taking by legal right or on intestacy. In addition to 'actual desertion', which speaks for itself, 'constructive desertion' may arise in circumstances where as a result of substantial misconduct on the part of the deceased, the surviving spouse was left with no choice but to part company with them. Of course, any agreement to live apart or

[19] As inserted by s.87(a) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
[20] As inserted by s.87(b) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
[21] As amended by s.87(c) of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
[22] It should be noted that this does not exclude succession on intestacy.

reconciliation may cease any desertion. It is essential that instructions be taken from the client is this regard.

DOES THE CLIENT HAVE CHILDREN?

When drafting a will for any person, you must make them aware of section 117 of the Succession Act 1965. The relationship of parent and child does not of itself create a moral duty on the part of the parent to make provision for any particular child, that is to say, a parent has freedom of testation and the parent is free to dispose of their assets as they see fit, however, a child has the right to make an application to Court pursuant to Section 117 of the Succession Act 1965 seeking a declaration that the deceased parent failed in her or her moral duty to make proper provision for them.

Section 117(1) of the Succession Act 1965 states as follows:

> *Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.*

The essential guidelines are those laid down and consistently endorsed in subsequent court decisions by Mr Justice Kenny in the well-known case of *FM v TAM* [1972] 106 ILTR 82 where the Court set out the guidelines as follows:

> *"(a) The existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death of the deceased and must depend upon:*
>
> *i. The amount left to the surviving spouse or the value of the legal right if the survivor elects to take this.*
>
> *ii. The number of the testator's children, their ages and their prospects in life at the date of the testator's death.*
>
> *iii. The means of the testator.*

iv. The age of the child whose case is being considered and his/her financial position and prospects in life.

v. Whether the testator has already in his lifetime made proper provision for the child.

The Supreme Court has decided that a 'relatively heavy onus of proof' lies upon a child in seeking to establish a 'positive failure in the moral duty'. *In the Estate of I.A.C.* (1989) I.L.R.M. 815) Mr Justice Finlay stated;

> *"I am satisfied that the phrase contained in s117(1) 'failed in his moral duty to make proper provision for the child in accordance with his means' places a relatively high onus of proof on an applicant for relief under the section. It is not apparently sufficient from these terms in the section to establish that the provision made for a child was not as great as it might have been, or that compared with generous bequests to other children or beneficiaries in the will, it appears ungenerous. The court should not, I consider, make an order under the section merely because it would on the facts proved have formed different testamentary dispositions. A positive failure in moral duty must be established."*

In the case of *In Re J.H.* (1984) I.L.R.M. 559, Mr Justice Barron stated as follows:-

> *"The power of the Court arises only to remedy a failure on the part of the testator to fulfil the moral duty towards the child. In general this will arise where a child has a particular need which the means of the testator can satisfy in whole or in part. If no such need exists, even where no provision has been made by the testator whether by his will or by otherwise, the court has no power to intervene."* [my emphasis]

The High Court judgement of Mr Justice Kearns of *XC v RT* [2003] 2 I.R. 250 at pages 262 – 264 set out what are, in my view, extremely useful criteria in seeking to determine the applicant's entitlement to relief pursuant to this Section. Accordingly I set them out in full below.

In the Estate of ABC deceased XC, YC & ZC v RT, KU & JL [2003] 2 IR 250 the Court set out the criteria as follows;

(a) The social policy underlying Section 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 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 obligation to the applicants and if so, whether he has failed in that obligation.

(c) There is a high onus of proof placed on an applicant for relief under Section 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 Section 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) Section 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 Section 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 all his moral obligations e.g. to aged and infirm parents.

(l) In dealing with a Section 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 a particular provision for him, the moral claims of others may require such provision to be reduced or omitted altogether.

(m) Special circumstances giving rise to a moral duty may arise if a child is induced to believe that by, for example, working on 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 both as to when to make provisions for an applicant child and as to the nature of such provision such powers must not be construed as giving the court a power to make a new will for the testator.

(q) The test to be applied is not which of the 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, constituted a breach of moral duty to the plaintiff.

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

It is important to note that there is no automatic right to any share in a deceased parent’s estate when they die testate.

Proceedings under Section 117 are not about fairness or equality between children and the applicants must establish that there was a need for provision to be made for them greater than was actually made.

It is important that when discussing the issue of section 117 with a client, that they have considered their moral duty and make their will in light of that. As a practitioner, you must be in a position to show the client's thought process as *"parents must be presumed to know their children better than anyone else."*

If a child is being wholly excluded or partially provided for, it may go a long way to deflecting a section 117 claim if the reasons for same are recorded.

Section 121 of the 1965 Act concerns voidable dispositions that have been made for the purpose of disinheriting a spouse or children. It applies to a disposition of property (other than a testamentary disposition or a disposition to a purchaser) under which the beneficial ownership of the property vests in possession in the donee within three years before the death of the person who made it or on his death or later.

In order for a disposition to be set aside, the court must be satisfied that it was made *"for the purpose of defeating or substantially diminishing the share of the disponer's spouse, whether on intestacy, or the intestate share of any of his children, or of leaving any of his children insufficiently provided for."*[23] Carroll J. in *MPD v MD*[24] was of the opinion that the purpose of the disposition is to be judged by the subjective intention of the deceased. In light of the fact that the onus of proof in relation to intention will rest with the person asserting that the disposition comes within the section's ambit, there is an obvious difficulty in that the person whose intention is being enquired into is deceased.

Therefore, when taking instructions for a will, the practitioner should ascertain whether or not they have made any dispositions which may be susceptible to section 121 of the Succession Act 1965.

PROMISSORY / PROPRIETARY ESTOPPEL?

[23] Succession Act 1965 s.121(2).
[24] [1981] I.L.R.M. 179.

If the client is a homeowner or the owner of farmlands, have a discussion about whether or not any relatives, friends or neighbours assist them in any way such as carrying out works or providing services to the home or land and if so, confirm whether or not they are being remunerated in respect of same. Also, confirm whether or not any representations or promises were made by the client to those individuals that they would be remunerated for their services upon the death of the client, or alternatively, confirm whether or not any agreement or representations were made pursuant to which the person providing the assistance was promised an interest in the home or the lands.

Promissory Estoppel

The doctrine of promissory estoppel can be relied upon so as to prevent a person from not acting upon representations made to another by words or conduct of a fact that causes that party to incur detriment in reliance on the representation. In such circumstances, the person making the representation will be prevented from acting in a manner that is inconsistent with what had been agreed. In the House of Lords decision in *Jordan v Money* [1854] 5 H.L.C. 185 at 210, Lord Cranworth summarised the principle of estoppel in the following manner:

> *"... if a person makes any false representation to another, and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set up that what he said was false."*

In *Industrial Yarns Ltd v Greene* [1984] I.L.R.M. 15 at 33, Costello J. concluded that in order to establish a claim of estoppel, *"the representor must show that what was said or done by the representor influenced both the belief and conduct of the representor to his detriment."*

Proprietary Estoppel

The concept of propriety estoppel was developed by equity to furnish a remedy to a person who acts on foot of representations made to them by an owner of land in relation to future property right to said land, and the person to whom the representations are made, relies upon them to his detriment.

In *McCarron v McCarron* Murphy J. quoted the circumstances in which proprietary estoppel operates by reference to the following passage from *Plimmer v. Mayor of Wellington*[25], which was an appeal to the Judicial Committee of the Privy Council:

> *"Where an owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance or promise that that part of the land would be made over to the person so expending his money a Court of Equity will prima facie require the owner by appropriate conveyance to fulfil his obligation…"*

Mr. Justice Laffoy in *Coyle v Finnegan & Another*[26] examined the legal principles that must be applied in such claims of propriety estoppel and referred to Delany on *Equity and the Law of Trusts in Ireland* (5th edition, Round Hall) (at page 760), wherein it is suggested that most scholars agree that the doctrine of proprietary estoppel is based on three main elements, namely:

(a) a representation or assurance made to the claimant;
(b) reliance on it by the claimant; and
(c) detriment to the claimant in consequence of his (reasonable) reliance.

The author then quotes the following passage from the judgment of Robert Walker L.J. in *Gillett v. Holt* (at page 829):

> *"… the doctrine of proprietary estoppel cannot be treated as subdivided into three or four watertight compartments. Both sides are agreed on that, and in the course of the oral argument in this court it repeatedly became apparent that the quality of the relevant assurances may influence the issue of reliance, that reliance and detriment are often intertwined, and that whether there is a distinct need for a 'mutual understanding' may depend on how the other elements are formulated and understood. Moreover the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round."*

[25] (1884) 9 App. Cas. 699
[26] [2013] IEHC 463

Furthermore, it was held by Hogan J. in *Coleman v Mullen* that no action in *quantum meruit* or in unjust enrichment lay in the circumstances of the case where the plaintiff had voluntarily acted as a good friend to an elderly neighbour and there had been no understanding between them that the plaintiff was entitled to be rewarded for her services.

Therefore, if it appears that the client is in some way dependant on another (in any way) it is important that you ascertain as to whether or not the client has made any promises in that regard.

CONSTRUCTION OF THE WILL

As a professional drafting a will, you will be expected to produce a document that is (i) free from textual ambiguity; and (ii) does not conflict with the rules of law. If a construction suit is necessary as a result of the failure of the practitioner, it is altogether likely that that practitioner will be burdened with the costs.

In the case of *In Re Curtin Deceased, Curtin v O'Mahony*[27], the Supreme Court stated that the overriding task of a Court when asked to construe a Will is to ascertain the intention of the Testator.

In *Howell v Howell*[28] and *Gaynor v Bank of Ireland*[29]**,** the Irish High Court approved the dictum of Lowry LCJ in the case of *Heron v Ulster Bank Ltd*[30] which laid down suggested guidelines for a Court of Construction:-

> *"I consider that, having first read the whole of the 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.*

[27] 1991 2.IR 562
[28] Unreported High Court 7 February 1992
[29] 1999 IEHC 210 Unreported High Court 29 June 1999
[30] 1974 N.I.L.R. 44

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 immediate 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 aides, 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 being adopted.*

6. *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 precedent since it has been well said that no Will has a twin brother (per Warner J in the matter of King 200 NY 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 context"*.

The practitioner should bear in mind these guidelines in mind when drafting a will. It is should also be remembered the rules as provided for in section 90 of the Succession Act 1965 relating to the admissibility of extrinsic evidence, which provides as follows:

> *"Extrinsic evidence shall be admissible to show the intention of the Testator and to assist in the construction of or to explain any contradiction in, a Will"*.

Section 90 of the 1965 Act has been the subject of much judicial comment. The first case to be decided under section 90 was *Bennett v Bennett*[31]. The Deceased gave his farm to his wife for life with remainder to his nephew *"Denis Bennett"* but he had no nephew of that name but he did have a brother named Denis. He also had a nephew William Bennett who claimed to be the person to whom the Deceased had intended to refer. Mr Justice Parke considered that section 90 permitted extrinsic evidence to be admitted showing that the nephew William Bennett had resided at and had worked at one of the Testator's farms without remuneration for several years and he was of the opinion that section 90 was not merely declaratory:-

> *"It seems to me that Section 90 is fundamentally novel. I believe it does amend the common law and directs the Courts in a proper case to look outside the Will altogether in order to ascertain the Testator's intention, if (but only if) the Will cannot be construed literally, having regard to the facts existing at the Testator's death"*.

This view of the effect of section 90 has been followed by a majority of the Supreme Court in *Rowe v Law*[32] and *O'Connell and Anor v The Governor & Co of the Bank of Ireland*[33]. Those decisions established that extrinsic evidence is only admissible if two conditions are satisfied. Extrinsic evidence will only be admissible if:-

(a) There is a contradiction or an ambiguity on the face of the Will, and

(b) Its admission is necessary to ascertain the intention of the Testator.

It goes without saying that if you are drafting a complex will, call upon the assistance of a colleague to read over same and to see if they can identify any ambiguity or lack of clarity.

Mistake

What if an error has been made in the execution of the will or the content of the will itself, can the court order the rectification of such errors?

In the recent UK decision of *Marley v Rawlings and another*[34] the Supreme Court provided further guidance on the validly of Wills and their rectification.

[31] Unreported, High Court, Parke J., 24 January 1977
[32] 1978 IR 55
[33] 1998 2 IR 596
[34] [2014] UKSC 2

In May 1999 Mr and Mrs Rawlings requested mirror Wills be drafted leaving everything to each other, and in the event of both of them dying, leaving everything to Terry Marley. Terry Marley was not a blood relative but Mr and Mrs Rawlings treated him as their son. When the Wills came to be executed, Mr and Mrs Rawlings signed the Will intended for the other. The mistake went unnoticed when Mrs Rawlings died and her estate passed to Mr Rawlings. However, when Mr Rawlings died in 2006 the couple's biological sons, Terry and Michael Rawlings, challenged the validity of Mr Rawlings' Will. If successful Mr Rawlings would have died intestate and his estate would pass instead to Terry and Michael Rawlings.

At first instance, it was held that Mr Rawlings' Will was invalid because it did not satisfy the requirements of section 9 of the Wills Act 1837 (in that it was not duly executed) and even if it did so it was not capable of being rectified under section 20(1) of the Administration of Justice Act 1982 ("Section 20(1)") because it was not a clerical error. On appeal to the Court of Appeal the first instance decision was upheld.

However, on 22 January 2014, the Supreme Court unanimously allowed the appeal, with Lord Neuberger stating as follows:

(i) The formalities of Section 9 have been satisfied because, whilst the Will purports, in its opening paragraphs, to be Mrs Rawlings' Will it is Mr Rawlings that signed it and therefore it can only have been his Will. In addition it was Mr Rawlings' intention that he sign the Will and that it should have effect.

(ii) He further commented that even if the Will did not satisfy the requirements of Section 9 it was still capable of being rectified pursuant to Section 20(1). He said that he could "see no reason why the word "Will" in Section 20(1) could not be read as meaning a document which, once it is rectified, is a valid Will".

(iii) The term clerical error should be given "a wide, rather than narrow meaning" and "as a matter of ordinary language, quite properly encompassed the error involved in this case". Accordingly it was held that the typed parts of the Will signed by Mr Rawlings be replaced with the typed parts of the Will signed by Mrs Rawlings.

Lord Neuberger's approach to Wills is akin to the interpretation of commercial contracts. In particular he states *"whether the document in question is a commercial contract or a Will, the aim is to identify the intention of the party or parties to the document by interpreting the words in their documentary, factual and commercial context".* On balance this common sense approach appears just in the current circumstances. Unfortunately, in Ireland, the Succession Act 1965 nor any other legislation makes provision for the rectification of clerical errors. Furthermore, the Supreme Court in *In Re Collins O'Connell and Another v Governor of the Bank of Ireland*,[35] essentially took the view that ait could not rectify a mistake in the will.

Perhaps the legislature needs to consider a similar statutory provision to that contained in the UK legislation and permit the rectification of will where clerical errors arise? Saying that, section 108 of the Assisted Decision-Making (Capacity) Bill 2013 contains a provision that a person who loses capacity, may subsequently, and during their lifetime, have their last will and testament altered by the Court in certain circumstances. Therefore, it is certainly conceivable (once enacted in its current form) that a court could rectify an error in a will at a time when the testator could not execute a corrective will or codicil (due to lack of testamentary capacity).

CRAFTING THE WILL

Name and address of testator

It is advisable that practitioners, when taking instructions, utilise the name of the testator as it appears on their birth certificate. If the testator is known by a different name, this should be reflected on the face of the will and perhaps the term "*otherwise known as*" be adopted. If the name of the testator, as it appears on the death certificate, is not the same as that on the face of the will, difficulties may arise in the administration of the estate.

Revocation clause

By their very nature, wills are revocable at any time before the death of the testator. Revocation can be brought about by the occurrences of many circumstances, i.e. (i) entry into

[35] [1998] 2 IR 596.

a marriage or civil partnership, (ii) destruction (or deemed destruction in case of lost wills) or by (iii) other duly executed will or codicil.

Section 85 provides that:

> (1) A will shall be revoked by the subsequent marriage [or entry into civil partnership][36] of the testator, except a will made in contemplation of that marriage [or civil partnership],[37] 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.

Practitioners should note that where a testator's marriage has been previously dissolved, the Family Law (Divorce) Act 1996 does not automatically revoke the testator's existing will; however, any subsequent marriage or entry into civil partnership will revoke an existing will.

A subsequent 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 will have the effect of revoking an existing will.

A will may be revoked 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. However, unintentional revocation can occur where the will, which was in the custody of the testator, cannot be located on his death. Parke B. in *Welch v Phillips*[38] stated:

> *"Now the rule of the law of evidence on this subject, as established by a course of decisions in the Ecclesiastical Court, is that: that if a will traced to the possession of the deceased and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect unless there is sufficient evidence to repeal it. The onus of proof in such circumstances is undoubtedly on the party propounding the will."*

[36] As amended by s.79 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
[37] As amended by s.79 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
[38] (1836) 1 Moore's P.C. 299.

It is best practice for the practitioner to retain possession of the original will or at the very least, if the original is handed over to the client, a copy of same should be retained and therefore would be of great assistance if any application to court has to be made to prove the will in terms of a copy.

Unintentional revocation of a pre-existing extra-jurisdictional will is a risk practitioners should be keenly alive to. It should be noted carefully by practitioners that a testamentary disposition revoking an earlier testamentary disposition shall also be valid as regards form, if it complies with any one of the laws according to the terms of which, under section 102(1), the testamentary disposition that has been revoked was valid. In essence, if the will is formally valid, the revocation clause contained within the testamentary disposition will also be formally valid. This can give rise to the often unintended and potentially disinheriting scenario where a foreign will unintentionally revokes an Irish will or vice versa, hence the imperative of positively obtaining instructions in respect of pre-existing foreign wills. Practitioners should be aware that it is possible to qualify revocation clauses in testamentary dispositions so as to avoid this scenario, one which could have professional consequences for practitioners.

An unambiguous warning relating to the revocation of wills was issued to practitioners in *Scally v Rhatigan*,[39] wherein Laffoy J. commented that:

> "Before considering that evidence in detail, I consider it appropriate to advert to an issue of concern which I raised during the hearing. The deceased had made an earlier will in the 1980s, apparently on the 21st November, 1989, which, as I understand the evidence, had been retained by Amorys [Solicitors]. In 2005, in the context of the execution of the Will, the earlier will was destroyed on the basis that it was revoked by the deceased. As one would expect, the testamentary document executed on the 19th May, 2005, that is to say, the Will, at its commencement was expressed to revoke all wills and testamentary dispositions previously made by the deceased. There is no copy of the earlier will available. Obviously, if it were the case that the deceased was not of sound disposing mind on the 19th May, 2005, the earlier will would not have been revoked. In that event, the apparent absence of any copy of his earlier will or any evidence of its contents would create a problem."

Section 87 of the 1965 Act, which deals with the revival of wills, provides that:

[39] [2011] 1 I.R. 639.

> 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.

Executors

Although, it is quite acceptable and commonplace to appoint only one executor, it is often advisable to appoint more than one. Obviously, if one of the executors is unable to act due to death or incapacity or in untraceable, the other executor can raise representation to the estate. Saying that, if too many executors are appointed, this may lead to administrative difficulties. It may be prudent to appoint a substitute executor, however, the practitioner must be careful not to appoint an alternative executor, i.e. 'A or B', as this will fail for uncertainty.

When appointing the solicitor as the executor, a charging clause must be inserted. it is important to remember that where a charging clause in included in the will, it is imperative that neither the solicitor (nor any partner of the practice) (nor their spouses) witness the will as this will invalidate the charging clause and the practitioner will only be permitted to receive their out-of-pocket expenses for administering the estate.

It goes without saying that from a practical point of view, the client should be encouraged to ask the proposed executor if they are willing to act. They may not wish to act and thus renounce their entitlement, permitting the next person entitled, who may not be at all suitable.

It is also best practice not to appoint an executor who is outside of jurisdiction as this may led to difficulties. Of course, an attorney in this jurisdiction could be appointed.

Trustees

Where the creation of a will trust appears appropriate to a practitioner, he should inform both the testator and the intended trustees as to the nature of the office and the associated duties and potential liability.

The office of trustee is said to be burdensome in nature and in the performance of his office, a trustee must act wholly in the interest of the trust. The trustee stands to gain nothing from the

trust, unless an express provision exists in the trust authorising remuneration. He is under an obligation to act with the highest standards of integrity and can be subjected to personal liability if that standard is not met. Generally, there is no minimum number of trustees required, except where statute requires otherwise (two trustees were required under section 39(1) of the Settled Land Act 1882) (repealed by the Land and Conveyancing Law Reform Act 2009 (the "2009 Act") Sch.2, Pt 4). For practical reasons it is preferable to appoint at least two. Furthermore, there is no upper limit on the number of trustees.

Upon appointment, trustees must ensure that they become acquainted with the terms of the trust and check the status of the trust property, i.e. has the trust fund been invested in accordance with the provision of the trust instrument? Kekewich J. in *Hallows v Lloyd*[40] stated that:

> *"This raises the important question, what are the duties of persons becoming new trustees of a settlement? ... I think that when persons are asked to become new trustees, they are bound to enquire of what the property consists that is proposed to be handed over to them, and what are the trusts. They ought also to look into the trust documents and papers to ascertain what notices appear among them of encumbrances and other matters affecting the trust."*

The duties of a trustee are extremely onerous and have to be carried out with the utmost diligence. If it is found that a trustee has failed to act in a responsible and reasonable manner, then they may be held personally liable for breach of trust. Paramount to the trustee's functions is the fiduciary duty that is imposed by equity. This duty places the trustee under a strict obligation to carry out the function of the trust with the utmost good faith.

Where an infant is entitled to any share in the estate of a deceased person and there are no trustees of such share able and willing to act, the personal representatives of the deceased may appoint a trust corporation or any two or more persons (who may include the personal representatives or any of them or a trust corporation) to be trustees of such share for the infant and may execute such assurance or take such other action as may be necessary for vesting the share in the trustee so appointed. In default of appointment, the personal representatives shall be trustees for the purposes of this section. On such appointment the personal representatives, as such, shall be discharged from all further liability in respect of

[40] (1888) 39 Ch D 686.

the property vested in the trustees so appointed.[41]

Testamentary Guardians

In cases where the testator has children who have not attained majority, and/or where the appointment of testamentary guardians appears appropriate to a practitioner, he should inform both the testator and the intended guardian as to the nature of the office and the associated duties.

Section 7 of the Guardianship of Infants Act 1964 provides for the appointment of and the powers of testamentary guardians:

(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.
(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.
(4) If the surviving parent so objects or if a testamentary guardian considers that the surviving parent is unfit to have the custody of the infant, the testamentary guardian may apply to the court for an order under this section.
(5) The court may—
    (*a*) refuse to make an order (in which case the surviving parent shall remain sole guardian), or
    (*b*) make an order that the testamentary guardian shall act jointly with the surviving parent, or
    (*c*) make an order that he shall act as guardian of the infant to the exclusion, so far as the court thinks proper, of the surviving parent.
(6) In the case mentioned in paragraph (*c*) of subsection (5) the court may make such order regarding the custody of the infant and the right of access to the infant of the surviving parent as the court thinks proper, and the court may further order that the surviving parent shall pay to the guardian or guardians, or any of them, towards the maintenance of the infant such weekly or other periodical sum as, having regard to the means of the surviving parent, the court considers reasonable.

[41] Section 57 of the Succession Act 1965.

(7) A person under the age of twenty-one years shall be entitled to appoint guardians by will notwithstanding section 7 of the Wills Act, 1837.
(8) An appointment of a guardian by deed may be revoked by a subsequent deed or by will.

Devises and Bequests

The practitioner should ascertain with detail and clarity the full nature and extent of all the assets and entitlements (legal or beneficial) enjoyed by the testator at the time of the execution of the will. If the client is the owner of immovable foreign property, it would be prudent for the practitioner to advise that a will should be made in the county where the property is location. However, it should be made clear that any such foreign will should not inadvertently revoke an earlier Irish will by not limiting the revocation clause to that jurisdiction.

It is also important that the practitioner understand (and convey to the testator) the various types of bequests that are being made and their respective consequences.[42]

It is important to be entirely clear as to the following definitions:

(1) Devise—"A gift of real property by will, either specific or residuary; to make such a gift. The recipient is the devisee".[43]
(2) Legacy—"A gift of personal property by will; a bequest.[44] The person to whom the property is given is called the legatee and the gift of property is called a bequest."
    - General—"A general legacy is a piece of personal estate which has not been distinguished from personal property of the same kind e.g. a bequest of a 'horse' of which the testator has several."[45]
    - Specific—"A specific legacy is a bequest of a special part of the testator's personal estate eg 'my horse which won the Irish Sweep's Derby in 1974'".[46]
    - Demonstrative— "A demonstrative legacy is general in its phrase but specific in its fund, e.g. £10 out of a bank balance, or 10 lambs out of a named flock".[47]

[42] Freedom of testation is subject to the legal right share of a spouse/civil partner and the rights of a child to bring an application pursuant to s.117 of the Succession Act 1965 for provision to be made for him or her where the deceased has failed to make proper provision for that child.
[43] Henry Murdoch, *Murdoch's Dictionary of Irish Law*, 4th edn (Dublin: Lexis Nexis, 2004).
[44] Murdoch, *Murdoch's Dictionary of Irish Law*, 4th edn (2004). Also note that Murdoch defines "bequest" as a gift of personal property by will; a legacy. It appears that the two terms "legacy" and "bequest" may be used interchangeably.
[45] Murdoch, *Murdoch's Dictionary of Irish Law*, 4th edn (2004).
[46] Murdoch, *Murdoch's Dictionary of Irish Law*, 4th edn (2004).
[47] Daniel Greenberg (ed.), *Shroud's Judicial Dictionary of Words and Phrases*, 8th edn (London: Sweet & Maxwell, 2012).

- Pecuniary— "pecuniary legacy" includes an annuity, a general legacy, a demonstrative legacy so far as it is not discharged out of the designated property, and any other general direction by a testator for the payment of money, including all death duties free from which any devise, bequest, or payment is made to take effect"[48]

It is for the client, having been given the appropriate legal advice, to decide how best to give effect to his testamentary wishes; however, the consequences of any such bequest and the possibility for dispute should be highlighted to the client. A practitioner may be sued in negligence for failing to have regard to the disposition of a particular asset.[49]

The following doctrines may apply to the devises and bequests as contained within his will:

Abatement of legacy

Abatement is the reduction of a legacy due to an insufficiency of assets in the testator's estate. Specific legacies take priority over general legacies and are liable to abatement only if the assets are otherwise insufficient for the payment of debts. Demonstrative legacies only abate if the fund out of which payment is directed is insufficient or if otherwise the assets of the estate are insufficient to pay the debts. General legacies abate proportionately between themselves except where a legacy has been given in payment of a debt.

Ademption

Ademption is the complete or partial extinction or withholding of a legacy by some act of the testator during his life e.g. sale of the object comprising a specific legacy. Therefore, the client should be advised to review their will where they make a specific disposal of that property. Commonly, the same practitioner will be involved in the sale of the property and the drafting of the will and if the practitioner fails to alert the client that the specific bequest has been adeemed as a result of the *inter vivos* disposal, an action in negligence may lie as against that practitioner by the disappointed beneficiary.

Lapse

Generally when a person to whom property has been devised or bequeathed dies before the testator the devise or bequest fails or lapses and the property falls into the residue; a lapsed

[48] Section 3(1) of the Succession Act 1965.
[49] In *Re Collins O'Connell and Another v Governor of the Bank of Ireland* [1998] 2 IR 596.

share of the residue however does not fall into the residue, but devolves upon an intestacy.

In the case of a devise to persons as joint tenants, if one person dies before the testator, the others take his share; whereas if two persons hold as tenants in common, the share of the deceased tenants lapses. Also there is no lapse where property is given to issue of the testator and such descendant dies leaving issue living at the testators death.

Where a person, being a child or 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 as 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 is 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 appears from the will.[50]

Residuary devise or bequest to include estate comprised in lapsed and void gifts

Unless a contrary intention appears from the will, any estate comprised or intended to be comprised in any devise or bequest contained in the will which fails or is void by reason of the fact that the devisee or legatee did not survive the testator, or by reason of the devise or bequest being contrary to law or otherwise incapable of taking effect, shall be included in any residuary devise or bequest, as the case may be, contained in the will.[51]

Residuary clause

Residue is defined as "[t]hat which remains of a deceased's estate after payment of debts, funeral and testamentary expenses, legacies and annuities. Where a testator does not effectually dispose of the residue of his property, he dies intestate as to it eg if a share of residue lapses, it does not fall into the residue, but goes to the next of kin on intestate succession."[52]

Residuary legatee—"The person entitled under a will to the balance of the personal estate remaining after paying the debts, expenses and legacies bequeathed by the will. The residuary

[50] Section 98 of the Succession Act 1965.
[51] Section 91 of the Succession Act 1965.
[52] Murdoch, *Murdoch's Dictionary of Irish Law*, 4th edn (2004).

legacy includes any lapsed or void legacies."[53]

Residuary devisee—"The person named in the will who is to take the real property remaining after satisfying specific gifts of real property in the will. The residuary devise includes any lapsed or void devises."[54]

Section 91 of the 1965 Act provides:

> Unless a contrary intention appears from the will, any estate comprised or intended to be comprised in any devise or bequest contained in the will which fails or is void by reason of the fact that the devisee or legatee did not survive the testator, or by reason of the devise or bequest being contrary to law or otherwise incapable of taking effect, shall be included in any residuary devise or bequest, as the case may be, contained in the will.

Charging Clause

If a practitioner fails to include a charging clause in a will, or if the solicitor, his spouse (or civil partner) or partner in his firm is an attesting witness to a will, the charging clause is to be treated as a conditional legacy. Therefore, the solicitor is not permitted to receive payment for works done under the charging clause.[55] Furthermore, the solicitor will only be entitled to recover out-of-pocket expenses.[56]

Practitioners should be mindful of section 82 of the 1965 Act, which provides that gifts to an attesting witness, or spouse (or civil partner), are void:

(1) If a person attests the execution of a will, and any devise, bequest, estate, interest, gift, or appointment, of or affecting any property (other than charges and directions for the payment of any debt or debts) is given or made by the will to that person or his spouse [or civil partner],[57] that devise, bequest, estate, interest, gift, or appointment shall, so far only as concerns the person attesting the execution of the will, or the spouse [or civil partner] of that person, or any person claiming under that person or spouse [or civil partner], be utterly null and void.

(2) The person so attesting shall be admitted as a witness to prove the execution of the

[53] Murdoch, *Murdoch's Dictionary of Irish Law*, 4th edn (2004).
[54] Murdoch, *Murdoch's Dictionary of Irish Law*, 4th edn (2004).
[55] *Re Pooley* (1888) 40 Ch D 1.
[56] *Re Barker* (1886) 31 Ch D 665.
[57] As amended by s.77 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

will, or to prove the validity or invalidity thereof, notwithstanding such devise, bequest, estate, interest, gift, or appointment.

Date

Customarily, the date of the execution of the will may be placed either at the top of the will or at the bottom of the will, above the testator's signature.

Signature of testator

When preparing a will, practitioners should be mindful that the position and quality of the testator's signature is of significance.

Form of signature

Section 78 of the 1965 Act does not set out what constitutes a valid signature and it appears that a testator (or witness) may sign his name, use his initials or simply make his mark. In *In the Goods of Blewitt*,[58] the court relied on the *dicta* of the Lord Chancellor in *Hindmarsh v Charlton*,[59] who was of the opinion that:

> *"The only question, then, is, whether the signature and subscription by initials only are sufficient. A mark is sufficient though the testator can write … Initials, if intended to represent the name, must be equally good. The language of the Lord Chancellor in Hindmarsh v. Charlton, seems equally applicable to the testator's signature as to the witnesses' subscription: 'I will lay down this as to my notion of the law that to make a valid subscription of a witness there must either be the name or some mark which is intended to represent the name;' and Lord Chelmsford says, 'The subscription must mean such a signature as is descriptive of the witness, whether by a mark or by initials, or by writing the name in full.'"*

Blind or illiterate testators

The Probate Officer may not allow probate of the will or administration with the will annexed, of any blind or illiterate person, to issue, unless he is satisfied by evidence on affidavit, that the will was read over to the testator before its execution, or that the testator had at such time knowledge of its contents.[60]

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[58] (1880) L.R. 5 P.D. 116.
[59] (1861) 8 H.L. 160 at 167.
[60] Order 79 r.63 of the Rules of the Superior Courts.

Attestation Clause

Section 78(2) of the 1965 Act provides:

> 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.

It is noteworthy that s.78(2) of the 1965 Act does not require a specific form for the attestation clause, and indeed the entire omission of an attestation clause from a will does not necessarily render the will invalid. This situation is provided for by Ord.79 r.6 of the Rules of the Superior Courts:

> If there be no attestation clause to a will presented for a probate, or administration with will annexed, or if the attestation clause thereto be insufficient, the Probate Officer shall require an affidavit from at least one of the subscribing 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.

Where the subscribing witnesses are dead

If both the subscribing witnesses are dead, or if from other circumstances no affidavit can be obtained from either of them, resort shall be had to other persons (if any) who may have been present at the execution of the will, but if no affidavit of any such other person can be obtained, evidence on affidavit shall be procured of the fact and of the handwriting of the deceased and the subscribing witnesses and also of any circumstances which may raise a presumption in favour of the due execution.[61]

Signature of witnesses

Section 78(2) of the 1965 Act provides that:

> Such signature shall be made or acknowledged by the testator in a presence of each of

[61] Order 79 r.8 of the Rules of the Superior Courts.

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.

A helpful summary of the rules practitioners should adhere to when a will is being witnessed is contained in the judgment of O'Neill J. in the case of *Re McLaverty*,[62] where he stated:

> *"In providing that the attesting witnesses do not have to be present when each of them signs, it seems to me to necessarily follow that an interval in time can arise in between the time when the attesting witness signs and when another signs. The section gives no guidance as to what length of time might be permissible but in severing the connection between the two witnesses signing together, it would seem to me that it was the intention of the Oireachtas that the attesting witnesses could sign on different occasions*."

Furthermore he stated:

> *"I am of the view therefore that the language of sub-section [2] does not permit of an interpretation which would impose a time limit or constraint on the signing by attesting witnesses of the will for the purposes of a valid execution, save those expressly stated in the subsection."*

Therefore, O'Neill J. was of the opinion that:

> *"The testator need not have seen the witnesses sign, provided that he had an opportunity to do so (even if only through a window). A blind testator will be treated as present when a witness signs if he would have been able to see the witness sign had he been a sighted person."*

Section 78 of the 1965 Act does not set out what constitutes a valid signature and it appears that a witness (or testator) may sign his name, use his initials or simply make his mark.[63]

Competence of the witnesses

If a person who attests the execution of a will is, at the time of execution or at any time afterwards, incompetent to be admitted a witness to prove the execution, the will shall not on

[62] Unreported, High Court, O'Neill J., January 27, 2003.
[63] See *In the Goods of Blewitt* (1880) L.R. 5 P.D. 116.

that account be invalid.[64]

A person shall not, by reason only of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of the will, or a witness to prove the validity or invalidity thereof.[65]

DISCLAIMER

This paper is intended to summarise the law and while every care has been taken in the preparation of this material, no responsibility can be taken by the author for any errors or omissions and no responsibility can be accepted by the author for any loss occasioned to any person acting or refraining from acting in reliance on anything contained therein.

[64] Section 81 of the Succession Act 1965.
[65] Section 84 of the Succession Act 1965.