



briefing

Private Client - 2008

“I owe much; I have nothing; the rest I leave to the poor.”

François Rabelais (1483 – 1553) ¹

Amusing and witty they may be, but Rabelais’ reputed last words would not serve as a valid English will today, not least without the formalities of the Wills Act 1837!

Nevertheless, the quote may serve to remind of some important issues in wills and probate practice, such as the treatment of debt, the growing need for Inheritance Tax (IHT) planning and the dangers of poor drafting.

“I owe much”

The treatment of debt

A person’s estate, for probate purposes, consists of their assets less their debts. The executor’s role is to collect in the assets, pay the debts, and distribute the balance in accordance with the will. Typical debts include credit card bills, unpaid tax for the preceding year and particularly where the deceased is living alone, utility bills.

For IHT purposes, the rules are slightly more complicated, but certainly if the estate appears likely to be taxable, the executor will not wish to understate the deceased’s debts. Debts which are properly deductible will reduce the amount on which tax will be payable at 40%.

Although they are not ‘real’ debts of the deceased, the IHT rules allow you to deduct funeral expenses, reasonable mourning expenses for the family and the cost of a headstone. This may sound simple, but consider the following:

- The deceased’s will directs that their ashes be scattered in Hawaii. Will the revenue allow the cost of return flights for six family members and accommodation for a week in Hawaii as a valid mourning expense?! Probably not, but there is latitude. If the testator has detailed and expensive wishes, he may by all means set them out in the will and there is a greater chance they will be allowed.
- What is reasonable will depend on the status and wealth of the deceased. £5,000 for mourning - in addition to the funeral costs – need not be excessive, but the receipts should be kept in support.

The opportunity to record a genuine debt should not be lost. Suppose an elderly person cannot afford house maintenance, e.g. roof repairs. In these circumstances, there is no reason a daughter with available cash could not give the elderly parent, say, £10,000 expressed to be by way of loan. Such arrangements may be informal, and without reference to charging interest, but at the very least an exchange of dated letters evidencing the loan could result in tax-saving on the subsequent death of that elderly person.

“I have nothing”

The growing need for IHT planning

While few of us may feel richer than Rabelais, it is not uncommon for a person to die with a larger estate than they realised. This is particularly galling for family beneficiaries faced with a large tax bill, whose parents worked extremely hard to have assets to pass on to the next generation. Consider the following:-

- Your home could be worth more than you think, particularly if there are planning possibilities
- Lifetime gifts made in the last seven years before death may have to be added back into the estate for tax purposes

¹ Rabelais was a French renaissance writer. Although he trained as a monk and later taught and practised medicine, he is best known for his satirical comment on the society and events of his day.



Please email James Greig at james.greig@morgan-cole.com with your feedback, comments and suggestions on this publication. If you would like to receive further copies, including copies produced using a larger typeface, or information relating to our services in this area, please call 01865 262 620.

- You may believe you have given away an asset – but if you still enjoy a benefit from your holiday home in France, or the Picasso on your wall, it could be part of your estate for IHT purposes.
- A legal claim (known as a ‘chase in action’) may have a value. An executor is obliged to collect assets in the estate. He or she can continue existing litigation, but should also pursue claims where, say there is evidence of mis-selling to the deceased if it is cost-effective to do so.

None of us wants to pay any more tax than is necessary. There can be a thin line between ‘evasion’ and ‘avoidance’ of tax; the former is unlawful, the second is permissible. There is a considerable quantity of anti-avoidance legislation. Unfortunately, because of its reactionary nature, the drafting and concepts in such legislation can be weak. As a result, it can have unexpected consequences on perfectly innocent arrangements, which did not have avoidance of tax in mind.

Faced with the uncertainties in the tax legislation, one respected accountant chairing a recent meeting admitted that the only advice he felt completely safe in giving clients from now on consisted in three words: ‘give it away!’

For the majority of families, it pays to be familiar with the exemptions provided in the legislation:

- annual exemption of £3,000
- small gift exemption of £250
- gifts out of surplus income (this can be particularly useful with a large pension)
- gifts in consideration of marriage to children or grandchildren
- gifts to individuals made seven years before death (of unlimited size)
- generally, gifts to one’s spouse or to charity

What of the family home? Given the increase in house prices, the usual problem is how to allow mum and dad to have the security and comfort they have worked their whole life to achieve, while minimising the tax bill on their death. Equity release schemes offer the chance to release cash from the family home, which can then be given away or invested in an insurance product.

However, they should only be considered as a last resort. If possible, and as part of wider family planning, downsizing followed by the lifetime release of capital to the next generation is preferable to living on in the family pile. The ‘chancellor’s darling’ in this regard is surely the aged widow or widower living on in the family home who has left it too late to move.

Most of us are somewhere between the super-rich and the Rabelais of this world. For us, it is sensible to sit down with a solicitor or another adviser who specialises in IHT planning to consider the likely IHT bill on death and how it can be reduced, both through wills and lifetime planning.

Otherwise, why not learn to ‘S.K.I.’? This is an acronym for ‘spending your kids’ inheritance’, and for once with a new hobby, it really could be as easy as it sounds, once the initial guilt has been overcome!

“The rest I leave to the poor”

The danger of poor drafting

Rabelais apparently believed he had so little that the generous sentiment was unlikely to provide any real relief to the poor.

But assuming Rabelais had the assets, would this be a valid gift? As a general rule, a gift which is not sufficiently certain as to its subject matter (i.e. what is being given) or in its objects (i.e. who could enforce this gift?) may fail. For example, a gift to ‘the poor members of my family’ is not conceptually certain and so the gift would be likely to fail.

Poor drafting can easily lead to the failure of a gift and the deceased’s intentions not being carried out. If a gift of residue fails, the intestacy rules will apply, under which the estate could pass to any number of undesirables: for example, the estranged nephew, the undeserving niece, or arguably the even less deserving Exchequer.



In Rabelais' case, no particular charity is mentioned, nor does he define whom he regards as poor. Nevertheless, the gift shows sufficient 'general charitable intent' that an application to the court for application of the gift to a particular charity (known as a 'cy-près' application) should be possible. But how will the court decide on which charity? It would be difficult unless there is some other extrinsic evidence from Rabelais' life how the word 'poor' should be construed. Any such application to the court is expensive, and it is always better for the testator to seek legal help with preparing a will in the first place.

Indeed, most tales of unexpected failures in wills come from so-called 'home-made' wills where professional advice has not been obtained. A well-drawn will which is tax-efficient and gives effect to the wishes of the Testator is a valuable item. Before rushing off a will as simple as Rabelais', or worse, assuming a will is not necessary, it is worth talking to a Solicitor.

Please note that the wills and probate team are based in our Oxford and Cardiff offices, but are able to service your needs from our other offices in Swansea and Reading, with no additional expense to the client

Our people

The Succession, Wills and Tax team



Richard Hale

Partner

T: 029 2038 5901

E: richard.hale@morgan-cole.com

Richard has worked in almost every area of private client work since joining the firm in 1974. He currently heads up the Probate, Trusts and Estate administration section of the team.



James Greig

Associate

T: 01865 262 620

E: james.greig@morgan-cole.com

James is based in Oxford and has experience in administering complex estates and dealing with the affairs of the elderly, including advising on wills, trusts, powers of attorney and inheritance tax planning. He is a member of the Society of Trust and Estate Practitioners.



Kathryn Woodward

Solicitor

T: 01865 262 633

E: kathryn.woodward@morgan-cole.com

Kathryn joined Morgan Cole in December 2007 and is based in Oxford. She has experience in dealing with wills, probate and related tax matters. Kathryn also deals with lasting powers of attorney and registration of existing enduring powers and elderly client issues generally. She is a member of the Society of Trust and Estate Practitioners.



Please email James Greig at james.greig@morgan-cole.com with your feedback, comments and suggestions on this publication. If you would like to receive further copies, including copies produced using a larger typeface, or information relating to our services in this area, please call 01865 262 620.



Gill Smart
 Legal Assistant
 T: 01865 262 185
 E: gillian.smart@morgan-cole.com

Gill joined the firm in 1989 as a secretary within the probate department. She has built up experience assisting senior fee earners with more complex matters and now specialises in the preparation of wills and registration of existing enduring powers of attorney and the preparation and registration of lasting powers of attorney.



Jean Abell
 Legal Executive
 T: 029 2038 5322
 E: jean.abell@morgan-cole.com

Jean is a fellow of the Institute of Legal Executives and a member of the Society of Trust and Estate Practitioners. She joined the firm in 1976. She deals with the preparation of wills and lasting powers of attorney and the registration of existing enduring powers of attorney, inheritance tax planning, and probate. Jean deals with all aspects of the administration of estates to include related inheritance tax, capital gains tax and income tax issues.



Sue Robins
 Legal Assistant
 T: 01865 262 102
 E: sue.robins@morgan-cole.com

Sue has been working in the probate department since 2000. She has experience with a wide range of estates, particularly where there is no family and practical issues need to be dealt with promptly and efficiently after a death.

This publication is © Morgan Cole, and may not be reproduced without our express permission. Recipients may forward this publication and view, print and download the contents for personal use only. The contents must not be used for any commercial purposes and the material in this publication or any part of it is not to be incorporated or distributed in any work or in any publication in any form without the prior written consent of Morgan Cole.

Professional advice should always be sought where you require assistance in specific areas of the law. No responsibility can be accepted for any action based on this article.

