

Setting up a Legacy Campaign – Legal Issues

Peter Littlefield



TURCAN CONNELL
SOLICITORS AND ASSET MANAGERS

Introduction



- Scots are among the great philanthropists of the world but:-
- 11% of Wills in Scotland – charitable bequest
- 17% of Wills in England – charitable bequest
- Why are Scottish charities missing out?

Setting up a Campaign



- An effective legacy officer can add 5/10% to a charity's legacy income
- There is no “one size fits all” strategy
- Understand the demographics of your supporters
- Find an inspirational reason for their support
- Identify a specific project?

Clauses in Wills



- **Pecuniary legacy**

I direct my Executors to make over the following legacies as soon as convenient after my death but without interest to date of payment and free of all taxes:-

- (a) The sum of [£] [name of charity], (registered charity number []), [address of head office].
- (b) The sum of [£] [name of charity], (registered charity number []), [address of head office].

If any charity has been wrongly designed, has amalgamated with or has transferred its assets to any other body then my Executors shall pay the legacy to such other charity as my Executors may in their sole discretion decide. The receipt of any officer of a charity shall be a sufficient discharge of my Executors.

Clauses in Wills



- Residuary legacy

I direct my Executors to pay and make over the residue of my estate wherever situated to [name of charity], (registered charity number []), [address of head office]. If this charity has been wrongly designed, has amalgamated with or has transferred its assets to any other body then my Executors shall pay the legacy to such other charity as my Executors may in their sole discretion decide. The receipt of any officer of a charity shall be a sufficient discharge of my Executors.

Take legal advice before including clauses in promotional material

Influencing Supporters



- Be careful of what you say in leaflets
- Average age for client who leaves a charitable bequest is 77yrs
- Beware of vulnerable supporters
- Encourage supporters to tell family – no surprises
- Try to avoid a challenge to the Will

Reducing a Will



- Court of Session Action
 - (a) Incapacity
 - (b) Facility & Circumvention
 - (c) Undue Influence

Reducing a Will



(a) Incapacity

Nisbet's Trustees v Nisbet (1871) 9 M 937

“understood the nature and effect of the Will the moment it was signed”

Example

Can a man who thinks he's a bar of chocolate sign a Will?

Reducing a Will



In England – Golden Rule

In re Simpson deceased (1977) NJL 487

If in doubt, get medical advice

(b) Facility & Circumvention

- Facile
- Victim of circumvention
- Harm to testator's interests

Reducing a Will



(c) Undue Influence

- Solicitor, Doctor, professional advisor etc
- *McKechnie v McKechnie Trustees 1908 SC 93*

Encourage supporters to take good advice

Actively discourage “Home Made” Wills

eg Mr Andrew’s Estate

Errors in Drafting



- Mis-description does not invalidate a legacy
- Use of extrinsic evidence allowed if Will is unclear

Example

“International Federation for Animal Welfare Charitable Trust, Lime House, Regency Close, Uckfield, East Sussex TN22 1DS”

Errors in Drafting



- Lime House is the registered office for “International Animal Welfare”
- Both charities reached an agreement.

Holmes v Bank of Scotland 2002 SCLR 481

White v Jones [1995] 2 AC 207

After the Death



- What questions should be asked?
- Try to avoid “Thanking and Banking”
- Ask for copy of the Will and any Codicils
- Ask for copy of Executory Account if you are a residuary beneficiary
- Not all Executors and Solicitors are honest!

Legal Rights



“if a man provides not for his own, and especially for those of his own house, he hath denied the faith, and is worse than an infidel”

1 Timothy 5:8

- Legal Rights – Spouse & children
- Succession (Scotland) Act 1964
- Civil Partnership Act 2004 s131

Legal Rights



Legal rights only applies to moveable property

- Spouse
- 1/3 net moveable estate (if children)
 - 1/2 net moveable estate (if no children)
- Children
- 1/3 net moveable estate (if spouse)
 - 1/2 net moveable estate (if no spouse)

Legal Rights



- Net moveable estate only – NOT heritage
- Adopted children s23 (1) 1964 Act
- Illegitimate children (Law Reform (Parent & Child) (Scotland) Act 1968) – reciprocal rights to inherit.
- Claim or Discharged/Renounced/lapse (20 yrs)

Legal Rights



- Scottish Law Commission Discussion Paper on Succession - Published August 2007
- Abolition of Legal Rights and Introduction of Legal Share
- Spouse/Civil Partner – 25% of what s/he would have got in intestacy
- Cohabitants – Family Law (Scotland) Act 2006
- Dependent Children / Non-Dependent Children

Conclusion



- Knowledge and Understanding
- Understand supporters; and
- Knowledge of succession law and executry administration
- Not just “Thanking and Banking”

Terminology



- Affidavit** Signed statement made on oath. A sworn statement which the court has regard to. It is often signed in the presence of a Notary Public.
- Abatement** If the estate is insufficient the legacies are abated or reduced pro rata
- Ademption** A specific legacy is adeemed if it no longer belongs to the testator when he dies. The legacy lapses entirely, the legatee gets nothing.

Terminology



Auditor of Court Person responsible for examining legal accounts. If you question a fee it can often be referred to the Auditor of Court. The Auditors of the Court of Session and Sheriff Courts respectively examine and are said to “tax” accounts.

Books of Council and Session

This is the popular title for the Register of Deeds and Probative Writs in which, deeds can be registered for preservation

Terminology



Conditio si institutus sine liberis descenderit

The ability of a legatee's children to inherit in his place if he fails to survive. Very restricted conditions.

Conditio si testator sine liberis descenderit

A Will can be revoked by the subsequent birth of a child if it makes no provision for the child. The Will is voidable at the instance of the child.

Terminology



Commissary Court

The Court Department that grants a title to Executors or administrators.

Confirmation

The Scottish equivalent of Probate. By Confirmation an Executor gains title to the property and assets of the deceased.

Confirmation Nominat

Title of the Executor of a deceased's estate where there is a Will

Terminology



Confirmation Dative

Title of the Executor of a deceased's estate where there is no Will.

Eik to Confirmation

An Executor is said to obtain and Eik to Confirmation in the event that he or she must obtain title to additional estate that was not included in the initial application for Confirmation.

Executor Dative

An Executor appointed by the Court.

Terminology



Executor Nominate

An Executor named in a Will.

Feu Duty

Effectively a perpetual ground rent but has been abolished. You may here this term occasionally.

Heritable Estate

Property in the form of land and houses.

Terminology



Holograph Writ

A deed or document that has been entirely handwritten by the granter. Prior to 1st August 1995 when the Requirements of Writing (Scotland) Act came into force, where printed or otherwise mechanically produced documents had been prepared a granter could write “adopted as holograph” which would have the same effect as if it had been wholly written by the granter.

Terminology



- Initial Writ** A document by which ordinary civil proceedings in the Sheriff Court are normally initiated. The corresponding document in the Court of Session is the Summons.
- Inner House** One of the two divisions of the Court of Session. They were called the Inner House and Outer House originally for the simple reason that the Court Rooms lay further from the entrance to the courthouse.

Terminology



- Interlocutor** An injunction or order of Court made during the course of an action.
- Interdict** The judicial prohibition issued by the Court of Session or Sheriff Court. This is similar to the English term of injunction.
- Inter Vivos* Between living persons

Terminology



Inventory

List of deceased's estate

jus relictæ

The legal right of a widow or civil partner. This equates to one-half or one-third of the deceased's moveable estate.

Legal Rights

The right of a spouse and child to share in the estate of a deceased.

Terminology



Legitim

The legal share (one-half or one-third) of a parent's net moveable estate due on death to the children.

Liferent

An interest in possession. This enables a beneficiary to receive the income from a trust fund or to make use of a trust asset that does not produce income.

In loco parentis

In place of a parent.

Terminology



Missives

The agreement setting forth the terms of a sale.

mortis causa

Deeds made in contemplation of death.

Moveable Estate

Anything that is not heritable estate. Also referred to as personal estate.

Terminology



Nobile Officium

The nobile office or duty of the Court of Session; an equitable jurisdiction by virtue of which the court may, without limits, mitigate the strictness of the common law and provide a legal remedy where none exists.

Terminology



Outer House

The part of the Court of Session which exercises a first instance jurisdiction. This should be compared to the Inner House. The Supreme Court is split into these two houses. The judges in the Outer House deal with first instance (new work) which has not been before the court but may have been before a tribunal or panel.

Terminology



pari passu

You will often see this terminology in Wills and it means to share and share alike or to rank equally.

per stirpes

By descendant. In other words through the parent and not in their own right. For example where per stirpes the share which would have fallen to a preceding parent if alive is divided equally among his children.

Terminology



per capita

By head. Where an estate is to be divided among beneficiaries per capita it is divided equally among them.

Precognition

Preliminary statement by a witness

pro indiviso

Often found in conveyancing. Means “in an undivided state”. It is usually in relation to property held by many people.

Terminology



- Register of Sasines** The Register of Titles to land and heritable property in Scotland prior to the introduction of the Land Register.
- Taxation** As applied to legal expenses including solicitors or advocates fees that have been incurred.
- ultimus haeres* The last heir – the Crown.

Terminology



vitious intromission

The meddling with the moveable estate of a deceased without having obtained Confirmation to the estate.

Writs

Documents of title.

QUESTIONS?

Peter Littlefield



TURCAN CONNELL
SOLICITORS AND ASSET MANAGERS