Eccentric wishes and charitable purposes

Trust and estate practitioners, as well as their clients, are not above enjoying a gift or two, say **Richard McDermott** and **Adam Carvalho**

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The festive season is fast approaching and the courts have been busy. Recent decisions in cases involving unusual and eccentric testamentary wishes or charitable giving are an early festive gift for trust and estate practitioners to mull over during the holiday break.

Wills: *The Vegetarian Society v Scott* [2013]
John McKeen died in November 2007. He was survived by his sister Jennifer Scott and her three sons. McKeen's will left around 80 per cent of his estate to the Vegetarian Society. Scott argued the will was invalid for lack of capacity. Had she succeeded, she would have inherited under the intestacy rules. The challenge failed, with the judgment of His Honour Judge Simon Barker QC representing an important reminder that, subject to limited exceptions, the principle of testamentary freedom remains very much alive. Practitioners should also bear in mind that:

1. The test for testamentary capacity, set out in *Banks v Goodfellow QBD* [1870], is both time-and-decision specific, and an existing impairment of the mind will not necessarily prevent a finding that the testator had capacity. McKeen had suffered from logical thought disorder and schizophrenia and, while these conditions manifested themselves in rather erratic behaviour and choices (for example he was not a vegetarian and had no apparent connection to the Vegetarian Society), the court still found that he had sufficient capacity to execute his will. HHJ Barker QC heard how McKeen had conducted several social and business relationships during his life, with his solicitors explaining in evidence that he was "usually unkempt…but also polite, intelligent and humane." The instructions McKeen gave to his solicitors were "clear and coherent".

2. It is crucial to ensure that, for the purposes of assessing capacity, expert evidence is obtained when appropriate and in accordance with all applicable requirements. Astonishingly, in this case, Scott's expert was unfamiliar with the elements of the test for testamentary capacity and had been heavily influenced by Scott's impartial and incomplete instructions.

3. The decision to challenge a will should not be taken without a detailed assessment of the merits and, if and when proceedings begin, clients and practitioner alike must not lose sight of the overriding objective. In *Vegetarian*, Scott was penalised on costs for rejecting multiple offers to settle and for the unreliability of her evidence.

Secret trusts
The British painter Lucian Freud died in July 2011 leaving a substantial net estate of around £96m. His residuary estate was estimated at around £42m. A will from 2004 left his residuary estate to his executors on half-secret trusts. His final will in 2006, stated at clause 6 that Freud left his residuary estate "to the said Diana Mary Rawstron and the said Rose Pearce [his executors] jointly". The executors' evidence was that they held the residue on fully secret trusts outlined by Freud before the will was executed.

Freud was known to have fathered at least 14 children. Paul Freud was accepted for the purpose of this claim to have been one of those children. He argued that under the 2006 will the executors held the residue on half-secret trusts. Had he succeeded, he could have sought to establish that the terms of the trust were not communicated to the executors before execution of the will, in which case there would have been a partial intestacy. The executors applied for a declaration that they were absolutely entitled to the residue.

Diana Rawstron and Rose Pearce v Paul Freud [2014] EWHC 2577 (Ch) provides a reminder of the tests for valid secret and half-secret trusts and an illustration of the approach taken after *Marley v Rawlings* to the construction of wills.

A secret trust is created where a person gives property to a legatee absolutely but the legatee agrees to hold that property on specified trusts. The trust fails if its terms are not communicated to the legatee during the testator's lifetime.

A half-secret trust is created where the will

makes clear the legatee takes the property on trust without setting out its terms. The trust fails if the terms are not communicated to the trustee before the will is executed, in which case the trustee holds the property for the residuary beneficiaries or those entitled under the intestacy rules.

Paul Freud advanced a number of arguments in support of his position that the 2006 will established a half-secret trust. He argued the trust administration and charging clauses in the 2006 will would not have been required unless the executors took the residue on trust, the executors were not stated to take the property 'beneficially' or 'absolutely' and common sense suggested the executors were not inheriting a £42m residuary estate themselves as Rawstron was the deceased's solicitor and Pearce just was one of a large number of the deceased's children.

Richard Spearman QC, sitting as a deputy judge, applied the contractual approach to construing wills outlined by Lord Neuberger in *Marley v Rawlings*. The above arguments could not outweigh the simple point that clause 6 was expressed as a simple gift and made no mention of any trust. The fact that Freud referred to the executors by name in clause 6 was consistent with a wish that they took personally. A reasonable explanation was that the deceased intended to impose a secret trust. Further, the deceased had revoked the 2004 will and executed the 2006 will on professional advice; had he intended to create a half-secret trust he could have done so.

Spearman found the executors took the residue absolutely. His judgment ended on a generous note towards Paul Freud, stating "I can readily understand, from his personal point of view, why the defendant has been reluctant to accept the claimants' interpretation of clause 6 of the will", and a note of caution to solicitors who may find themselves in similar situations: "No matter how honest and well-meaning a solicitor may be, this does not guarantee that the solicitor's evaluation of any particular question of mixed fact and law is correct."

The declaratory relief will, however, allow the executors to administer the residue in accordance with what appear to have been the deceased's wishes.

Charitable gifts

Practitioners should note, following September's decision of the High Court in *Routier and Venables v HMRC* [2014] EWHC 3010 (Ch), that a gift to a trust established for charitable purposes will only qualify for the exemption from inheritance tax (per section 23(6) Inheritance Tax Act 1984) if the trust's purposes are charitable under UK law and the trust is governed by UK law.

Coulter was domiciled in Jersey when she died in October 2007. It is assumed (but is unclear from the report) that her estate comprised assets held in the UK. Under her will, residue was to pass to a trust (governed by Jersey law) for the benefit of the Parish of St Ouen (the Parish) in Jersey to provide housing for elderly people living there. The trust income was to be accumulated and then distributed to an unincorporated body established by the parish, and in default to pass to Jersey Hospice Care.

HMRC argued the gift of residue was subject to IHT of £600,000. The trustees, who were keen to avoid a lengthy dispute, therefore executed a deed of variation, replacing the residuary gift with a legacy of £10,000 to Jersey Hospice Care and an absolute gift of the residue to the Parish for the purpose of the construction of homes for the elderly of the Parish. The deed added a further clause to the will, allowing the trustees to amend the terms of the trust to ensure it complied with the terms of section 23(6).

HMRC continued to state that IHT was due and the trustees thus entered into a second deed of variation which replaced the reference in the will to Jersey law with a reference to the law of England and Wales. After argument, it was agreed that the second deed did not have retrospective effect (presumably because it was signed more than two years from the date of death.

Mrs Justice Rose DBE held that the gift was subject to IHT because the section 23(6) exemption was only available for trusts governed by UK law and with charitable purposes under UK law. One of the most significant factors in her judgment was the House of Lords' decision in *Dreyfus v HMRC* [1956] AC 39 which held that it would be incongruous to require the courts to determine whether the purposes of a body governed by foreign law constituted UK charitable law purposes.

The decision will have been galling for the trustees, not least because it seemed easy on the facts to conclude that the test for being charitable under UK law had been satisfied. The court was clearly concerned about the risk of opening the floodgates to future claims, particularly those where the similarities between UK charitable trusts and foreign charitable trusts are less obvious.

Practitioners would be wise to review their files to determine whether clients' existing wills will be affected by this important decision. **SJ**

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