Who is the beneficiary?

This month’s paper will look at definitions and rules of construction affecting beneficiaries. It is important that the instruction taker and the will drafter, who may not necessarily be the same person, ensure that the testator’s wishes are interpreted with absolute certainty. To ensure that a legacy passes to the correct beneficiary you must be certain that they are defined clearly and correctly.

LAPSE

Under the doctrine of lapse a gift will fail if a beneficiary predeceases the testator. The doctrine of lapse cannot be excluded by a testator. In the case of *Re Ladd* [1932] 2 Ch 219 the testator included a statement “to the intent that this my will shall take effect whether I survive or predecease my husband.” The husband predeceased but it was held that the appointment to the husband lapsed and his personal representatives did not take as this statement could not exclude the doctrine of lapse.

Substitutional gifts are acceptable, so a testator may direct that if a beneficiary predeceases them their gift will pass to their personal representatives to be held as part of their estate or will pass to the deceased beneficiary’s children, or even to a different beneficiary entirely.

The doctrine of lapse will not apply where a gift is made to two or more people as joint tenants unless all of the beneficiaries predecease.

If a beneficiary predeceases a testator there is no charge to IHT on the gifted property on the beneficiary’s estate as well as the testator’s estate as at the time of the beneficiary’s death they were not entitled to anything under the testator’s will.

Class Gifts

When a gift is made to a class of beneficiaries, e.g. ‘to my nieces and nephews in equal shares’ the doctrine of lapse will not apply. This is because the members of the class are not determined until the testator’s death, so a beneficiary who has predeceased is not included as a member of that class. This makes class gifts remarkably flexible as a method of making provision for potential future beneficiaries; a common use being for testator’s who wish to provide for all their children equally but who may have more children between the date of the will and their death.

Exceptions to the Doctrine of Lapse

There are two exceptions to the doctrine of lapse:

1) section 33 Wills Act 1837

2) Gifts made in discharge of a moral obligation

1) Section 33 Wills Act 1837 provides that where a testator makes a gift to a child or remoter descendant and that descendant predeceases the testator leaving issue who are living at the testator’s
death then their gift will not lapse, and will pass instead to the issue in equal shares unless there is some contrary intention in the Will.

Section 33(3) states that:

‘Issue shall take under this section through all degrees, according to their stock, in equal share if more than one, any gift or share which their parent would have taken and so that no issue shall take whose parent is living at the testator’s death and that no issue shall take whose parent is living at the testator’s death and so capable of taking.’

Although s33 applies to contingent gifts it is not clear whether the substitute beneficiary taking as a result of the operation of this section is required to meet the same condition. To avoid any confusion the drafter should make express provision as to whether the condition applies to the substitutional gift.

Section 33(2) prevents lapse where there is a class gift. If a testator makes a gift to a class of people consisting of their children or remoter descendants, a member of the class predeceases the testator leaving issue and those issue are surviving at the testator’s death then the gift will take effect as if the issue of the deceased member of the class were an original member of the class.

For avoidance of any doubt, s33(4) further provides that the illegitimacy of issue is disregarded, and that a child conceived before the testator’s death and born after is treated as though they were living at the date of the testator’s death.

2) Where a testator makes a gift by his will to a person in discharge of a moral obligation, and that obligation still exists at the time of the testator’s death, the gift does not lapse if the beneficiary predeceases. This is because it is inferred that the testator intended the gift to pass to the beneficiary’s estate.

This reasoning was explained in Stephens v King [1904] 2 Ch.30,33 as the testator not intending to merely make a gift to the beneficiary, but to discharge what he regarded as a moral obligation. The exception has been held to be applicable where the obligation was not legally binding, and also in discharge of a debt which is statute barred. As this is a common law exception its ambit is uncertain. It is currently understood that this only applies to the express recognition of the testator of his moral obligation to pay debts.

**Uncertainty as to Order of Deaths**

Due to the doctrine of lapse it is important to establish the order of deaths. Where a beneficiary survives a testator even by a short period of time they may take under the will, however if they predecease then the doctrine of lapse will apply. It is also important to establish the order of deaths to determine which joint tenant benefits under the right of survivorship.

Where the order of deaths is uncertain s184 Law of Property Act 1984 provides that it is presumed that the deaths occurred in order of seniority so that the younger is treated as having survived the elder. The effect of this can be that where a couple have wills leaving their estates to each other and die in circumstances where it is impossible to tell who died first, this rule will determine that the eldest’s
estate will pass to the younger and then to the beneficiaries of their estate. If this would not be what they would wish then the drafter should consider including a survivorship clause to prevent this.

**CHANGE OF GENDER**

If a beneficiary changes their gender between the date of the will and the testator’s death this may affect the distribution of the estate.

s9(1) of the Gender Recognition Act 2004 states that once a full gender recognition certificate is obtained by a person their gender becomes the acquired gender for all purposes. This means that a gift in a will construed as ‘to my daughters’ could benefit a person who was previously a son or could remove benefit from a person who was previously a daughter. Similarly, a gift to ‘my eldest son’ could pass to someone other than the intended beneficiary or fail entirely if by the date of the death the son in question has acquired a gender recognition certificate.

For this reason it is best to avoid solely gender specific drafting and refer to beneficiaries by name so the intended beneficiary is clear. If a beneficiary is specifically named but changes their name and gender before the testator’s death the gift to them can still take effect as the will expressed a clear intention to benefit that particular person. If the beneficiary is able to verify that they are the same person referred to in the will then the gift will take effect.

s15 GRA 2004 further provides:

*The fact that a person’s gender has become the acquired gender...does not affect the disposal or devolution of property under a will or other instrument made before 5 April 2004.*

**FORFEITURE**

As a rule of public policy, a person is unable to benefit from the will of a testator (or intestate) that he has killed. A person who is convicted of the murder or manslaughter of a testator cannot receive a benefit from the testator’s will, subject to any relief under the Forfeiture Act 1982.

The rule covers all forms of unlawful killing, including death by dangerous driving. The 1982 Act includes a reference to a person who has unlawfully aided, abetted, counselled or procured the death of another. Motive and the notion of moral guilt seem not to be relevant, although the rule doesn’t apply if the killer is of unsound mind and found not guilty by reason of insanity.

The FA 1982 gives the court the power to modify the effect of the forfeiture rules if it is just to do so.

In *Re K deceased* [1985] CH 85 the court heard argument that the rule of public policy does not apply to all manslaughters, only to those where there has been violence or a threat of violence. In the Court of Appeal the court affirmed the rule of public policy and upheld the first instance decision [1986] Ch 180, [1985] 2 All ER 833.

In the event that a beneficiary is disqualified from inheriting by the rule, the gift passes as if the beneficiary had died immediately before the testator, see *In the estate of Crippen* [1911] P 108.
If the beneficiary is a member of a class of beneficiaries then he is excluded from the class as if he had predeceased the testator and the remainder of the eligible persons making up the class benefit. A further effect of the forfeiture rule is to sever a joint tenancy if a joint tenant is convicted of the unlawful killing of another joint tenant, so that they cannot benefit from the rule of survivorship.

Relief under the Forfeiture Act 1982 (FA1982):

A person convicted of killing another in circumstances where that person inherits under the deceased’s will may apply to the court to modify the rule of public policy as it affects him personally. The application must be made within 3 months of the conviction (see s(3) FA 1982). If the person is convicted of murder the court has no power to affect the application of the forfeiture rule, see s(5) FA1982.

In cases other than a conviction for murder the court may allow the applicant to take, see s(4) FA1982:

i) under the deceased’s will or the law relating to intestacy;

ii) on the nomination of the deceased (for example pension benefits);

iii) under a valid *donatio mortis causa*;

iv) the deceased’s share of jointly-owned property, and

v) other property held in trust.

The court has a discretion as to how it applies the forfeiture rule to the various assets and interests owned by the deceased, *Re Forfeiture Act [1999] Pens LR1*.  

S(3) of the 1982 Forfeiture Act expressly provides that the forfeiture rule does not preclude an application by the convicted person, except where the applicant is a convicted murderer, under the Inheritance (Provision for Family and Dependents) Act 1975.

However, in the case *Re Royse, Royse v Royse [1985] Ch D 22* the court held that a woman convicted of unlawfully killing her husband was not able to apply under I(PFD)A1975 since the reason that she was not in receipt of reasonable financial provision was not due to the lack of provision by the will (one of the requirements under I(PFD)A1975 upon which the applicant must satisfy the court) but due to the rule of public policy.

In the recent case of *Macmillan Cancer Support v Hayes and Long [2017] EWHC 3110 (Ch)* the court exercised their discretion under the FA 1982 to modify the rule where an elderly husband smothered his wife rather than seeing her taken into a care home once he could no longer care for her himself. He subsequently took his own life. The decision to modify the rule was made after considering the lack of moral culpability, the fact that there were no moral claims to consider from those who would benefit if the forfeiture rule applied, and the fact that the killer would not actually benefit from the death.

**Animal Beneficiaries**

Non-charitable purpose trusts are generally void due to the lack of a beneficiary to enforce the trust, however as with most things there are some exceptions.
One such exception is a gift on trust for the maintenance of a particular animal or animals. This type of trust is known as a trust of imperfect obligation as the objects of the trust, being animals, are unable to compel the trustees to administer it.

A trust of imperfect obligation is limited to a maximum period of 21 years. For most common household pets this period will be sufficient, but other arrangements may need to be made for pets with longer lifespans.

**UPKEEP OF GRAVES**

A further exception to the rule against non-charitable purpose trusts is that a gift to a trust established to fund the maintenance of a grave is perfectly valid.

A gift for the upkeep and maintenance of graves also takes effect as a trust of imperfect obligation and creates problems if any attempt is made to make the gift last for an indefinite period. As there are no lives in being the perpetuity period is 21 years.

The simplest course of action would be to find a young member of the family prepared to accept the responsibility for the upkeep voluntarily. Alternatively it may be possible to make arrangements with the burial authorities, but the arrangements cannot last indefinitely.

The Parish Councils and Burial Authorities (Miscellaneous Provisions) Act 1970 offers the means to maintain a grave without perpetuity problems. A local authority may enter an agreement with any person, for appropriate consideration payable to the local authority, to maintain a grave or memorial within a cemetery managed by that local authority. The maximum period of such an agreement is 100 years from commencement of the agreement. A testator may instruct his trustees to enter into such an agreement, but the trustees are not obliged to observe his wishes.

If the grave is within a churchyard a legacy could be made to “the churchwardens of the church” with a request that the grave is kept in good order. The gift is made as a charitable gift for the “fabric of the church” and being charitable avoids the perpetuity problems. It should however be explained to the testator that the gift is not legally enforceable. The Incumbent and Churchwardens (Trust) Measure 1964 will apply to vest the property in the hands of the appropriate diocesan authority.

Furthermore the testator may make a bequest to his trustees to provide for the upkeep of a grave “so far as they can legally do so and in any manner they may in their discretion arrange”, which was held to be a valid form of words (Re Hooper [1932] 1 Ch 38). But note that as the trustees are acting as trustees of a trust of imperfect obligation they are not obliged to carry out the wishes of the testator. If the trustees choose not to carry out the terms of trust a resulting trust arises and the money held for this purpose results as part of the residuary estate.

**CONCLUSION**

It is important that it is possible to clearly identify who stands to benefit from a will in all circumstances, as uncertainty can lead to delays in administration and disputes between the family and friends of the testator as they try to puzzle out what they actually intended to happen.
To minimise the potential of disputes arising always make sure that beneficiaries are clearly defined and it is clear on the face of the will what should happen if the preferred beneficiaries are unable to inherit for any reason.

**Important Reminder:**

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